

**This volume was donated to LLMC
to enrich its on-line offerings and
for purposes of long-term preservation by**

Northwestern University School of Law

THE
FEDERAL REPORTER.

VOLUME 54.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

APRIL—MAY, 1898.

ST. PAUL:
WEST PUBLISHING CO.
1898.

COPYRIGHT, 1893,
BY
WEST PUBLISHING CO.

FEDERAL REPORTER, VOLUME 54.

JUDGES

OF THE

**UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.**

FIRST CIRCUIT.

HON. HORACE GRAY, CIRCUIT JUSTICE.
HON. LE BARON B. COLT, CIRCUIT JUDGE.
HON. WILLIAM L. PUTNAM, CIRCUIT JUDGE.
HON. NATHAN WEBB, DISTRICT JUDGE, MAINE.
HON. EDGAR ALDRICH, DISTRICT JUDGE, NEW HAMPSHIRE.
HON. THOMAS L. NELSON, DISTRICT JUDGE, MASSACHUSETTS.
HON. GEORGE M. CARPENTER, DISTRICT JUDGE, RHODE ISLAND.

SECOND CIRCUIT.

HON. SAMUEL BLATCHFORD, CIRCUIT JUSTICE.
HON. WILLIAM J. WALLACE, SENIOR CIRCUIT JUDGE.
HON. E. HENRY LACOMBE, JUNIOR CIRCUIT JUDGE.
HON. NATHANIEL SHIPMAN, CIRCUIT JUDGE.
HON. WILLIAM K. TOWNSEND, DISTRICT JUDGE, CONNECTICUT.
HON. ALFRED C. COXE, DISTRICT JUDGE, N. D. NEW YORK.
HON. ADDISON BROWN, DISTRICT JUDGE, S. D. NEW YORK.
HON. CHARLES L. BENEDICT, DISTRICT JUDGE, E. D. NEW YORK.
HON. HOYT H. WHEELER, DISTRICT JUDGE, VERMONT.

THIRD CIRCUIT.

HON. GEORGE SHIRAS, JR., CIRCUIT JUSTICE.
HON. MARCUS W. ACHESON, CIRCUIT JUDGE.
HON. GEORGE M. DALLAS, CIRCUIT JUDGE.
HON. LEONARD E. WALES, DISTRICT JUDGE, DELAWARE.

HON. EDWARD T. GREEN, DISTRICT JUDGE, NEW JERSEY.

HON. WILLIAM BUTLER, DISTRICT JUDGE, E. D. PENNSYLVANIA.

HON. JOSEPH BUFFINGTON, DISTRICT JUDGE, W. D. PENNSYLVANIA.

FOURTH CIRCUIT.

HON. MELVILLE W. FULLER, CIRCUIT JUSTICE.

HON. HUGH L. BOND, CIRCUIT JUDGE.

HON. NATHAN GOFF, CIRCUIT JUDGE.

HON. THOMAS J. MORRIS, DISTRICT JUDGE, MARYLAND.

HON. AUGUSTUS S. SEYMOUR, DISTRICT JUDGE, E. D. NORTH CAROLINA.

HON. ROBERT P. DICK, DISTRICT JUDGE, W. D. NORTH CAROLINA.

HON. CHARLES H. SIMONTON, DISTRICT JUDGE, SOUTH CAROLINA.

HON. ROBERT W. HUGHES, DISTRICT JUDGE, E. D. VIRGINIA.

HON. JOHN PAUL, DISTRICT JUDGE, W. D. VIRGINIA.

HON. JOHN J. JACKSON, JR., DISTRICT JUDGE, WEST VIRGINIA.

FIFTH CIRCUIT.

HON. HOWELL E. JACKSON, CIRCUIT JUSTICE.

HON. DON A. PARDEE, CIRCUIT JUDGE.

HON. A. P. McCORMICK, CIRCUIT JUDGE.

HON. JOHN BRUCE, DISTRICT JUDGE, M. AND N. D. ALABAMA.

HON. HARRY T. TOULMIN, DISTRICT JUDGE, S. D. ALABAMA.

HON. CHARLES SWAYNE, DISTRICT JUDGE, N. D. FLORIDA.

HON. JAMES W. LOCKE, DISTRICT JUDGE, S. D. FLORIDA.

HON. WILLIAM T. NEWMAN, DISTRICT JUDGE, N. D. GEORGIA.

HON. EMORY SPEER, DISTRICT JUDGE, S. D. GEORGIA.

HON. EDWARD C. BILLINGS, DISTRICT JUDGE, E. D. LOUISIANA.

HON. ALECK BOARMAN, DISTRICT JUDGE, W. D. LOUISIANA.

HON. HENRY C. NILES, DISTRICT JUDGE, N. AND S. D. MISSISSIPPI.

HON. DAVID E. BRYANT, DISTRICT JUDGE, E. D. TEXAS.

HON. JOHN B. RECTOR, DISTRICT JUDGE, N. D. TEXAS.

HON. THOMAS S. MAXEY, DISTRICT JUDGE, W. D. TEXAS.

SIXTH CIRCUIT.

HON. HENRY B. BROWN, CIRCUIT JUSTICE.

HON. HOWELL E. JACKSON, CIRCUIT JUDGE.¹

HON. HORACE H. LURTON, CIRCUIT JUDGE.²

HON. WILLIAM H. TAFT, CIRCUIT JUDGE.

¹Commissioned Associate Justice Supreme Court, Feb. 18, 1893.

²Commissioned March 27, 1893.

HON. JOHN WATSON BARR, DISTRICT JUDGE, KENTUCKY.
 HON. HENRY H. SWAN, DISTRICT JUDGE, E. D. MICHIGAN.
 HON. HENRY F. SEVERENS, DISTRICT JUDGE, W. D. MICHIGAN.
 HON. AUGUSTUS J. RICKS, DISTRICT JUDGE, N. D. OHIO.
 HON. GEORGE R. SAGE, DISTRICT JUDGE, S. D. OHIO.
 HON. D. M. KEY, DISTRICT JUDGE, E. AND M. D. TENNESSEE.
 HON. ELI S. HAMMOND, DISTRICT JUDGE, W. D. TENNESSEE.

SEVENTH CIRCUIT.

HON. JOHN M. HARLAN, CIRCUIT JUSTICE.
 HON. WALTER Q. GRESHAM, CIRCUIT JUDGE.¹
 HON. JAMES G. JENKINS, CIRCUIT JUDGE.²
 HON. WILLIAM A. WOODS, CIRCUIT JUDGE.
 HON. HENRY W. BLODGETT, DISTRICT JUDGE, N. D. ILLINOIS.³
 HON. PETER S. GROSSCUP, DISTRICT JUDGE, N. D. ILLINOIS.⁴
 HON. WILLIAM J. ALLEN, DISTRICT JUDGE, S. D. ILLINOIS.
 HON. JOHN H. BAKER, DISTRICT JUDGE, INDIANA.
 HON. JAMES G. JENKINS, DISTRICT JUDGE, E. D. WISCONSIN.⁵
 HON. WILLIAM H. SEAMAN, DISTRICT JUDGE, E. D. WISCONSIN.⁵
 HON. ROMANZO BUNN, DISTRICT JUDGE, W. D. WISCONSIN.

EIGHTH CIRCUIT.

HON. DAVID J. BREWER, CIRCUIT JUSTICE.
 HON. HENRY C. CALDWELL, CIRCUIT JUDGE.
 HON. WALTER H. SANBORN, CIRCUIT JUDGE.
 HON. JOHN A. WILLIAMS, DISTRICT JUDGE, E. D. ARKANSAS.
 HON. ISAAC C. PARKER, DISTRICT JUDGE, W. D. ARKANSAS.
 HON. MOSES HALLETT, DISTRICT JUDGE, COLORADO.
 HON. OLIVER P. SHIRAS, DISTRICT JUDGE, N. D. IOWA.
 HON. JOHN S. WOOLSON, DISTRICT JUDGE, S. D. IOWA.
 HON. CASSIUS G. FOSTER, DISTRICT JUDGE, KANSAS.
 HON. RENSSELAER R. NELSON, DISTRICT JUDGE, MINNESOTA.
 HON. AMOS M. THAYER, DISTRICT JUDGE, E. D. MISSOURI.
 HON. JOHN F. PHILIPS, DISTRICT JUDGE, W. D. MISSOURI.
 HON. ELMER S. DUNDY, DISTRICT JUDGE, NEBRASKA.
 HON. ALFRED D. THOMAS, DISTRICT JUDGE, NORTH DAKOTA.
 HON. ALONZO J. EDGERTON, DISTRICT JUDGE, SOUTH DAKOTA.
 HON. JOHN A. RINER, DISTRICT JUDGE, WYOMING.

¹ Appointed Secretary of State, U. S. March 6, 1893.

² Commissioned Circuit Judge, March 28, 1893.

³ Resigned Oct. 15, 1892, to take effect Dec. 5, 1892.

⁴ Commissioned, Dec. 20, 1892.

⁵ Commissioned April 3, 1893.

NINTH CIRCUIT.

HON. STEPHEN J. FIELD, CIRCUIT JUSTICE.

HON. JOSEPH McKENNA, CIRCUIT JUDGE.

HON. WILLIAM B. GILBERT, CIRCUIT JUDGE.

HON. WM. W. MORROW, DISTRICT JUDGE, N. D. CALIFORNIA.

HON. ERSKINE M. ROSS, DISTRICT JUDGE, S. D. CALIFORNIA.

HON. HIRAM KNOWLES, DISTRICT JUDGE, MONTANA.

HON. CORNELIUS H. HANFORD, DISTRICT JUDGE, WASHINGTON.

HON. THOMAS P. HAWLEY, DISTRICT JUDGE, NEVADA.

HON. MATTHEW P. DEADY, DISTRICT JUDGE, OREGON.¹

HON. CHARLES B. BELLINGER, DISTRICT JUDGE, OREGON.²

HON. JAMES H. BEATTY, DISTRICT JUDGE, IDAHO.

HON. WARREN TRUITT, DISTRICT JUDGE, ALASKA.

¹ Deceased March 24, 1893.

² Commissioned April 15, 1893.

CASES REPORTED.

	Page		Page
Adams, United States v. (C. C.)..	114	Bee, United States v. (C. C. A.)..	112
Advance Coal Co., Delahousaye v. (C. C. A.).....	1015	Bellingham Bay Land Co., Richards v. (C. C. A.).....	209
Aerated Fuel Co. v. Cohansey Glass Manuf'g Co. (C. C.).....	386	Bennett, The Stephen (C. C. A.)..	207
Aerated Fuel Co. v. Cox & Sons Co. (C. C.).....	386	Benson, Kenedy v. (C. C.).....	836
Aerated Fuel Co. v. Woodbury Glass Co. (C. C.).....	386	Bister, In re (C. C.).....	158
Aiken v. Smith (C. C. A.).....	894	Bixby v. Deemar (C. C. A.).....	718
Aiken v. Smith (C. C. A.).....	896	Blindell v. Hagan (C. C.).....	40
Akaba, The (C. C. A.).....	197	Board of Assessors for the Parish of Orleans, Citizens' Bank of Louisiana v. (C. C.).....	73
Albert Dumois, The (D. C.).....	529	Board of Levee Com'rs for Parish of Orleans, Hart v. (C. C.)..	559
American Buckle & Cartridge Co., Winchester Repeating Arms Co. v. (C. C.).....	703	Boston Towboat Co. v. Wood (C. C. A.).....	197
American Eagle, The, Jones v. (D. C.).....	1010	Braddock Glass Co., Macbeth v. (C. C.).....	173
American Gas Controller & Fixture Co. v. Siemens-Lungren Co. (C. C. A.).....	163	Bradley, St. Louis & S. F. R. Co. v. (C. C. A.).....	630
Ansonia Brass & Copper Co., Wilson v. (C. C. A.).....	495	Braxton, Wood v. (C. C.).....	1005
Arnold v. Woolsey (C. C. A.)....	268	Bridgeport Land & Improvement Co., McElwee v. (C. C. A.).....	627
Atchison, T. & S. F. R. Co., Pinson v. (C. C.).....	464	Briggs v. Central Ice Co. (C. C.)..	376
		Brill, Singer Manuf'g Co. v. (C. C. A.).....	380
Babcock & Wilcox Co. v. World's Columbian Exposition Co. (C. C.)	214	Brittain v. Crowther (C. C. A.)..	295
Bache, In re (C. C.).....	371	Brixham, The, Velasco Terminal R. Co. v. (D. C.).....	539
Baltimore & O. R. Co., Horn v. (C. C. A.).....	301	Brown, Puget Mill Co. v. (C. C.)	987
Baltimore & O. Tel. Co. of Baltimore County v. Interstate Tel. Co. (C. C. A.).....	50	Brusie v. Peck Brothers & Co. (C. C. A.).....	820
Barnes v. Union Pac. R. Co. (C. C. A.).....	87	Buch v. The Elizabeth T. Cottingham (C. C. A.).....	207
Barr, McClaskey v. (C. C.).....	781	Buckner, Hart v. (C. C. A.).....	925
Battle & Co., United States v. (C. C. A.).....	141	Burg, Wood v. (C. C. A.).....	197
Beacon Vacuum Pump & Electrical Co., Edison Electric Light Co. v. (C. C.).....	678	Burns, United States v. (C. C.)..	351
Beal, Putnam Sav. Bank v. (C. C.).....	577	Burrow v. Kansas City, Ft. S. & M. R. Co. (C. C.).....	278
		Byrne, Crabtree v. (C. C. A.)....	432
		Calder v. Henderson (C. C. A.)...	802
		California Fig Syrup Co., Improved Fig Syrup Co. v. (C. C. A.)	175
		Campbell v. The Young America (D. C.).....	410

	Page		Page
Campbell, De Chambrun v. (C. C.)	231	Colorado Eastern R. Co., Union	
Cannon, Northern Pac. R. Co. v. (C. C. A.)	252	Pac. R. Co. v. (C. C. A.)	22
Cantini v. Tillman (C. C.)	969	Conley, Gulf, C. & S. F. R. Co. v. (C. C. A.)	486
Carter & Co. v. Fry (C. C.)	882	Copenhaver, In re (C. C.)	660
Central Ice Co., Briggs v. (C. C.)	376	Cottingham, The Elizabeth T. (C. C. A.)	207
Central Railroad & Banking Co. of Georgia v. Farmers' Loan & Trust Co. of New York (C. C.)	556	Coulson v. Panhandle Nat. Bank (C. C. A.)	855
Central Railroad & Banking Co. of Georgia, Clarke v. (C. C.)	556	Cox & Sons Co., Aerated Fuel Co. v. (C. C.)	386
Central Trust Co. v. Richmond, N., I. & B. R. Co. (C. C.)	723	Coyle v. Franklin (C. C. A.)	644
Central Trust Co. of New York v. Chicago, K. & T. R. Co. (C. C.)	598	Crabtree v. Byrne (C. C. A.)	432
Cerro Gordo, The, Tabor v. (D. C.)	391	Crabtree v. Madden (C. C. A.)	426
Chaffin, Hull v. (C. C. A.)	437	Crocker-Wheeler Motor Co., Riker v. (C. C.)	519
Chapel, United States v. (D. C.)	140	Crook, Horner & Co. v. Old Point Comfort Hotel Co. (C. C.)	604
Charleston Ice Manuf'g Co. v. Joyce (C. C. A.)	332	Crowther, Brittain v. (C. C. A.)	295
Chicago, K. & T. R. Co., Central Trust Co. of New York v. (C. C.)	598	Cruikshank, In re (C. C.)	676
Ching Jo, In re (D. C.)	334	Curlew, The, Franklin Consolidated Coal Co. v. (D. C.)	899
Cincinnati, N. O. & T. P. R. Co., N. K. Fairbank & Co. v. (C. C. A.)	420	Curtain, Talley v. (C. C. A.)	43
Citizens' Bank of Louisiana v. Board of Assessors for the Parish of Orleans (C. C.)	73	Dallas Consolidated Traction R. Co., Thomson-Houston Electric Co. v. (C. C. A.)	1001
City of Birmingham, The (C. C. A.)	197	David Burns, United States v. (C. C.)	351
City of Des Moines, Morgan v. (C. C.)	456	Davis, Press v. (C. C. A.)	267
City of Detroit v. Detroit City R. Co. (C. C.)	1	Davis, United States v. (C. C. A.)	147
City of New Orleans, Whitney v. (C. C. A.)	614	Day, Hudson River Railroad & Terminal Co. v. (C. C.)	545
City of New York, The, Stevens v. (C. C. A.)	181	De Chambrun v. Campbell (C. C.)	231
Clarke, The Stacey (D. C.)	533	Deemar, Bixby v. (C. C. A.)	718
Clarke v. Central Railroad & Banking Co. of Georgia (C. C.)	556	Deere & Co., St. Paul Plow Works v. (C. C.)	501
Cleveland City Forge Iron Co. v. Taylor Bros. Iron-Works Co. (C. C.)	82	Delahousaye v. Advance Coal Co. (C. C. A.)	1015
Cleveland City Forge Iron Co. v. Taylor Bros. Iron-Works Co. (C. C.)	85	Deland v. Platte County (C. C.)	823
Clyne, Kellogg v. (C. C. A.)	696	Detroit City R. Co., City of Detroit v. (C. C.)	1
Cohansey Glass Manuf'g Co., Aerated Fuel Co. v. (C. C.)	386	Diebold Safe & Lock Co., Gerard v. (C. C. A.)	889
Collins Manuf'g Co. v. Ferguson & Hutter's Trustee (C. C.)	721	Dieckerhoff, In re (C. C.)	161
Colorado Cent. Consolidated Min. Co. v. Turek (C. C. A.)	262	Doe v. Waterloo Min. Co. (C. C.)	935
		Doud v. National Park Bank of New York (C. C. A.)	846
		Dow, Holloway v. (C. C.)	511
		Ducournau, United States v. (C. C.)	138
		Dufour v. Lang (C. C. A.)	913
		Dumols, The Albert (D. C.)	529
		Dupre, Mann Boudoir Car Co. v. (C. C. A.)	646

	Page		Page
East & West R. Co. of Alabama, Grant v. (C. C. A.).....	569	Fuller & Warren Co. v. Town of Arlington (C. C.).....	166
Edison Electric Light Co. v. Bea- con Vacuum Pump & Electrical Co. (C. C.).....	678	Gast Lithograph & Engraving Co., Falk v. (C. C. A.).....	890
Edison Electric Light Co. v. Westinghouse Electric & Man- uf'g Co. (C. C.).....	504	Gastrell, Wineman v. (C. C. A.)..	819
E. H. Nicholson, The (D. C.)....	185	Geo. A. Macbeth Co. v. Lippen- cott Glass Co. (C. C.).....	167
Eisner, In re (C. C.).....	671	Gerard v. Diebold Safe & Lock Co. (C. C. A.).....	889
Electric Merchandise Co., Leib v. (C. C. A.).....	385	Gerdau, In re (C. C.).....	143
Elizabeth T. Cottingham, The, Buch v. (C. C. A.).....	207	Giller, United States v. (C. C.)... 656	
Ellis, Gulf, C. & S. F. R. Co. v. (C. C. A.).....	481	Gillinder, Macbeth v. (C. C.).... 169	
Elsesser v. The Havana (D. C.)..	201	Gillinder, Macbeth v. (C. C.).... 171	
Eno, In re (C. C.).....	669	Globe Buttonhole Mach. Co., Reece Buttonhole Mach. Co. v. (C. C.).....	884
Ewing, Lamb v. (C. C. A.).....	269	Goodrich, United States v. (C. O. A.).....	21
Fairbanks, Whitney v. (C. C.)... 985		Goodyear Metallic Rubber Shoe Co., Williams v. (C. C. A.)....	498
Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. (C. C. A.)	420	Gottlieb, Thatcher v. (C. C.).... 312	
Falk v. Gast Lithograph & En- graving Co. (C. C. A.).....	890	Gould v. Hayne (C. C.).....	951
Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co. (C. C. A.)	759	Gould v. Hayne (C. C.).....	963
Farmers' Loan & Trust Co. of New York, Central Railroad & Banking Co. of Georgia v. (C. C.).....	556	Gould, Hayne v. (C. C.).....	951
Felix v. Ledos (C. C.).....	163	Gould, Hayne v. (C. C.).....	963
Ferguson, United States v. (C. C.)	28	Goulding v. Hammond (C. C. A.)	639
Ferguson & Hutter's Trustee, Collins Manuf'g Co. v. (C. C.)..	721	Grant v. East & West R. Co. of Alabama (C. C. A.).....	569
Fidelity Trust & Safety Vault Co. v. Mobile St. R. Co. (C. C.)....	26	Greenwich Ins. Co. v. Waterman (C. C. A.).....	839
Field, United States v. (C. C. A.)	367	Gulf, C. & S. F. R. Co. v. Con- ley (C. C. A.).....	486
First Nat. Bank of St. Albans, Sowles v. (C. C.).....	564	Gulf, C. & S. F. R. Co. v. Ellis (C. C. A.).....	481
Fisk v. Mahler (C. C.).....	528	Gulf, C. & S. F. R. Co. v. John- son (C. C. A.).....	474
Fitzsimmons v. United States (C. C. A.).....	812	Gulf, C. & S. F. R. Co. v. Mat- thews (C. C. A.).....	486
Flagler, Kidd v. (C. C.).....	367	Gulf, C. & S. F. R. Co. v. Selfred (C. C. A.).....	485
Forty-Nine Thousand, Seven Hun- dred and Seventy-Four Bushels of Rye, Owen v. (D. C.).....	185	Gulf, C. & S. F. R. Co. v. Wal- lace (C. C. A.).....	485
Four Hundred and Fifty-Seven Bags of Coffee, Rustad v. (D. C.).....	529	Haberman Manuf'g Co., Lalance & Grosjean Manuf'g Co. v. (C. C.).....	378
Francis v. Howard County (C. C. A.).....	487	Haberman Manuf'g Co., Lalance & Grosjean Manuf'g Co. v. (C. C.).....	517
Franklin, Coyle v. (C. C. A.)....	644	Hagan, Blindell v. (C. C.).....	40
Franklin Consolidated Coal Co. v. The Curlew (D. C.).....	899	Hamilton, Southern Pac. Co. v. (C. C. A.).....	468
Fry, Carter & Co. v. (C. C.)....	882	Hammond, W. & H. M. Gould- ing v. (C. C. A.).....	639

	Page		Page
Hanby, National Harrow Co. v. (C. C.).....	493	J. E. Trudeau, The (C. C. A.)...	907
Harmon, Union Pac. R. Co. v. (C. C. A.).....	29	Johnson v. Meyers (C. C. A.)....	417
Harmon Lumber Co. v. The Warrior (C. C. A.).....	534	Johnson, Gulf, C. & S. F. R. Co. v. (C. C. A.).....	474
Hart v. Board of Levee Com'rs for Parish of Orleans (C. C.)....	559	Jones v. The American Eagle (D. C.).....	1010
Hart v. Buckner (C. C. A.).....	925	Jones, Pluche v. (C. C. A.).....	860
Havana, The (D. C.).....	411	Jonty Jenks, The (D. C.).....	1021
Havana, The, Elssesser v. (D. C.)	201	Joyce, Charleston Ice Manuf'g Co. v. (C. C. A.).....	332
Havana, The, Reed v. (D. C.)...	201		
Havana, The, Roberts v. (D. C.)..	201	Kaestner v. National Brewing Co. (C. C.).....	715
Havana, The, Rossman v. (D. C.)	201	Kansas City, Ft. S. & M. R. Co. Burrow v. (C. C.).....	278
Havana, The, Turner v. (D. C.)..	201	Kasit v. Pilot Boat No. 5 (D. C.)..	537
Havane, The, Wanser v. (D. C.)..	201	Keane, Hofman v. (C. C.).....	986
Hayne v. Gould (C. C.).....	951	Kelley, Hinchman v. (C. C. A.)...	63
Hayne v. Gould (C. C.).....	963	Kellogg v. Clyne (C. C. A.).....	696
Hayne, Gould v. (C. C.).....	951	Kelly v. Sparks (C. C.).....	70
Hayne, Gould v. (C. C.).....	963	Kenedy v. Benson (C. C.).....	836
Hefel v. Whitely Land Co. (C. C.)	179	Kidd v. Flagler (C. C.).....	367
Hendee, Seymour v. (C. C.).....	563	Kimball Lumber Co., Schreyer v. (C. C. A.).....	653
Henderson v. Henshall (C. C. A.)	320	King v. Wooten (C. C. A.).....	612
Henderson, Calder v. (C. C. A.)..	802	Kinne v. Webb (C. C. A.).....	34
Hendy, United States v. (C. C.)..	447	Kinney v. United States (C. C.)..	313
Henshall, Henderson v. (C. C. A.)	320	Kircher v. Murray (C. C.).....	617
Herbert v. Rainey (C. C.).....	248	Knapp, Morss v. (C. C.).....	701
Hinchman v. Kelley (C. C. A.)...	63	Kursheedt Manuf'g Co., In re (C. C. A.).....	159
Hipwell, Zimpelman v. (C. C. A.)	848	Kuteman, Texas & P. R. Co. v. (C. C. A.).....	547
Hofman v. Keane (C. C.).....	986		
Holloway v. Dow (C. C.).....	511	Lakin v. Roberts (C. C. A.).....	461
Horn v. Baltimore & O. R. Co. (C. C. A.).....	301	Lalance & Grosjean Manuf'g Co. v. Haberman Manuf'g Co. (C. C.)	375
Howard County, Francis v. (C. C. A.).....	487	Lalance & Grosjean Manuf'g Co. v. Haberman Manuf'g Co. (C. C.).....	517
Howard Towing Ass'n v. The J. E. Potts (D. C.).....	539	Lamb v. Ewing (C. C. A.).....	269
Hudson River Railroad & Terminal Co. v. Day (C. C.).....	545	Lang, Dufour v. (C. C. A.).....	913
Hull v. Chaffin (C. C. A.).....	437	Lapham v. Noble (C. C.).....	108
Humes v. Third Nat. Bank (C. C. A.).....	917	Laurence, The, New York, P. & N. R. Co. v. (C. C. A.).....	542
Hunter-Benn & Co., Olsen v. D. C.)	530	Leavitt v. Windsor Land & Investment Co. (C. C. A.).....	439
Improved Fig Syrup Co. v. California Fig Syrup Co. (C. C. A.)	175	Ledos, Felix v. (C. C.).....	163
Insley, United States v. (C. C. A.)	221	Leib v. Electric Merchandise Co. (C. C. A.).....	385
Interstate Tel. Co., Baltimore & O. Tel. Co. of Baltimore County v. (C. C. A.).....	50	Lewis v. Loper (C. C.).....	237
Irwin, West v. (C. C. A.).....	419	Lewis v. The Wellington (D. C.)	901
J. E. Owen, The (D. C.).....	185	Lindauer, Morris v. (C. C. A.)...	23
J. E. Potts, The Howard Towing Ass'n v. (D. C.).....	539	Lippencott Glass Co., Geo. A. Macbeth Co. v. (C. C.).....	167
		Loper, Lewis v. (C. C.).....	237

	Page		Page
Low, Waples-Platter Co. v. (C. C. A.).....	93	National Park Bank of New York, Doud v. (C. C. A.).....	846
Macbeth v. Braddock Glass Co. (C. C.).....	173	National Sheet-Metal Roofing Co. v. Smeeton (C. C. A.).....	385
Macbeth v. Gillinder (C. C.).....	169	Newhall, Sheppard v. (C. C. A.)..	306
Macbeth v. Gillinder (C. C.).....	171	New Orleans & A. Packet Co. v. Pickles (C. C. A.).....	907
Macbeth Co. v. Lippencott Glass Co. (C. C.).....	167	New Orleans & C. R. R., Schneider v. (C. C.).....	466
McClaskey v. Barr (C. C.).....	781	New York, P. & N. R. Co. v. The Laurence (C. C. A.).....	542
McCoy, United States v. (D. C.)..	107	Nicholson, The E. H. (D. C.)....	185
McDermaid, Palmer v. (C. C. A.)	509	Niles Tool Works v. Taylor Bros. Iron-Works Co. (C. C.).....	82
McElwee v. Bridgeport Land & Improvement Co. (C. C. A.)....	627	N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. (C. C. A.).....	420
McKay, Remer v. (C. C.).....	432	Noble, Lapham v. (C. C.).....	108
Madden, Crabtree v. (C. C. A.)..	426	Northern Pac. R. Co. v. Cannon (C. C. A.).....	252
Maggie S. Robinson, The (D. C.)	904	Northern Pac. R. Co. v. Wright (C. C. A.).....	67
Magone, Wootton v. (C. C.).....	673	Old Point Comfort Hotel Co., Crook, Horner & Co. v. (C. C.)	604
Mahler, Fisk v. (C. C.).....	528	Oliver v. The Sirius (C. C. A.)... 188	
Mann Boudoir Car Co. v. Dupre (C. C. A.).....	646	Olsen v. Hunter-Benn & Co. (D. C.)	530
Marker v. Mitchell (C. C.).....	637	Orr, The William (D. C.).....	904
Marshall, The Samuel (C. C. A.)..	396	Ottenburg, Treusch v. (C. C. A.)..	867
Mary Adelaide Randall, The, Wierk v. (D. C.).....	411	Overman v. Warwick Cycle Manufacturing Co. (C. C.).....	496
Matheson, In re (C. C.).....	492	Owen, The, J. E. (D. C.).....	185
Mathews, Gulf, C. & S. F. R. Co. v. (C. C. A.).....	486	Owen v. 49,774 Bushels of Rye (D. C.).....	185
Merrill v. Rokes (C. C. A.).....	450	Owen v. 65,000 Bushels of Corn (D. C.).....	185
Merritt, President and Trustees of Bowdoin College v. (C. C.)..	55	Pacific Coast Steamship Co. v. The Portland (C. C. A.).....	404
Meyer v. St. Louis, I. M. & S. R. Co. (C. C. A.).....	116	Palmer v. McDermaid (C. C. A.)..	509
Meyers, Johnson v. (C. C. A.)... 417		Panhandle Nat. Bank, Coulson v. (C. C. A.).....	855
Mitchell, Marker v. (C. C.).....	637	Patrick, United States v. (C. C.)..	338
Mobile St. R. Co., Fidelity Trust & Safety Vault Co. v. (C. C.)... 26		Peck Brothers & Co., Brusie v. (C. C. A.).....	820
Mock Chew, United States v. (C. C. A.).....	490	Pennsylvania Co., Toledo, A. A. & N. M. R. Co. v. (C. C.).....	730
Morgan v. City of Des Moines (C. C.).....	456	Pennsylvania Co., Toledo, A. A. & N. M. R. Co. v. (C. C.).....	746
Morris v. Lindauer (C. C. A.).... 23		Pepper v. Taylor (C. C. A.).....	32
Morrison Co., Sawyer Spindle Co. v. (C. C.).....	693	Philadelphia & R. R. Co., Platt v. (C. C.).....	569
Morse v. Knapp (C. C.).....	701	Pickles v. New Orleans & A. Packet Co. (C. C. A.).....	907
Murphy v. United States (C. C.).. 110		Pilot Boat No. 5, Kasit v. (D. C.)	537
Murray, Kircher v. (C. C.).....	617		
Mutual Ben. Life Ins. Co. v. Robison (C. C.).....	580		
National Bank of Commerce v. Town of Granada (C. C. A.)... 100			
National Brewing Co., Kaestner v. (C. C.).....	715		
National Harrow Co. v. Hanby (C. C.).....	493		

	Page		Page
Pinson v. Atchison, T. & S. F. R. Co. (C. C.).....	464	St. Luke's Church v. Witters (C. C.)	567
Pittman v. The Samuel Marshall (C. C. A.).....	396	St. Paul Plow Works v. Deere & Co. (C. C.).....	501
Platt v. Philadelphia & R. R. Co. (C. C.).....	569	Samuel Marshall, The, Pittman v. (C. C. A.).....	396
Platte County, Deland v. (C. C.)..	823	Sawyer Spindle Co. v. W. G. & A. R. Morrison Co. (C. C.).....	693
Pluche v. Jones (C. C. A.).....	860	Schmid, In re (C. C.).....	145
Portland, The, Pacific Coast Steamship Co. v. (C. C. A.).....	404	Schneider v. New Orleans & C. R. R. (C. C.).....	466
Potts, The J. E. (D. C.).....	539	Schreyer v. Kimball Lumber Co. (C. C. A.).....	653
Prentiss Tool & Supply Co. v. Taylor Bros. Iron-Works Co. (C. C.).....	82	Seifred, Gulf, C. & S. F. R. Co. v. (C. C. A.).....	485
President and Trustees of Bowdoin College v. Merritt (C. C.)..	55	Seymour v. Hendee (C. C.).....	563
Press v. Davis (C. C. A.).....	267	Shapleigh, United States v. (C. C. A.).....	126
Puget Mill Co. v. Brown (C. C.)..	987	Sharp, Troy Laundry Machinery Co. v. (C. C.).....	712
Putnam v. Ruch (C. C.).....	216	Shattuck, In re (C. C.).....	365
Putnam Sav. Bank v. Beal (C. C.)	577	Sheppard v. Newhall (C. C. A.)..	306
Rainey, Herbert v. (C. C.).....	248	S. H. Harmon Lumber Co. v. The Warrior (C. C. A.).....	534
Randall, The Mary Adelaide (D. C.)	411	Siemens-Lungren Co., American Gas Controller & Fixture Co. v. (C. C. A.).....	163
Randall v. Wierk (D. C.).....	411	Simpson v. The State of California (C. C. A.).....	404
Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co. (C. C.)	884	Singer Manuf'g Co. v. Brill (C. C. A.)	380
Reed v. The Havana (D. C.)....	201	Sing Lee, In re (D. C.).....	334
Remer v. McKay (C. C.).....	432	Singleton, United States v. (D. C.)	488
Richards v. Bellingham Bay Land Co. (C. C. A.).....	209	Sirius, The, Oliver v. (C. C. A.)..	188
Richmond, N., I. & B. R. Co., Central Trust Co. v. (C. C.)....	723	Sixty-Five Thousand Bushels of Corn, Owen v. (D. C.).....	185
Riker v. Crocker-Wheeler Motor Co. (C. C.).....	519	Smeeton, National Sheet-Metal Roofing Co. v. (C. C. A.).....	385
Roberts v. The Havana (D. C.)..	201	Smith v. The Stephen Bennett (C. C. A.).....	207
Roberts, Lakin v. (C. C. A.).....	461	Smith, Aiken v. (C. C. A.).....	894
Robinson, The Maggie S. (D. C.)	904	Smith, Aiken v. (C. C. A.).....	896
Robison, Mutual Ben. Life Ins. Co. v. (C. C.).....	580	Southern Pac. Co. v. Hamilton (C. C. A.).....	468
Robson, Stutz v. (C. C.).....	506	Southern Pac. Co., Standard Oil Co. v. (C. C. A.).....	521
Rokes, Merrill v. (C. C. A.).....	450	Sowles v. First Nat. Bank of St. Albans (C. C.).....	564
Rossman v. The Havana (D. C.)..	201	Sowles v. Witters (C. C.).....	568
Royal, The, Thames Towboat Co. v. (C. C. A.).....	204	Sparks, Kelly v. (C. C.).....	70
Ruch, Putnam v. (C. C.).....	216	Stacey Clarke, The, Thompson v. (D. C.).....	533
Russell, Stockton v. (C. C. A.)..	224	Standard Oil Co. v. Southern Pac. Co. (C. C. A.).....	521
Rustad v. Four Hundred and Fifty-Seven Bags of Coffee (D. C.)	529	State of California, The, Simpson v. (C. C. A.).....	404
St. John, The (C. C. A.).....	1015		
St. Louis, I. M. & S. R. Co., Meyer v. (C. C. A.).....	116		
St. Louis & S. F. R. Co. v. Bradley (C. C. A.).....	630		

	Page		Page
Stephen Bennett, The, Smith v. (C. C. A.).....	207	Trudeau, The J. E. (C. C. A.)....	907
Stevens v. The City of New York (C. C. A.).....	181	Turck, Colorado Cent. Consolidat- ed Min. Co. v. (C. C. A.).....	262
Stockton v. Russell (C. C. A.)...	224	Turner v. The Havana (D. C.)...	201
Stutz v. Robson (C. C.).....	506	Turner, United States v. (C. C.)..	228
Sundberg, Virginia Home Ins. Co. v. (C. C.).....	389	Tyler v. Western Union Tel. Co. (C. C.).....	634
Superior, The (C. C. A.).....	204	Tyler Mining Co. v. Sweeney (C. C. A.).....	284
Sweeney, Tyler Mining Co. v. (C. C. A.).....	284	Union Pac. R. Co. v. Colorado Eastern R. Co. (C. C. A.).....	22
Tabor v. The Cerro Gordo (D. C.)	391	Union Pac. R. Co. v. Harmon (C. C. A.).....	29
Talley v. Curtain (C. C. A.).....	43	Union Pac. R. Co., Barnes v. (C. C. A.).....	87
Taylor, Pepper v. (C. C. A.).....	32	United States v. Adams (C. C.)..	114
Taylor Bros. Iron-Works Co., Cleveland City Forge Iron Co. v. (C. C.).....	82	United States v. Battle & Co. (C. C. A.).....	141
Taylor Bros. Iron-Works Co., Cleveland City Forge Iron Co. v. (C. C.).....	85	United States v. Bee (C. C. A.)..	112
Taylor Bros. Iron-Works Co., Niles Tool Works v. (C. C.)....	82	United States v. Burns (C. C.)..	351
Taylor Bros. Iron-Works Co., Prentiss Tool & Supply Co. v. (C. C.).....	82	United States v. Chapel (D. C.)..	140
Texas & P. R. Co. v. Kuteman (C. C. A.).....	547	United States v. David Burns (C. C.)	351
Texas & P. R. Co., Warner v. (C. C. A.)	920	United States v. Davis (C. C. A.)	147
Texas & P. R. Co., Warner v. (C. C. A.)	922	United States v. Ducournau (C. C.)	138
Thames Towboat Co. v. The Roy- al (C. C. A.).....	204	United States v. Ferguson (C. C.)	28
Thatcher v. Gottlieb (C. C.).....	312	United States v. Field (C. C. A.)	367
Third Nat. Bank, Humes v. (C. C. A.)	917	United States v. Giller (C. C.)...	656
Thompson v. The Stacey Clarke (D. C.).....	533	United States v. Goodrich (C. C. A.)	21
Thomson-Houston Electric Co. v. Dallas Consolidated Traction R. Co. (C. C. A.).....	1001	United States v. Hendy (C. C.)..	447
Tillman, Cantini v. (C. C.).....	969	United States v. Insley (C. C. A.)	221
Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C.).....	730	United States v. McCoy (D. C.)..	107
Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C.).....	746	United States v. Mock Chew (C. C. A.).....	490
Toledo & S. H. R. Co., Farmers' Loan & Trust Co. v. (C. C. A.)..	759	United States v. Patrick (C. C.)..	338
Town of Arlington, Fuller & War- ren Co. v. (C. C.).....	166	United States v. Shapleigh (C. C. A.)	126
Town of Granada, National Bank of Commerce v. (C. C. A.).....	100	United States v. Singleton (D. C.)	488
Treusch v. Ottenburg (C. C. A.)..	867	United States v. Turner (C. C.)..	228
Troy Laundry Machinery Co. v. Sharp (C. C.).....	712	United States v. Willamette Val. & C. M. Wagon-Road Co. (C. C.)	807
		United States v. Workingmen's Amalgamated Council of New Orleans (C. C.).....	904
		United States, Fitzsimmons v. (C. C. A.).....	812
		United States, Kinney v. (C. C.)	313
		United States, Murphy v. (C. C.)	110
		Velasco Terminal R. Co. v. The Brixham (D. C.).....	539
		Virginia Home Ins. Co. v. Sund- berg (C. C.).....	389

	Page		Page
Wallace, Gulf, C. & S. F. R. Co. v. (C. C. A.).....	485	William Orr, The (D. C.).....	904
Wanser v. The Havana (D. C.)..	201	Williams v. Goodyear Metallic Rubber Shoe Co. (C. C. A.)....	498
Waples-Platter Co. v. Low (C. C. A.)	93	Wilson v. Ansonia Brass & Cop- per Co. (C. C. A.).....	495
Warner v. Texas & P. R. Co. (C. C. A.).....	920	Winchester Repeating Arms Co. v. American Buckle & Cartridge Co. (C. C.).....	703
Warner v. Texas & P. R. Co. (C. C. A.).....	922	Windsor Land & Investment Co., Leavitt v. (C. C. A.).....	439
Warrior, The, S. H. Harmon Lumber Co. v. (C. C. A.).....	534	Wineman v. Gastrell (C. C. A.)..	819
Warwick Cycle Manuf'g Co., Overman v. (C. C.).....	496	Witters, St. Luke's Church v. (C. C.)	567
Waterloo Min. Co., Doe v. (C. C.)	935	Witters, Sowles v. (C. C.).....	568
Waterman, Greenwich Ins. Co. v. (C. C. A.).....	839	Wood v. Braxton (C. C.).....	1005
Webb, Kinne v. (C. C. A.).....	34	Wood v. Burg (C. C. A.).....	197
Wellington, The, Lewis v. (D. C.)	901	Wood v. The Wellington (D. C.)	901
Wellington, The, Wood v. (D. C.)	901	Wood, Boston Towboat Co. v. (C. C. A.).....	197
West v. Irwin (C. C. A.).....	419	Woodbury Glass Co., Aerated Fuel Co. v. (C. C.).....	386
Western Union Tel. Co., Tyler v. (C. C.).....	634	Woolsey, Arnold v. (C. C. A.)...	268
Westinghouse Electric & Manuf'g Co., Edison Electric Light Co. v. (C. C.).....	504	Wooten, King v. (C. C. A.).....	612
W. G. & A. R. Morrison Co., Saw- yer Spindle Co. v. (C. C.).....	693	Wootton v. Magone (C. C.).....	673
Whitely Land Co., Hefel v. (C. C.)	179	Workingmen's Amalgamated Council of New Orleans, United States v. (C. C.).....	994
Whitney v. City of New Orleans (C. C. A.).....	614	World's Columbian Exposition Co., Babcock & Wilcox Co. v. (C. C.).....	214
Whitney v. Fairbanks (C. C.)....	985	Wright, Northern Pac. R. Co. v. (C. C. A.).....	67
Whitney v. Wilder (C. C. A.)....	554	W. & H. M. Goulding v. Ham- mond (C. C. A.).....	639
Wierk v. The Mary Adelaide Ran- dall (D. C.).....	411	Young America, The, Campbell v. (D. C.).....	410
Wierk, Randall v. (D. C.).....	411	Zimpelman v. Hipwell (C. C. A.)	848
Wilder, Whitney v. (C. C. A.)....	554		
Willamette Val. & C. M. Wagon- Road Co., United States v. (C. C.)	807		

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

CITY OF DETROIT v. DETROIT CITY RY. CO. et al.

(Circuit Court, E. D. Michigan. January 5, 1893.)

1. REMOVAL OF CAUSES—LOCAL PREJUDICE—PARTIES.

In a suit by the city of Detroit as sole plaintiff against a street-railway company of that city and others, some of whom are citizens of the state, praying "that the franchise be decreed to expire," and the company compelled to vacate the streets, a nonresident mortgagee of the company is entitled, under Act Aug. 13, 1888, § 2, (25 St. p. 435,) to remove the cause to a federal court when local prejudice is shown. *Whelan v. Railroad Co.*, 35 Fed. Rep. 849, followed.

2. SAME—LOCAL PREJUDICE.

The right of removal to a federal court on the ground of local prejudice extends not only to cases where such prejudice would affect the jury, but also to those in which the decisions of the judge as to questions of law or fact may be affected thereby. *Burgess v. Seligman*, 2 Sup. Ct. Rep. 10, 107 U. S. 33, followed.

3. SAME—PETITION FOR REMOVAL—TIME OF FILING.

Under the law of Michigan, a decree by default against a nonresident, brought in by publication only, can be set aside by him as a matter of right. *Held*, that a nonresident respondent, brought in by publication, against whom an order pro confesso before decree was entered, but was afterwards set aside, could file its petition for removal to a federal court under Act March 3, 1875, at the term at which a hearing could first be had on its answer. *McDonald v. McDonald*, 7 N. W. Rep. 230, and *Harter v. Kernochan*, 103 U. S. 562, followed.

4. SAME.

By the law of Michigan, where a respondent is served by publication, and is misnamed as "The Washington Trust Co.," the true name being "The Washington Trust Co. of the City of New York," an order pro confesso against such absent respondent is void, and there can be no trial on such order so as to bar its right of removal to a federal court, under Act March 3, 1875, providing that such removal must be before the trial of the suit. *Guarantee Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 11 Sup. Ct. Rep. 512, 139 U. S. 137, followed.

5. SAME.

Chancery rule 27 of the circuit courts of Michigan gives a complainant 20 days to except against the answer, at the end of which time, if no exception is taken, the answer is deemed sufficient. Rule 45 gives a complainant 20 days after the answer is deemed sufficient to file a general

replication putting the case at issue. If no replication is filed, the cause stands for hearing on bill and answer. *Held* that, where a new term would begin before the expiration of 40 days after the filing of the answer, the respondent may at such new term remove the cause to a federal court on the ground of local prejudice, under Act Aug. 13, 1888, § 2, (25 St. p. 435,) although the complainant might have set the case down for hearing on bill and answer at the prior term, waiving its right to exceptions and a replication, no such waiver having been actually made.

6. SAME.

Under Act Aug. 13, 1888, § 2, (25 St. p. 435,) a cause may be removed to a federal court on the ground of local prejudice at any time before the first trial thereof is actually held, although such trial might have been held before the date of the application for removal. *Fisk v. Henarie*, 12 Sup. Ct. Rep. 207, 142 U. S. 459, explained and followed.

7. SAME—FORM OF AFFIDAVIT.

An order for removal of a cause to a federal court is interlocutory in its nature, and the affidavit need not state that the facts are sworn to of the personal knowledge of the affiant, but it is sufficient that they are of his opinion and belief, if he is a credible person, and the facts on which such belief is based are given.

8. SAME—LOCAL PREJUDICE.

On an application by a nonresident mortgagee of a street-railway company for removal of a suit against the company to a federal court, an affidavit by the applicant's agent, stating that there is prejudice and local influence; that a riot against the company has received much public sympathy; that the city authorities have refused to protect the employees and property of the company against the rioters; that a public meeting, attended by citizens of all classes and by the municipal officers, has advised the bringing of the suit; and that the judges who would try the case in the state court are shortly to stand for re-election,—shows sufficient ground for removal to a federal court.

9. SAME.

The right of removal to a federal court on the ground of local prejudice exists although the applicant, if defeated in the trial court, has the right of appeal to a state supreme court, as to which no local prejudice is alleged.

10. SAME—STATE COURT—INABILITY TO GET JUSTICE.

The fact that a decision by state judges adversely to a party would expose them to local criticism and ill will, and endanger their chances of re-election, is sufficient to show that such party will not be able to obtain justice in such court within the meaning of Act Aug. 13, 1888, § 2, (25 St. p. 435,) regulating removals from state to federal courts, irrespective of the fact that the state judges would probably rise above such local prejudice and render an entirely disinterested decision.

In Equity. Bill in the circuit court of Wayne county, Mich., by the city of Detroit against the Detroit City Railway Company, the Detroit Citizens' Street-Railway Company, Sidney D. Miller and William K. Muir, trustees, and the Washington Trust Company of the City of New York. The Washington Trust Company of the City of New York removed the cause to the federal circuit court, and it is now on motion to remand. Denied.

Charles A. Kent and Benton Hanchett, for complainant.

Henry M. Duffield, John C. Donnelly, Ashley Pond, and Otto Kirchner, for defendants.

Before TAFT, Circuit Judge, and SEVERENS and SWAN, District Judges.

TAFT, Circuit Judge. This is a motion to remand a suit in equity, which has been removed here from the circuit court of Wayne county, Mich. The averments of the bill filed by the city of Detroit, stated generally, are that the Detroit Citizens' Street Railway is in the possession and enjoyment of a franchise to operate street railways in a number of the streets of the city; that by virtue of a limitation of the constitution of the state of Michigan the franchise will expire May 9, 1893; that the railway company claims that the franchise will not expire until 1909; that the city wishes to sell the franchise at once, so as to enable the purchaser to make necessary preparations to operate railways in May, 1893, but that the claim of the company prevents the sale. The prayer of the petition is that the franchise of the company be decreed to expire as claimed by complainant, and that a mandatory injunction issue, compelling the defendant company to vacate the streets with its tracks, etc., in May, 1893. The Detroit City Railway, upon which the franchise was originally conferred, and from which, in 1891, by mesne conveyance, the present company obtained it, is made a party. Two deeds of trust conveying this franchise were given,—the one by the Detroit City Railway, in 1890, to Miller and Muir, trustees, to secure bonds amounting to \$1,000,000; and the other by the Detroit Citizens' Street-Railway Company to the Washington Trust Company of the city of New York, to secure \$2,000,000 of bonds. The trustees under the deeds of trust are made parties to the bill.

The bill was filed March 15, 1892. An order for service by publication on the proper affidavit was taken against the Washington Trust Company March 22d. All the defendants except the trust company were personally served, their appearances were duly entered, and their separate answers filed. The answers set forth additional details in the history of the franchises enjoyed by the railway company, deny that they will expire in May, 1893, and aver facts which are said to estop the complainant from claiming as in its bill. On August 13th, proof of publication against the Washington Trust Company was made. The notice published advised the Washington Trust Company of the pendency of a suit described as a suit of the City of Detroit against the City Railway Company, the Detroit Citizens' Street-Railway Company, Sidney D. Miller and William K. Muir, trustees, and the Washington Trust Company. An order pro confesso was taken on the same day against the Washington Trust Company. On August 19, 1892, the following entry was made in the case:

"It is hereby stipulated and agreed that the default heretofore entered in this cause against the Washington Trust Company of the City of New York, one of the defendants herein, for nonappearance in said cause, may be set aside, and that said defendant may answer to the bill of complaint filed in said cause."

On the same day the answer was filed. The corporate name of the trust company is "The Washington Trust Company of the City of New York," the words "of the City of New York" being a part thereof. On the 26th day of August the solicitor for the complainant served the solicitor for the trust company with notice that

the suit would be brought on for hearing on bill and answer at the next term of court, which would begin September 13th. On October 19, 1892, before any hearing was had in accordance with the notice, the trust company presented a petition to Judge Swan, of this court, for the removal of the suit on the ground that by reason of prejudice and local influence the petitioner could not obtain justice in the Wayne circuit court, or in any other court in the state to which, for such cause, the case could be removed. The petition states the jurisdictional facts, and refers to an affidavit accompanying it, to make it appear to the court that its averment in regard to prejudice and local influence is well founded. Upon the petition and affidavit Judge Swan made the order removing the cause as prayed. Subsequently a motion to remand the cause was made by the solicitor for the city of Detroit on the following grounds:

"(1) The cause was not subject to removal under the statutes of the United States applicable thereto. (2) The cause was not removed within the time required by said statutes; it was not removed until after the first term at which it could have been tried. (3) The affidavit and petition upon which such order was based do not contain any legal evidence of the facts therein stated. (4) The facts stated in said affidavit and petition, if true, do not offer any evidence that said Washington Trust Company, from prejudice or local influence, was not able to obtain justice in said circuit court for the county of Wayne, in chancery."

We shall consider these grounds in order.

1. The act under which this removal is to be sustained, if at all, was passed August 13, 1888, (25 St. c. 866, p. 433,) to correct the enrollment of an act approved March 3, 1887, (24 St. c. 373, p. 552.) The act is an amendment of the act of March 3, 1875, determining the jurisdiction of circuit courts of the United States, and regulating the removal of causes from state courts. By the first section the original jurisdiction of circuit courts of the United States is defined. Part of the second section is as follows:

"That in any suit of a civil nature in law or in equity arising under the constitution or laws of the United States or treaties made or which shall be made under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending or which may hereafter be brought in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending or may hereafter be brought in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant being such citizen of another state may remove such suit into the circuit court of the United States for the proper district at any time before the trial thereof when it shall be made to appear to such circuit court that from prejudice or local influence he will not be able to obtain justice in such state

court, or any other state court to which the defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause."

It has been held by the supreme court of the United States in *Re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. Rep. 141, that only suits involving \$2,000 or more can be removed for local prejudice. The petition for removal shows that the necessary amount is involved. It has been held by Judge Jackson in *Whelan v. Railroad Co.*, 35 Fed. Rep. 849, and in *Thouren v. Railway Co.*, 38 Fed. Rep. 673, that under this act, where all the plaintiffs in a state court are citizens of the state where suit is brought, a single defendant, being a citizen of another state, may remove the case into the proper United States circuit court for prejudice and local influence, even though he is united as codefendant with citizens of the same state as the plaintiffs, and even though there is no separable controversy between the plaintiffs and the nonresident removing defendant. We understand the chief justice in the case of *Wilder v. Iron Co.*, 46 Fed. Rep. 676, to concede and assume the correctness of the view of Judge Jackson as given above. It follows that, as the city of Detroit, the sole plaintiff here, is a citizen of Michigan, and the trust company, one of the defendants, is a citizen of New York, the order of removal, so far as the citizenship of the parties is concerned, was authorized by statute.

Counsel for complainant do not seriously dispute the correctness of the foregoing views, but the ground which they vigorously press upon the court for excluding this from the cases included within the local prejudice clause is very different. They say that the only question at issue in this suit is one of law, and that questions presenting only questions of law are not removable under the statute for prejudice and local influence. It is conceded that the questions arising on the bill and answer involve simply the construction of the constitution of the state of Michigan, and the laws and ordinances passed thereunder, and are purely of law. The contention of counsel is that the prejudice and local influence which congress had in mind was that which would operate upon a jury, and that it never could have supposed that a state judge would be affected thereby in deciding questions of law. We are clear that this claim of counsel cannot be supported. The local prejudice clause under discussion begins with the words, "And where a suit is now pending, or which may hereafter be brought," etc. The proper limitation to be put on the meaning of this phrase has been authoritatively stated by the supreme court in the case of *In re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. Rep. 141, where Mr. Justice Bradley said:

"The fourth clause [the one in question] describes only the special cases comprised in the preceding clauses. The initial words 'and where' are equivalent to the phrase 'and when in any such case.' In effect, they are tantamount to the beginning words of the third clause, namely, 'and when in any suit mentioned in this section.'"

The suits mentioned in this section are suits at law and in equity. It necessarily follows, therefore, that the local prejudice clause relates to both suits at law and in equity. The words of the clause

"at any time before the trial thereof," used in fixing the time within which the removal on account of prejudice or local influence can be made, are relied on as indicating that only suits at law can be removed; because the word "trial" is properly used only with reference to such suits. This view is refuted by the foregoing language of Mr. Justice Bradley, and by the further fact that under the removal act of 1875, which, it is conceded, permitted the removal of causes in equity as well as at law, the same words are used to fix a time within which removals under that act could be made. When the words "trial" and "hearing" are used together, as in the removal acts of 1866 and 1867, the one refers to a trial at common law and the other to a hearing on the merits in chancery, (*Car Co. v. Speck*, 113 U. S. 84-86, 5 Sup. Ct. Rep. 374;) but when the word "trial" alone is used it includes both trial at common law and hearing in chancery as in the act of 1875.

If the prejudice and local influence clause applies to suits in equity, then congress must have intended to provide against the prejudice of judges as well as of juries, for there are no juries in equity. The contention on behalf of complainant is, therefore, reduced to a claim that it was the intention of congress to save suitors from injustice by a judge in the determination of issues of fact, but not against injustice done by him in deciding issues of law. We do not see why a judge, if influenced improperly against a party, may not yield to such influence as well in his decisions of legal questions as in his conclusions of fact.

The sole reason of the framers of the constitution for including in the judicial power of the United States the right to decide controversies between citizens of different states was a fear of the operation of prejudice or local influence in the tribunals of one state against a citizen of another. It was thereby intended in the administration of justice, both in determining facts and in deciding the law, to secure a judiciary independent of local influences and surroundings. Recognizing this intention on the part of the framers of the constitution, the federal courts exercise an independence of judgment in deciding many questions of state law, and under some circumstances decline to follow the state courts. In the leading case of *Burgess v. Seligman*, 107 U. S. 33, 2 Sup. Ct. Rep. 21, Mr. Justice Bradley, in discussing the power and duties of the federal courts in administering state laws, spoke for the supreme court as follows:

"The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, but not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of these laws. The existence of the two co-ordinate jurisdictions in the same territory is peculiar, and the result would be inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are often regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is;

but where the law has not been thus settled it is the right and duty of the federal courts to exercise their own judgment, as they also always do with reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon in a particular state of the decisions, or when there is no decision of the state tribunal, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted in the state courts after such rights have accrued. But even in such cases, for the sake of harmony, and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflicts with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

We could have no better evidence than this that one of the objects of the makers of the constitution, in conferring judicial power in controversies between citizens of different states, was to avoid possible injustice to nonresident litigants from the influence of local prejudice on decisions by state courts on pure questions of law. But it is said we are considering a statute, and not the constitution. That is true, but the reason for conferring a constitutional power, and its scope and object, are of controlling importance in construing a statute passed in the exercise of the power. In cases where the right to sue in the federal courts, or the right to remove cases to them, is made to depend only on the fact of diverse citizenship, congress merely assumes the existence of local prejudice, and provides against its dangers to nonresidents, without regard to the actual fact, while in the clause under discussion, congress puts on him who would enjoy its benefit the burden of an affirmative showing. But in either case the evil sought to be avoided by the act of congress was the same as that which led the makers of the constitution to confer the power to pass the act,—possible injustice to nonresident litigants from prejudiced opinions of law as well as from prejudiced conclusions of fact. Neither authority nor federal statute has been cited which makes the distinction between questions of law and questions of fact contended for. If it was the intention of congress to so limit the right of removal, it could have expressed itself in language not to be mistaken, and would not have left the limitation to be inferred from an argumentative construction, which finds no basis either in the words used or in the reason of the provision.

2. The second objection to the order of removal is that the removal was not in time. The statute provides that the petition for removal in a proper cause shall be filed "at any time before the trial thereof." It is said that the supreme court has decided in *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. Rep. 207, that the time for removal under this act is the same as that in the act of 1875, and that, under the act of 1875 the petition for removal was required

to be filed before or at the term at which the cause could first be tried, and before the trial thereof. Conceding for the purpose of the argument that the supreme court has so decided, we are nevertheless of the opinion that the petition for removal in this case was in time. The petition for removal was filed on the 19th day of October, in the September term, which began on the 13th of September. The appearance of the trust company was required, by the order of publication and the notice, to be at the April term, on July 22d. Upon the 13th of August an order pro confesso was taken against the trust company on proof of publication and in default of its appearance. Subsequently, on August 19th, the order pro confesso was by stipulation set aside, and the trust company was allowed to file its answer. The argument on behalf of the city is that, as a decree might have been taken at once on this order pro confesso against the trust company upon the complainant's making the necessary proofs, this would have been a trial on the merits, and therefore a trial could have been had in the April term. It would follow from this that the petition for removal should have been filed at the April term, and, as filed, was too late. If the order pro confesso had been taken on a personal and actual service, the argument would be unanswerable, for it is clear that generally a hearing on a default is a trial, within the meaning of the removal act of 1875. *McCallon v. Waterman*, 1 Flip. 651. And it is also clear that under the act of 1875 a postponement of the trial by stipulation between counsel beyond a term when either party could demand a trial did not enlarge the time of removal beyond the first possible trial term. *Babbitt v. Clark*, 103 U. S. 612.

Under the circumstances of this case, the answer to the argument is twofold: First. Under the laws of Michigan, a decree by default against a nonresident brought in by publication only, can be set aside by such nonresident as a matter of right on payment of costs, and his right to answer the complainant's bill and to have a hearing on the merits is absolute. *McDonald v. McDonald*, 45 Mich. 44, 7 N. W. Rep. 230. A fortiori, it would seem that such a nonresident is entitled to have an order pro confesso before decree set aside, and to file an answer to the bill. Under the act of 1875, a nonresident against whom a decree by default had been rendered on service by publication, and on whose application within a prescribed time agreeably to the laws of the state, a decree was set aside, and his answer filed, was held entitled to file his petition for removal at the term at which the hearing could first be had on his answer. *Harter v. Kernochan*, 103 U. S. 562. It would seem to follow that, as the trust company in this case as a matter of right could have had the order pro confesso set aside, and it was set aside, the first trial term within which it was required to file its petition for removal under the requirements of the act of 1875 was the term at which a hearing could be had on its answer. Second. There could have been no trial on the order pro confesso, because that order was void. The order could only be valid in case all the steps required by the statute of Michigan in summoning an absent defendant had been literally and exactly complied with. See *Colton v. Rupert*, 60 Mich.

318, 27 N. W. Rep. 520; Guarantee Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. Rep. 512. One of the most important requisites of a service by publication is that it shall correctly state the parties to the suit in which the defendant is summoned, and that it shall correctly state the name of the defendant. In the case of Colton v. Rupert, 60 Mich. 318, 27 N. W. Rep. 520, the suit was by Garrett B. Hunt and Henry S. Cunningham against Palmer Colton, and the defendant, a nonresident, was sought to be brought in by publication. In three of the publications the name of the first complainant was printed "Grant" instead of "Garrett," as contained in the order and in the bill of complaint. It was held by the supreme court of Michigan that the service was void. See, also, Entrekin v. Chambers, 11 Kan. 368; Magoffin v. Mandaville, 28 Miss. 354; Chamberlain v. Blodgett, 96 Mo. 482, 10 S. W. Rep. 44; Whelen v. Weaver, 93 Mo. 430, 6 S. W. Rep. 220; McRee v. Brown, 45 Tex. 503. In the present case the name of the first defendant sued and as given in the order was the "Detroit City Railway." As published, it was "The City Railway," which does not correctly give the corporate name of the company intended to be sued. Again, the name of the defendant, as given in the bill of complaint, was the "Washington Trust Company of the City of New York," and the order of publication was against "The Washington Trust Company," and this was the name in the notice published. The real name of the defendant is "The Washington Trust Company of the City of New York," and as such it is entitled to be sued. The service against it under the name of "The Washington Trust Company" cannot be regarded as valid. The importance attached to corporate names in Michigan is sufficiently shown in the case of People v. Oakland Co. Bank, 1 Doug. (Mich.) 282, where it was held that an act of the legislature repealing the charter of the Bank of Oakland County could not be considered to be the repeal of the charter of the president, directors, and company of the Oakland County Bank. It is quite true that by coming in with its answer the trust company waived all defects in the service, and could not now be heard to object that it is not properly in court. That, however, is aside from the point we are considering, which is whether, when the order pro confesso was taken, the trust company was then before the court, so as to make a default decree against it possible. If it was not legally served, then it was not in court, and there could have been no trial of its case until after it had filed its answer. For these reasons the appearance of the trust company must be regarded as voluntary, and the question whether, by an order pro confesso, the right of a defendant to remove for local prejudice is cut off, is not in the case.

The answer of the trust company was filed on the 19th of August. Chancery rule No. 27 of the circuit courts of Michigan gives the complainant 20 days in which to allege exceptions against the answer, at which time, if no exceptions are filed, the answer is deemed sufficient. By chancery rule No. 45, 20 days after the answer is deemed sufficient are given to the complainant to file a general replication putting the case at issue. If no replication is filed the cause stands

for hearing on bill and answer. Forty days from the 19th of August brings us down to the 28th of September,—15 days after the beginning of the September term. The case could not have been regularly tried before the 28th of September as against the trust company, the removing defendant. It is said that the complainant might have set the case down for hearing on bill and answer, waiving its right to allege exceptions or to file a replication, and therefore the cause could have been tried before the 13th of September, in the April term. It is sufficient answer to this claim to say that the complainant did not waive its right not to have a hearing on bill and answer until after the beginning of the September term. As, on the one hand, a waiver of either party under the act of 1875 could not postpone the time at which a cause could first be tried for the purpose of removal under that act, so, clearly, the possible waiver of either party, not in fact made, could not be construed to advance the time of trial so as to defeat the right of removal before the cause could regularly be tried. It is true that on the 26th of August the complainant served notice on the defendants, stating that the case would be brought on for hearing on bill and answer at the September term. This was certainly not a waiver of the right of complainant to delay a hearing until the September term. The petition for removal was filed at the September term, and before the trial of the cause. It therefore follows that it was in time in any view which may be taken of the holding of the supreme court in *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. Rep. 207.

In our opinion, however, the decision of the supreme court in *Fisk v. Henarie* is not to be given the meaning contended for by counsel for the complainant. In that case the cause was removed from a state court to a federal court under the act of 1888, after it had been three times tried in the state court. The contention on the part of the removing defendants was that the words in this act, "at any time before the trial thereof," used in regard to removal on the ground of prejudice or local influence, were, in effect, "at any time before the final trial thereof," and were to be given the same meaning as the words of the act of July 27, 1866, and the act of March 2, 1867, "at any time before the trial or final hearing of the suit," under which language it had often been ruled that it was not too late to apply for a removal after trials which had been set aside by the trial court or by an appellate court. The chief justice, in giving the opinion of the court, refers to the omission of the word "final" in the acts of 1887 and 1888, and points out that in this respect the language is like that of the act of 1875, in which the words are, "before or at the term at which said cause could be first tried and before the trial thereof." The chief justice says:

"This has been construed to mean the first term at which the cause is in law triable,—the first term at which the cause would stand for trial, if the parties had taken the usual steps as to pleadings and other preparations; and it has also been decided that there cannot be a removal after a hearing on a demurrer to the complaint because it does not state facts sufficient to constitute a cause of action."

After quoting the language of the act of 1887, carried into the act of 1888, the chief justice continues:

"In view of the repeated decisions of this court in exposition of the acts of 1866 and 1867 and 1875, it is not to be doubted that congress, recognizing the interpretation placed on the word 'final' in the connection in which it was used in the prior acts and the settled construction of the act of 1875, deliberately changed the language, 'at any time before the final hearing or trial of the suit,' or 'at any time before the trial or final hearing of the cause,' to read, 'at any time before the trial thereof,' as in the act of 1875, which required the petition to be filed before or at the term at which the cause could be first tried, and before the trial thereof. The attempt was manifest to restrain the volume of litigation pouring into the federal courts, and return to the standard of the judiciary act, and to effect this in part by resorting to the language used in the act of 1875 as its meaning had been determined by judicial interpretation. This is more obvious in view of the fact that the act of March 3, 1887, was evidently intended to restrain the jurisdiction of the circuit court, as we have heretofore held."

Two members of the court—Mr. Justice Field and Mr. Justice Harlan—dissented. In their opinion, the language "any time before the trial" meant the same as in the acts of 1866 and 1867; that is, "at any time before the final trial." The question at issue in the case, therefore, was whether the trial referred to in the act was a final trial or a first trial. The majority of the court held that, because the words "before the trial thereof" had been used in the act of 1875 in connection with words which left no doubt that there they meant the first trial, therefore the same words in the act of 1887 must be taken to have the same meaning. We do not understand from the opinion, however, that the majority of the court intended to incorporate bodily into the acts of 1887 and 1888, from the act of 1875, the words, "before or at the term at which said cause could be first tried." It is not apparent on what grounds this could be done. The act of 1875 fixed the time for removal, not only before the first actual trial, but also before or within the first term when a trial was possible. The supreme court holds that the words "before the trial thereof," in the act of 1887, were taken from the act of 1875. This being the case, the omission in the act of 1887 of the words limiting the period of removal to that before or within the term of possible trial which appear in the act of 1875 would seem to clearly indicate the congressional intention not to impose such a limitation in the subsequent act. The case before the supreme court did not require the construction contended for, and for the reasons stated we do not feel authorized to attribute such a view to that court until some further expression from it on the subject. The words "at any time before the trial" should be given their ordinary meaning, i. e. "at any time before the first trial thereof," and up to the time of that first trial, whether that occur at one term or another, the right of removal under the local prejudice clause remains. It follows that this cause was removed in time.

3. The next objection to the order of removal is that the affidavit in support of the petition is not legal evidence, because the facts which it states are sworn to on the information and belief of the affiant, and not of his personal knowledge. Neither the order removing nor the order remanding a cause is a final order. In *re Pennsylvania Co.*, 137 U. S. 451, 453, 11 Sup. Ct. Rep. 141. The petition for removal is in the nature of an interlocutory motion. It was long the practice in the high court of chancery in England to permit par-

ties to submit at the hearing of interlocutory motions affidavits on belief, provided that the facts were stated upon which such belief was founded. See *Bird v. Lake*, 1 Hem. & M. 111; 2 Daniell, Ch. Pr. 1509; 1 Daniell, Ch. Pr. 394. And by equity rule 90 the practice of the circuit court is to be regulated by the practice of the high court of chancery in England so far as the same may be applicable. The same practice now prevails in the high court of judicature of England. See *Bidder v. Bridges*, 26 Ch. Div. 1. In that case one rule provided that the court or judge might make an order for examination of witnesses *de bene esse* "when the judge is satisfied, and when it shall appear necessary for the purpose of justice;" and it was held that such satisfaction could be produced on affidavits on belief under the following rule:

"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to belief, with the grounds thereof, may be admitted."

We do not think it would be too much to say that the rule thus stated is everywhere in practice, and that for the purpose of a hearing on interlocutory motions it is not necessary that the affiant should have personal knowledge of every fact stated, if the grounds of his belief are sufficiently set forth. Much reliance is placed upon the opinion of Mr. Justice Bradley in the case of *In re Pennsylvania Co.*, *supra*, where he discussed the amount and kinds of evidence necessary to make local prejudice appear to the court within the meaning and requirements of the clause under consideration. He said:

"Our opinion is that the circuit court must be legally (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in a state court. Legal satisfaction requires some proof suitable to the nature of the case; at least an affidavit of a credible person; and a statement of facts in such affidavit, which sufficiently evince the truth of the allegation. The amount and manner of proof in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient. If the petition for removal states the facts on which the allegation is founded, and that petition be proven by the affidavit of a person or persons in whom the court has confidence, this may be regarded as *prima facie* proof, sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered. In view of these considerations, we are disposed to think that the proof of prejudice and local influence in this case was not such as the circuit court was bound to regard as satisfactory. The only proof offered was contained in the affidavit of the general manager of the defendant corporation, to the effect that from prejudice and local influence the company would not be able to obtain justice in the court of common pleas for Litchfield county, or any other state court to which, etc. We do not say that, as a matter of law, this affidavit was not sufficient, but only that the court was not bound to regard it so, and might well have regarded it as not sufficient."

An affidavit on belief of a credible person as to the facts showing local prejudice or influence which will prevent the removing party from obtaining justice in the state court, if the grounds of that belief are stated in the affidavit, is "proof suitable to the nature of the case," and a court may therefore be "legally satisfied" therefrom of the truth of the allegations. Such an affidavit is not a "perfunctory

showing by a formal affidavit of mere belief," but is that kind of evidence which for many years has been accepted in all courts of equity on interlocutory motions as a substitute for the direct evidence of witnesses having personal knowledge required in the hearing on the merits of a case. The affidavit in this case is made by Francis H. Page, the secretary of the Washington Trust Company of the City of New York. After a positive averment of prejudice and local influence, he goes on to state that he is secretary of the Washington Trust Company of the City of New York, and that by direction of his company he visited the city of Detroit, to ascertain the condition and situation of the suit, and to protect its interests; that, after a careful and impartial investigation and examination, he has thoroughly familiarized himself with the actual condition of affairs in Detroit in connection with the controversy in this action. The affiant then refers to facts, of which the following are examples: A riot, (of which it may be remarked in passing, the supreme court of Michigan has taken judicial notice;) the conduct of the mayor and council in reference thereto, as evidenced by official records and otherwise; the calling and proceedings of a public meeting; the appointment of a committee by that meeting, and their public acts; the speeches at the public meeting, as evidenced by a stenographic report thereof; extracts from the local press; the issues of a local election and its results; the messages of the mayor; the resolutions of council,—and many other facts, all in the nature of local history, of which an investigation for the purpose would give the affiant reasonably accurate knowledge. His statement of such facts on information and belief, therefore, if he be a credible person, (which we have no reason to doubt,) furnished the court trustworthy legal evidence upon which to dispose of the petition for removal, and, if the facts stated were sufficient, might reasonably and legally satisfy the court of the existence of such prejudice and local influence either against the trust company or in favor of the city in this controversy as to justify the removal of the cause.

4. The final objection urged on behalf of the complainant, to the order of removal, is that the facts stated in the affidavit do not show the necessary prejudice and local influence. The statute directs a removal "when it shall be made to appear to said circuit court that, from prejudice or local influence he (the removing defendant) will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause." The defendant trust company has no right, under the laws of Michigan, to remove this cause from the Wayne circuit court to any other court of the state on account of prejudice and local influence. This is conceded. That it is within the power and discretion of a Wayne circuit judge to invite a judge from another circuit to hear the case, is not material, because the defendant cannot request it as a matter of right. The inquiry must be limited, therefore, to the existence of such prejudice and local influence as will affect the defendant's getting justice in the Wayne circuit court.

Counsel contend that, inasmuch as a decision of the Wayne circuit court involves only a question of law which the defendant trust company, in the event of an adverse decree, can carry to the supreme court of the state, no showing can be sufficient which does not tend to prove that the decision of the supreme court also will be affected by prejudice and local influence. We do not agree in this view. It rests on the false premise that no injury is done to a party litigant when a court of original jurisdiction, swayed by prejudice or local influence, decides a case against him, if the case involves only an appealable question of law. He is entitled, on general principles, to have his rights justly determined in every tribunal whose aid or protection the law gives him, no matter whether the judgment is to depend on disputed facts or law. It is an injustice to him to be compelled to appeal to a higher court to right a wrong done him by the prejudice of the trial judge. In this cause, the disadvantage to the trust company, in case of an adverse decision by the Wayne circuit court, will be substantial. The mandatory injunction prayed by the city, if granted by the circuit court, would compel the street-railway company, pending the appeal to the supreme court, to tear up its tracks from the streets of the city, and materially injure the mortgage security held by the trust company; and if, on the other hand, a supersedeas bond should be given to stay the enforcement of the decree, the giving of such a heavy bond is a burden which neither the trust company nor its mortgagor should have imposed on it except by a tribunal free from prejudice or local influence.

Coming now to the affidavit, we find in it a positive averment of the existence of prejudice and local influence, as follows:

"Deponent further saith that the said the Washington Trust Company of the City of New York, from prejudice and local influence, will not be able to obtain justice in said circuit court for the county of Wayne, in the state of Michigan, or in any other state court to which the said Washington Trust Company of the City of New York may, under the laws of the state of Michigan, have the right, on account of such prejudice and local influence, to remove said cause; that said prejudice and local influence also exist against the franchises and property involved in said suit and against the Detroit Citizens' Street-Railway Company, which is in possession of and operating the street railways under such franchises, and through them the said prejudice and local influence exist against the Washington Trust Company of the City of New York, which is the grantee in a deed of trust executed by the said Detroit Citizens' Street-Railway Company to the said the Washington Trust Company of the City of New York, and that said prejudice and local influence exist in favor of the city of Detroit, the complainant in said suit, and is being used by said complainant against the said the Washington Trust Company of the City of New York as said defendant in the said suit."

The affiant then gives a detailed history of the controversy between the street-railway company and the city and the people of Detroit, which, for the purpose of this opinion, may be summarized in the following: The Detroit City Railway Company was organized May 9, 1863, and was by ordinance given a franchise to operate a street railway in several main streets of the city for a period of 30 years from its incorporation. In November, 1879, the common council of Detroit by ordinance extended the life of the company's franchise until 1909, which was sixteen years after the time when the company's cor-

porate life, as limited by the constitution of Michigan, must expire. During the year 1890 there had been much public criticism of the railway company because of its poor equipment and service, and its failure to adopt a system of rapid transit. The public feeling thus aroused against the company was increased by the continuous comment in the public press that the stock of the company was largely owned by aliens, and that the railway was operated by persons of foreign birth. January 1, 1891, the Detroit City Railway transferred all its property and franchises to a corporation known as the Detroit Street-Railway Company. In April, 1891, a general strike of the employes of the new company took place, because a few of their number had been discharged. The company would have had no difficulty in supplying new men and operating its lines if a mob of citizens and strikers had not forcibly resisted the running of its cars. Policemen were placed on the company's cars for a short time to protect them from attack, when the common council of the city passed a resolution formally protesting against the use of the police force. The mayor was appealed to by the company, and he replied that he had no power in the premises. Several riots took place, in which the property and employes of the company were attacked and injured. The only official act of the mayor in connection with the riots was to issue a proclamation calling upon all persons to preserve the peace, which he took no steps to enforce. The supreme court of Michigan, in the case of *Geist v. Railway Co.*, 51 N. W. Rep. 1112, took judicial notice of this riot, and set aside a verdict against the company because of a reference to it in the speech of counsel for the plaintiff. The words of the court are:

"In view of the great excitement and anger of the populace, which culminated in mob violence against the railway company but a few weeks before the trial, of which we cannot fail to take judicial knowledge as a matter of current history, this remark might have revived the feeling, and had a prejudicial effect upon the jury against the defendant."

A large public meeting, attended by citizens of all classes, was held to express sympathy with the strikers, and to denounce the railway company. The common council and the mayor publicly called upon the railway company to submit the matters in difference between it and its former employes to arbitration, and, in order to avoid further loss from lawless violence in the absence of adequate police protection, the company was compelled to do so. Soon after these occurrences, the public demand for rapid transit became so great that in June following the railway company agreed to put in the necessary plant if its franchise should be extended from 1909 to 1920. The common council accordingly passed an ordinance granting the extension. The people of the city were much incensed at this action of the council, and charges of bribery against the members of the council and the company were made, and reiterated in the public press. The conditions imposed on the company in the ordinance were declared to be insufficient. A very large indignation mass meeting, the call for which was signed by prominent citizens, was held in July, 1891, and was attended by the mayor and nearly all the aldermen. The railway company was denounced in all the speeches.

The attorney for the company, in attempting to present the case of his client, was interrupted and shouted down. Resolutions were passed; stating that the franchises of the company would expire in May, 1893, and that they could be made to realize a million dollars or more to the city treasury; demanding that the present company give the public rapid transit, and, on failure to immediately comply, that the franchises be condemned, and put up for sale to the highest bidder; and protesting against the action of the council in extending the franchises, and demanding that the mayor veto the ordinance. A committee of 50 leading citizens was appointed to present the protest to the mayor and the common council, and to take action in the courts or otherwise in respect to the street franchises. The mayor vetoed the ordinance in a message in which he reiterated the sentiment of the indignation meeting, as expressed in its resolutions. The public feeling against the street-railway company had become so great in the fall of 1891 that the then owners of the stock sold out to a new company, owned and controlled by leading citizens of Detroit; but this change of ownership was denounced in the public press as a change from one set of monopolists to another. One article, quoted in the affidavit, concludes as follows:

"Simmered down, it looks as if the street-railway corporations which have been making so much trouble for the citizens, and creating so much scandal in the municipality, had simply been reinforced by a cordon of other great and powerful corporations; that they are endeavoring to disarm public suspicion of their intentions until they close all avenues of escape, then to draw their lines closer and closer, then to swoop down and get what the old company tried but failed to,—extension of franchises in the streets, worth millions, for nothing."

In a communication to all the papers of the city, the secretary of the mayor charged that the ownership of the railway company had not in fact changed, but that the present seeming owners were purely conveniences for the old stockholders. The term of the mayor ended January 1, 1892, and an election for his successor took place in November, 1891. The leading issue of the campaign was the street-railway question, and the mayor was re-elected, although a majority of the electors of Detroit are members of the political party opposed to that of the mayor. The citizens' committee of 50, appointed at the meeting in July, 1891, issued an address in this campaign, asking the public to vote against 9 aldermen, because they were said to be favorable to the street-railway company. The result was the election of a majority of the council on an anti-street-railway platform. The mayor, in his official messages to the common council, and in open letters to the leading newspapers, which were published during the winter of 1891-92, frequently called attention to the great pecuniary value of the street-railway franchise to the city, if it could only sell the same to the highest bidder, and to the opinion of leading lawyers that the franchise of the present company would expire in May, 1893, or earlier. He recommended the employment of counsel in addition to the regular attorneys of the city to act on her behalf. This course was also recommended by the citizens' committee of 50, and in January, 1892, they suggested the names of two lawyers for such employment. The mayor

reported that he had retained the gentlemen named for the city. The council tabled a resolution authorizing him to do so, and considerable discussion as to his authority in this matter was had. One of counsel retained for the city withdrew from the case in March, 1892. Thereupon the mayor, in a message to the council, charged that such withdrawal was the result of "subornation of treason" by the railway company. In the same month the council passed an ordinance limiting the life of the franchise of the railway company to May, 1893, and repealing the ordinance of 1879, by which the franchise of the railway had been extended to 1909. A few days later the bill in this case was filed.

The city of Detroit is a municipal corporation, forming a large part of the county of Wayne. The judges of the Wayne circuit court are elected by the qualified electors of Wayne county, once in six years. The terms of the present judges expire December 31, 1893, but their successors will be elected on the first Monday in April next. The present judges are all candidates for re-election. The affidavit closes with this positive statement:

"And this deponent further saith that all the above-stated prejudice and local influence in favor of the city of Detroit, complainant in this suit, and against the Detroit Citizens' Street-Railway Company, operate upon and adversely to the holders of bonds issued by said Detroit Citizens' Street-Railway Company to the Washington Trust Company of the City of New York, by reason of the latter's relation as trustee of the Detroit Citizens' Street-Railway Company, and trustee for the holders of bonds of said street-railway company. That by reason of the prejudice and ill will existing against the said street-railway company, and, through it, against the Washington Trust Company of the City of New York, as above set forth, and the determination of the public and the public authorities that said railway company shall be defeated, if possible, in anything which it undertakes or proposes, the judges of the Wayne circuit court are placed in a most trying and embarrassing situation, and are subject to constant and persistent importunity and public pressure; and justice requires that they should not be called upon to determine the questions in issue between the city of Detroit and said railway company, in which the Washington Trust Company of the City of New York is interested."

No affidavit has been tendered in contradiction of the facts here set forth. Judge Jackson, in the case of *Whelan v. Railroad Co.*, 35 Fed. Rep. 849, and in *Thouron v. Railroad Co.*, 38 Fed. Rep. 673, expressed the opinion that on a hearing of this kind affidavits could not be introduced to contradict or rebut the affidavit filed in support of the petition for removal on the issue of the existence of prejudice and local influence. Counsel for the city state that they acquiesce in this decision of Judge Jackson, and have therefore filed no rebutting affidavits. Whether the language of the supreme court in the case of *In re Pennsylvania Co.*, supra, does not shake the decision of Judge Jackson as authority upon this point we are not called upon now to consider or decide. Suffice it to say that no affidavits contradicting the averments of the Page affidavit have been filed, and the action of the court must be predicated upon that alone.

If the facts stated in the affidavit, of which we have only mentioned a part, do not show prejudice and local influence in the community of the city of Detroit against the defendants in this case

v.54f.no.1—2

and in favor of the city as complainant, then it is difficult to imagine facts that would. It is very clear that the citizens of Detroit generally are impressed with a feeling that the street-railway company has abused its privileges; that the continued enjoyment by it of the franchises will be an injustice to the city, and will deprive the city of a very large sum of money which it may acquire by the sale of these franchises to the highest bidder in the coming spring; and that the feeling has ripened into a conviction that the company has no rights in the streets after May, 1893. Whether such public feeling is due to misconduct of the railway company, and may be justified, is not here the question. For the purpose of this argument, such justification may be conceded. With that we have nothing to do. All that we hold is that the community of Detroit have prejudged the case now before us, and, therefore, that prejudice and local influence in favor of the city and against the defendants, including the trust company, do exist.

It is contended by counsel, however, that, even if prejudice and local influence be shown, there is no evidence that by reason thereof the defendant will not obtain justice from the judges of the Wayne circuit court. The "justice" which the defendant must be prevented from obtaining in the state court to entitle him to a removal is certainly not a judgment or decree in his favor. The phrase does not refer to any particular result in the case, but rather to the influences which will operate upon the tribunal in deciding it. The "justice" which defendant has the right to obtain is a hearing and decision by a court wholly free from, and not exposed to the effect of, prejudice and local influence. If it is made to appear to the United States court that prejudice and local influence do exist, which would have a natural tendency to operate directly on the state court, and furnish an interested motive for the judges to decide the case against the petitioning defendant, it is the duty of the United States court to grant the removal, without any inquiry into the fact whether the particular state judges before whom the case is pending could and would rise above such prejudice and local influence, and decide the case unmoved by any personal benefit or disadvantage which would follow their decision. In a majority of cases, doubtless, the state judges would do their duty without fear or favor, but the petitioning defendant is not to be exposed to the chance that prejudice and local influence may work against him. The existence of local influence, and its natural tendency to operate upon the court, being shown, the tribunal is no longer one in which, in the sense of the removal statute, "justice" can be obtained.

A decision in this case adverse to the city of Detroit would probably cause many electors of the city in the approaching judicial election, convinced of the righteousness of the city's cause, to vote against the judge rendering the decision; and no judge could be unconscious of that fact in passing upon the case. We quite agree with counsel when they say that there is nothing here to show that the judges of the Wayne circuit court would not rise above influences of a personal character, and render a just decision; but the adverse in-

fluences of a personal nature are present, and in such a case we must presume a human weakness in all judges to prevent injustice from the frailty of a few. It is by force of a presumption of like character that all judges are held to be disqualified because of a pecuniary interest in the event of a suit. At common law the ownership of a single share of stock in a corporation, which is party to a suit, absolutely disqualifies a judge to hear it. *Dimes v. Junction Canal*, 3 H. L. Cas. 759. It is held by some courts that where a judge is a taxpayer of a county he cannot hear a case in which the county is interested. *Peck v. Freeholders*, 21 N. J. Law, 656; *Pearce v. Atwood*, 13 Mass. 324. No one claims that in many of such cases the judge is not able to discard utterly from his consideration of the merits of the case every motive of pecuniary interest, but the policy of the law forbids that litigants should be exposed to the possibility of bias arising therefrom. If disqualification is presumed in a judge because of a pecuniary interest in the suit, however small, we think it reasonable, under a statute in terms framed to protect nonresident litigants from injustice arising from prejudice and local influence, to presume that judges, dependent for their election and continuance in office upon the suffrages of a community, are disqualified to hear and determine a legal controversy between a nonresident and that community, when it is clearly shown that the community has prejudged the case, and would be likely to visit the judges, in case of an adverse decision, with its ill will. Without such a presumption as this, the statute would be a dead letter in all cases to be heard by a judge without a jury, for, in the nature of things, direct proof that a judge would be influenced by public sentiment and a desire for re-election would be impossible. Congress could never have intended the federal judges to pass on the personal qualities of an individual state judge every time an application is made to remove a suit in equity from a state court under the statute. Congress did, in the clause under discussion, compel the nonresident to make proof of prejudice and local influence, which, if it exists, can be easily shown; but when it is shown the presumption of its injurious influence upon a nonresident's case must follow. This presumption is the basis of the constitutional provision for a federal judiciary in diverse citizenship cases. Mr. Justice Miller states it in his lectures on the Constitution as follows, (pages 332, 333:)

"The reason for this, as has been frequently said by commentators and courts, was the fear in the minds of the makers of the constitution that local prejudice likely to arise in favor of a man sued in the courts of his own state would result in unfair decisions against his nonresident adversary. * * * It was thought that a court owing allegiance to and receiving its commission from the United States would be a safer tribunal than a court which was commissioned by a state, which could be influenced by a vote of its citizens, and might be swayed more or less in its decisions from the absolute principles of justice."

It is said that at common law prejudice was never a ground for challenge to a judge. That is true. Interest was the only ground of disqualification. Favor would not be presumed in a judge, and it was, at common law, no ground for excepting to a judge that he was related to either party. In *re Dodge & Stevenson Manuf'g*

Co., 77 N. Y. 101, 112; *Inter Brookes and the Earl of Rivers*, Hardr. 503. But public opinion has grown more sensitive, and now by statute in most of the states relationship to the parties, and several other grounds unknown at the common law, disqualify a judge. In several states a party may, under the statute, except to a judge for personal prejudice or bias, and the affidavit of the excepting party asserting the existence of such bias has, under some statutes of this kind, been held to be conclusive evidence thereof. *Carrow v. People*, 113 Ill. 550; *Smelzer v. Lockhart*, 97 Ind. 315; *Turner v. Hitchcock*, 20 Iowa, 310; *Runals v. Brown*, 11 Wis. 185. The fact, if it be a fact, that there is no provision in the laws of any of the states for removals on the ground that prejudice and local influence in the community affect the judge, has no weight in considering a federal statute of removals, the reason for which we have several times alluded to.

Counsel insist that we must impugn the judicial integrity of the judges of the Wayne circuit court to reach a conclusion that, by reason of prejudice and local influence, the defendant cannot obtain justice in that court. This does not at all follow. We entertain the highest respect for our brother judges of the state court, as we ought, for those exercising concurrent jurisdiction with us. By our conclusion here, we no more reflect upon them than did the supreme court of errors of New Jersey reflect upon the great jurist Chief Justice Hornblower when it held that he was disqualified to render the judgment he had rendered in a suit by the freeholders of Essex county on the bond of a defaulting official, because he was a taxpayer of that county, (*Peck v. Freeholders*, 21 N. J. Law, 656,) or than did the house of lords reflect on the lord chancellor of England, Earl Cottenham, when it held that he was disqualified to render the judgment he had rendered in a suit against a canal company, because he held a few shares of its stock. Men may be unconsciously influenced by personal motives, and public policy will not trust any judge, however great and pure, when such motives are present. Said Chief Justice Bell in *Moses v. Julian*, 45 N. H. 52:

"The most perfect integrity that can be in judges is no hindrance why the parties, who have causes before them, may not challenge them, or except against them, and why they ought not of their own accord, to abstain from hearing causes in which they may have some interest, or where there may be some just ground for suspecting them; and they themselves are obliged to declare the causes which may render them suspected, if the parties are ignorant of them; for, although a judge may be above the weakness of suffering himself to be biased or corrupted, and may have resolution enough to render justice against his own relations, and in other cases where it may be lawful for the parties to except against the judges, yet they ought to mistrust themselves, and not draw upon themselves the just reproach of a rash proceeding which would be, in effect, a real misdemeanor. Dom. Pub. Law, Lib. 2, tit. 1, § 214."

Nor, in reaching this conclusion, do we attack the whole system of an elective judiciary, as was claimed in argument. We simply hold that, under extraordinary circumstances, judges elected by a community must be presumed to be affected by a prejudice shown to pervade that entire community, so as to make it unjust to compel

a nonresident to try his controversy with the community before its own judges. If this holding is an attack on the system of an elective judiciary, then it is the constitution and laws of the United States which are responsible for the attack, and not the courts which administer them. The motion to remand is denied.

UNITED STATES v. GOODRICH.

(Circuit Court of Appeals, Eighth Circuit. February 6, 1893.)

No. 176.

APPEAL—ASSIGNMENTS OF ERROR—TIME OF FILING.

In pursuance of rule 11 of the United States circuit court of appeals for the eighth circuit, requiring an assignment of errors to be filed with the petition for the writ of error or appeal, and declaring that errors not assigned according to this rule will be disregarded, the court will not consider errors the assignment of which is not made and filed in the court below until after the appeal or writ of error is allowed.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Suit by Ralph L. Goodrich, clerk of the United States circuit and district court for the western division of the eastern district of Arkansas, against the United States for fees. The circuit court entered a judgment for plaintiff. 47 Fed. Rep. 267. Defendant appeals. Affirmed.

Charles C. Waters, U. S. Atty.

U. M. Rose and G. B. Rose, for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This is an appeal from a judgment against the United States for fees due to the clerk of the circuit court for the eastern district of Arkansas, rendered under the provisions of the act of March 3, 1887, (24 St. c. 359.) The judgment appealed from was entered on October 5, 1891, and on the same day an appeal to this court was prayed for and granted. No assignment of errors was filed until June 30, 1892. By the act of March 3, 1891, (26 St. pp. 826, 829,) no appeal by which this judgment could be reviewed in this court could be taken, except within six months after the entry of this judgment. The eleventh rule of this court which was adopted on June 17, 1891, reads as follows:

"The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done, coun-

sel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

As the appellant did not file any assignment of errors when it prayed for its appeal, nor until long after the six months allowed for perfecting the appeal had expired, the errors assigned in this case must be disregarded under the rule. In view of the fact that this is the first case in which we have had occasion to enforce this rule, we have carefully examined this record, and are satisfied that no substantial error was committed by the court below, and that no injustice will be done by the application of the rule to this case, while the announcement that it will be enforced may promote its observance, and thus prevent injustice from its enforcement in the future. The result is that this court will not consider errors the assignment of which is not made and filed in the court below when the appeal or writ of error is allowed. The judgment below is affirmed.

UNION PAC. RY. CO. v. COLORADO EASTERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 6, 1893.)

No. 145.

1. APPEAL—TIME OF TAKING—CIRCUIT COURT OF APPEALS.

The United States circuit court of appeals has no jurisdiction in a case where more than six months intervene between the entry of judgment and the day on which the writ of error is sued out. *U. S. v. Baxter*, 51 Fed. Rep. 624, 2 C. C. A. 410, followed.

2. SAME—ASSIGNMENT OF ERRORS—TIME OF FILING.

The eleventh rule of the circuit court of appeals for the eighth circuit, requiring an assignment of errors to be filed with the petition for the writ of error or appeal, is mandatory. *U. S. v. Goodrich*, 54 Fed. Rep. 21, followed.

In Error to the Circuit Court of the United States for the District of Colorado.

Proceeding by the Colorado Eastern Railway Company against the Union Pacific Railway Company for the condemnation of certain land. Judgment for plaintiff. 41 Fed. Rep. 293. Defendant brings error. Writ of error dismissed.

John M. Thurston, Willard Teller, and H. M. Orahood, (E. B. Morgan, on the brief,) for plaintiff in error.

L. M. Cuthbert, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. The judgment in this case was rendered on November 23, 1891. The writ of error was sued out on June 14, 1892. This court has no jurisdiction of this case, since more than six months intervened between the entry of the judgment and the day on which the writ of error was sued out. *U. S. v. Baxter*, 51 Fed. Rep. 624, 2 C. C. A. 410; *Brooks v. Norris*, 11 How. 207;

Scarborough v. Pargoud, 108 U. S. 567, 2 Sup. Ct. Rep. 877; Cummings v. Jones, 104 U. S. 419; Mussina v. Cavazos, 6 Wall. 355, 360. Moreover, the assignment of errors was not filed until June 11, 1892, which was more than six months after the judgment was rendered. U. S. v. Goodrich, 54 Fed. Rep. 21, (decided this day.) The writ of error is accordingly dismissed.

MORRIS et al. v. LINDAUER et al.

(Circuit Court of Appeals, Sixth Circuit. February 16, 1893.)

No. 71.

1. FEDERAL COURTS — JURISDICTION — STATE STATUTES—FRAUDULENT ASSIGNMENTS.

The fact that the Michigan statute vests in the circuit court of that state the supervision of trusts created by assignments for the benefit of creditors does not exclude the jurisdiction of the federal circuit court, in cases of diverse citizenship, to entertain a suit to set aside a mortgage made in contemplation of the assignment, and covering all the assigned property, as in fraud of creditors. *Ball v. Tompkins*, 41 Fed. Rep. 486, applied.

2. SAME—DIVERSE CITIZENSHIP—TRUSTS.

Where a trustee is a party to an action in a federal court, brought under the diverse citizenship clause of the federal constitution, the citizenship of the trustee, and not that of the beneficiaries under the trust, determines the jurisdiction. *Knapp v. Railroad Co.*, 20 Wall. 124, followed.

3. FRAUDULENT CONVEYANCES—EVIDENCE.

S. began business in Michigan in August, 1888, with goods of the value of \$7,500. In the following spring he purchased more goods to the amount of \$4,500. April 19, 1889, he executed a mortgage on the goods in favor of his brother and others, and on April 22, 1889, executed a general assignment. At the time of the assignment there were only left goods to the value of \$5,000. No other disposition of the rest of the goods was shown. Shortly before making the assignment S. bought other goods, and just as the obligations therefor were falling due he borrowed a large sum from a bank, and then assigned. The brother had at various times and places made contradictory statements as to the amount S. owed him, and knew all about S.'s affairs, and had gone to various persons with S. for the purpose of getting S. credit. *Held*, that the mortgage was a fraud upon the general creditors of S., and was void as to the brother.

4. SAME—KNOWLEDGE OF GRANTEE—INNOCENT BENEFICIARY.

Where a mortgage is given to one person for the purpose of securing debts due to himself and others, with intent on the part of the mortgagor to defraud other creditors, it is valid as to an innocent beneficiary whose debt is an honest one, although the mortgagee himself is a party to the fraud.

5. SAME—KNOWLEDGE OF AGENT.

But such a mortgage is void as to one who, though innocent himself, procured the security through an agent who had knowledge of the fraud.

Appeal from the Circuit Court of the United States for the Southern Division of the Western District of Michigan.

In Equity. Bill to set aside a mortgage, brought by Max Lindauer, Adolph Lindauer, and Solomon Michelbacher against Victor Schoenfeld, Louis E. Morris, and Jacob Aarons. The circuit court entered a decree for complainants. Respondents appeal. Affirmed.

Victor Schoenfeld, a retail dry goods merchant, resident and doing business in Manistee, Mich., purchased goods of Lindauer & Co., a Milwaukee firm, composed of Max Lindauer and Adolph Lindauer, citizens of Wisconsin, and Solomon Michelbacher, a citizen of New York. Schoenfeld was indebted for such purchases to the amount of \$3,527, most of which indebtedness was incurred after March 16th. He was also indebted to the First National Bank of Manistee in the sum of \$1,000 for money borrowed upon his promise to forthwith secure the loan by mortgage. This loan was made on the day next mentioned. On April 19th Schoenfeld executed and delivered to Louis E. Morris, as trustee, in favor of the First National Bank of Manistee, J. R. Torbe, Julius Schoenfeld, and Mayer Bernhard, of Milwaukee, a trust mortgage on all the mortgagor's property, purporting to be in consideration of \$5,768.75, and this mortgage was filed in the office of the clerk of the city of Manistee, April 19, 1889, at 5 o'clock P. M. On April 22d, Schoenfeld executed a general assignment of all his property for the benefit of his creditors in favor of Jacob Aarons as assignee, and filed it in the office of the county clerk. The assignee took possession and began selling the stock.

The following opinion was delivered in the circuit court by SEVERENS, J.:

"The defendants in this case renewed at the hearing their objection to the jurisdiction of the court, that by reason of the making and filing of the assignment in the office of the clerk of Manistee county by the defendant Victor Schoenfeld the circuit court in chancery for that county became possessed of the subject-matter of the present controversy, and that this possession of the subject-matter, under the jurisdiction conferred upon that court by the statute of Michigan, was exclusive of the right of any other court to intervene, and disturb the exercise of the powers of the state court. The general principle appealed to in support of this proposition is familiar and well established. This court cannot disturb the actual possession of a thing taken into possession by the state court, but it has jurisdiction to ascertain and declare, in a case where the requisite citizenship of the parties exists, the rights of the parties in the subject matter. This question was fully considered here in the recent case of *Ball v. Tompkins*, 41 Fed. Rep. 486, and I do not think it necessary to restate the grounds upon which the court is of the opinion that the objection here urged is untenable. It is proper, however, to say that it cannot be admitted that the legislature of the state intended such consequences to follow from their vesting the supervision of the trusts created by assignments in the courts of the state, for any attempt to do this would be futile in the face of the constitutional provision giving the citizen of another state the right to invoke the action of the federal courts in his behalf against a wrong of which he may complain. The objection that some of the beneficiaries in the mortgage are citizens of the same state as the complainants is not tenable. The mortgagee, who is their trustee, represents them, and it is his, and not their, citizenship which is considered. *Knapp v. Railroad Co.*, 20 Wall. 124.

"Upon the merits of the case the first question presented is whether the chattel mortgage of April 19, 1889, should be deemed and taken as made in contemplation of the assignment, which was executed three days later, according to its date, and therefore to be treated as part of one scheme with it. There are several indications that the mortgagor intended, when he gave the mortgage, to follow it up with an assignment,—not absolutely decisive, it is true, but tending in the direction of showing that all was intended to be, and was done substantially as, one transaction. The same persons witnessed both instruments. No circumstance occurred after giving the mortgage for making the assignment. There does not seem to have been any pressure brought to bear upon the mortgagor, and no fresh motive appears; and there are some other facts indicating the way to the same conclusion. But it is necessary, in order to invalidate the mortgage on this ground, that the mortgagees should have had notice of the mortgagor's intention; and for the purpose of testing the question whether such notice was had I think that, under the circumstances of the case, the inquiry must be directed to the beneficiaries of the mortgage, and not to the nominal party. While I should not have much difficulty in regard to the other parties who were active in procuring the mortgage, it does not appear

to me sufficiently proven that the bank, which is one of the parties secured thereby, had notice that an assignment was expected to follow, and, it being innocent of any intended fraud, I think the mortgage is valid in so far as the indebtedness to the bank is concerned.

"But I think the facts were such in regard to the other parties benefited by the mortgage that it ought not to stand, and should be held void as against creditors, under the statutes relating to fraudulent conveyances. The testimony of the persons engaged in the transaction presents a contradictory mass, from which it is impossible to gather anything with confidence. Especially is this so with reference to the testimony of the Schoenfelds. The alternative is to deduce the moral probabilities from the facts about which there is no dispute. All the principal features in the case point to a conclusion irreconcilable with an honest purpose in preparing for and making the mortgage. It appears that in August, 1888, Victor Schoenfeld took to Manistee and started in trade with goods of the value of about \$7,500. It does not appear whether he purchased any more until spring, but, assuming that he did not, he then purchased more; the additional purchases amounting to about \$4,500. It thus appears that he had in all at his store in Manistee goods of the value of \$13,000. Of these there remained, at the time of the assignment, only \$5,000 or \$6,000 worth. As no other disposition of the rest is shown, it is right to assume that they were sold out at retail, and should have brought, with the usual profit on such trade, of say twenty per cent., as much as \$9,000. What has become of all these goods, or their proceeds, if sold? No answer is given by the testimony. Another circumstance consists of the fact that just before the failure, during a very short lapse of time, Victor Schoenfeld suddenly inflated his stock of merchandise by purchases on credit. This inflation was, relatively to his former stock, quite large; and just as his obligations for this stock newly bought were falling due, and before any one was pressing him, he made this mortgage. In my opinion, he did not expect to pay for them when he bought these goods just before his failure, but was planning to make as large an addition as he could, and with the whole stock cover his brother's and particular friends' debts, and cover in for himself as much as he could. When matters were ripe he helped himself by a further loan from the bank, which he put in his pocket. He then let the shell go to the general creditors. No other reasonable construction can be put upon his actions. And the proof tends strongly to show that his brother, Julius, was a party to that scheme, or at least was cognizant of it. It is not likely that he was ignorant of the situation in general of the brother, in whose affairs he had so much interest. He must have known of the large increase of the stock. His coming suddenly to Manistee, with a lawyer, in the very nick of time, before the creditors who had sold the new goods would be pressing for their dues, shows concert of action.

"Another feature is presented by the proof that, although Julius is secured in this mortgage for the sum of \$3,633.75 for a debt alleged to be due him on the purchase of some of his brother's original stock, yet it appears that a year before, when he was representing to the complainants, for the purpose of extending credit, the amount of his assets, he said that \$1,800 was the amount due from Victor. This is sought to be explained by showing that it was only accounted worth fifty cents on the dollar. But there was no apparent reason existing then why the brother's debt should have been discounted so much, and, if that was done, it seems singular that neither to Kann nor to Lindauer should have been dropped any suggestion that the \$1,800 was the result of an estimate of an indebtedness twice as large. Victor himself told Lindauer in the early spring or late winter before the failure that his indebtedness was in fact but \$900. Taken altogether, the evidence satisfies me that no such sum was due to Julius as is represented in the mortgage, and that it was stuffed for the purpose of carrying something by for the mortgagor's future use.

"And there is another fact. It is disclosed that at the assignee's sale a friend appears, who buys in the stock of goods. There has never been any permanent change of possession of them, but Victor Schoenfeld has had them, and continued his business with them upon an agreement with the buyer to pay him the purchase price and a certain sum for his profit or trouble. It appears

that, when the testimony was taken, (July, 1891,) the whole amount going from Victor to this friend was only about \$1,600, including the \$500 so-called 'profit.' How it should happen that the business should have been barren before and prosperous after the failure does not appear.

"The evidence seems to show that the indebtedness to Torbe, as well as that to Bernhard, mentioned in the mortgage, was actual, and there is no evidence to show that they personally participated in any fraud. But their agent and procurator in the obtaining the security did have notice of it, if he was not an active participant therein, and the notice he had must be imputed to those parties.

"The result is that the mortgage is held valid as to the bank and void as to the rest. The fund in the hands of the assignee, Aarons, should be applied in payment of the debt to the bank, and the balance should be distributed among the general creditors who come in and prove their claims; and such will be the decree of the court."

E. E. Benedict, for appellants.

Smiley, Smith & Stevens, for appellees.

Before JACKSON and TAFT, Circuit Judges, and BARR, District Judge.

PER CURIAM. The decree of the court below in this case is clearly correct for the reasons stated in the opinion of said court, which is made a part of the record. The facts and circumstances of the case as disclosed by the testimony fully establish the conclusion reached by the lower court. We do not deem it necessary to review the testimony in detail. It has been carefully examined and considered, and fully sustains the findings on which the decree was rested. The decree is affirmed, and the costs of the appeal will be taxed against the appellant Louis E. Morris, trustee. The cause will be remanded, with instructions to the lower court to proceed with the execution of its decree.

FIDELITY TRUST & SAFETY VAULT CO. v. MOBILE ST. RY. CO.'

(Circuit Court, S. D. Alabama. January 4, 1893.)

1. APPEAL—EFFECT ON COLLATERAL PROCEEDINGS.

An appeal and supersedeas do not oust the jurisdiction of the lower court, or preclude collateral or independent proceedings.

2. SAME—CONFIRMATION OF SALE.

An appeal and supersedeas of a decree in respect to solicitors' fees in a foreclosure proceeding do not preclude the lower court from passing on the question of confirmation of the sale made under it.

3. CONFIRMATION—INADEQUACY OF PRICE.

Inadequacy of price alone is not a ground to set aside a judicial sale, unless so great as to shock the conscience and excite the suspicion of the court.

4. SAME—OPINION AS TO RESALE.

Expression of a well-founded opinion by a witness that the property would, on resale, bring a much higher price, is not sufficient ground for setting aside a judicial sale.

5. SAME—ACTS OF BIDDERS.

Inadequacy of price, accompanied by additional circumstances of unfairness, growing out of fraud, accident, or some trust relation, are good

*Reported by Peter J. Hamilton, Esq., of the Mobile, Ala., bar.

grounds against confirmation, but the fact that mortgage bondholders of a street-railway company were known to have authorized a committee to bid up to \$400,000, and that this report deterred others from bidding, is not good ground for setting aside a sale of the property for \$225,000 to the bondholders.

In Equity. Bill by the Fidelity Trust & Safety Vault Company against the Mobile Street-Railway Company to foreclose a mortgage. Heard on motion to make absolute an order confirming the sale of the railway property. Granted.

For opinion on motion to set aside service of a petition in the nature of a cross bill filed by certain bondholders, see 53 Fed. Rep. 850.

G. L. & H. T. Smith and McCaleb & Lapeyre, for the motion.
Clark & Clark and Overall, Bestor & Gray, opposed.

TOULMIN, District Judge. As preliminary to this motion it is suggested that the court has no jurisdiction to hear and decide it, because an appeal has been taken in the cause, and a supersedeas bond given with a stay of proceedings. The decree appealed from is one confirming the report of the special master, and decreeing the payment of money thereunder for solicitors' fees and other expenses, and was a final decree. The execution of that decree was superseded, but the supersedeas has nothing to do with the decree in which the equities of the cause were involved, and by which they were settled, nor does it preclude collateral or independent proceedings. An appeal, where a supersedeas is obtained, does not preclude parties from prosecuting collateral or independent proceedings, (Amer. Dig. 1892, p. 285, § 1729;) and it is held that an appeal to the supreme court with a stay does not oust the jurisdiction of the lower court, (Amer. Dig. 1892, p. 288, § 1743; Briggs v. Shea, [Minn.] 50 N. W. Rep. 1037.) This motion is a separate and distinct proceeding from that which culminated in the decree from which the appeal in question was taken. It is based on grounds which have nothing to do with the issues involved in and settled by that decree. The purpose of the motion now submitted is not to raise any question going behind that decree or concluded by it. Whatever course may be taken by the appellate court as to the decree appealed from, whether it be affirmed or reversed, the question arising on this motion would neither be determined nor discussed. Tested by these rules, which are found laid down in Allen v. Allen, 80 Ala. 154, I am of opinion that the court has the jurisdiction to decide this motion.

The grounds of opposition to the motion, as stated, are inadequacy of price and unfairness in the sale. If the property sold at an inadequate price, the inadequacy must be so great as to shock the conscience and to excite the suspicion of the court, or there must be an inadequacy of price, with additional circumstances against the fairness of the sale, growing out of fraud, accident, or some trust relation of the parties. On the proof submitted as to the value of the property I am not convinced that it sold at greatly less than its value; certainly the inadequacy of price is not so great as to shock the conscience and to excite the suspicion of the court. Mere in-

adequacy of price is not alone sufficient to set aside the sale, and the expression of opinion, however well founded, that the property on a resale would bring a much higher price, is not sufficient. *Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. Rep. 887; *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. Rep. 686.

Are there then any additional circumstances against the fairness of the sale? Have the purchasers taken any undue advantage? If so, of whom? Has any party interested in the property been misled or surprised? There are some statements in the affidavits submitted, based on information and belief, that some of the buyers, who were bondholders, deterred other proposed buyers from bidding by creating the impression that they were going to bid \$400,000 for the property, but these statements are too vague and indefinite for the court to act on them. The proposed purchasers are not named. What sum they were willing to pay for the property is not given. They do not testify in the matter. What was said by the buyers, or any of them, to create, or that tended to create, such impression, is not shown; and while I can well see that an impression might have prevailed that the bondholders might bid as much as \$400,000, inasmuch as they had authorized their committee to bid as much as that sum, and which seems to have been generally known, the circumstances show that the committee was clothed with a discretion to buy the property at any price, limited only by the sum named. This statement, or the substance of such a statement, of itself cannot be said to be an act of unfairness, or an act that would raise the presumption of fraud. However much I may regret that the property did not realize a larger sum, there is no evidence of such conduct on the part of the purchasers as would afford any ground to justify the court in setting aside the sale. The motion to make the order confirming the sale absolute is therefore granted.

UNITED STATES v. FERGUSON.¹

(Circuit Court, S. D. Alabama. December 23, 1892.)

1. EQUITY PLEADINGS—INFORMAL ANSWER.

A literal denial in the answer of a material allegation in the bill is not to be deemed an admission, although on exception it might have been held insufficient.

2. SAME—EFFECT OF ANSWER.

At a hearing on the pleadings, embracing bill, answer denying its material allegations, and replication reiterating the averments of the bill, the answer must be taken as true, and the bill will be dismissed.

In Equity. Submitted for decree on the pleadings. Bill dismissed.

M. D. Wickersham, U. S. Dist. Atty.

John R. & C. W. Tompkins, for defendant.

¹ Reported by Peter J. Hamilton, Esq., of the Mobile, Ala., bar.

TOULMIN, District Judge. A literal denial in the answer of a material allegation of the bill, although it might be held insufficient on exceptions, cannot be deemed an admission of the allegation. 1 Brick. Ala. Dig. 716. If a cause is heard on bill and answer alone, or upon bill, answer, and replication, the answer must be taken as true. 1 Brick. Ala. Dig. 739; Reynolds v. Bank, 112 U. S. 409, 5 Sup. Ct. Rep. 213; Story, Eq. Pl. 674; 1 Daniell, Ch. Pl. & Pr. 843, 845. This cause is heard on bill, answer, and replication, and is thereon, by consent of parties, submitted for a final decree.

The answer literally denies every material allegation of the bill, upon the truth of which allegations depends the complainants' right to the relief sought by them. The replication, in substance and effect, reiterates the allegations of the bill, and avers the power of complainants to prove and maintain the same. On the issue thus made, and the hearing had thereon, the court is of opinion that the complainants have failed to establish their right to relief. The bill will therefore be dismissed, at complainants' costs.

UNION PAC. RY. CO. v. HARMON et al.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 133.

EQUITY—PLEADING—DECREE—APPEAL.

The Union Pacific Railway Company, having sold land, reserving all coal underneath the surface, "also such right of way and other grounds as may be necessary for the proper working of any coal mines," and for the transportation of coal therefrom, subsequently filed a bill averring that there was a vein of coal on the land of sufficient thickness to pay for working; that the company had a right to enter on the land for the purpose of sinking shafts to extract the coal, but that the purchasers, by force and violence, prevented such entry. The bill prayed an injunction to restrain such interference. The answer denied that there was coal on the land, or that the reservation in the deed authorized the complainant to prospect upon the land, and averred that the complainant's railroad crossed the land over a strip 100 feet wide, of which complainant owned the fee, and whereon shafts could be sunk to remove coal from the land. The injunction was denied, and the bill dismissed, no evidence having been taken, as counsel intended that all material facts should be embraced in the pleadings. *Held* that, on the record, the appellate court could not say that the circuit court erred in refusing the injunction, but that the decree dismissing the bill upon its merits was erroneous, since it would probably prevent complainant from thereafter asserting the right to enter upon the land in any way for the purpose of mining coal.

Appeal from the Circuit Court of the United States for the District of Colorado.

In Equity. Bill by the Union Pacific Railway Company against W. M. Harmon, F. H. Harmon, and Guy D. Harmon to restrain defendants from preventing complainant from entering on certain land to mine coal thereon. The circuit court refused an injunction, and dismissed the bill. Complainant appeals. Modified and affirmed.

Willard Teller and H. M. Orahood, (J. M. Thurston and E. B. Morgan, on the brief,) for appellant.
Charles M. Campbell, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. From the record in this case it appears that on the 28th of May, 1888, W. M. Harmon, F. H. Harmon, and Guy D. Harmon purchased of the Union Pacific Railway Company 160 acres of land, situated in Boulder county, in the state of Colorado, a deed thereof being executed by the trustees of said company, which contained a reservation as follows:

"Reserving to said company and its assigns all coal that may be underneath the surface of the land herein described; also such right of way and other grounds as may be necessary for the proper working of any coal mines that may be developed upon said premises, and for the transportation of the coal from the same."

On the 7th of January, 1892, the Union Pacific Railway Company filed in the United States circuit court, for the district of Colorado, a bill in equity, wherein it was averred that the greater part of the land conveyed by the deed above described is underlaid with a vein of coal of sufficient thickness to pay for working and mining the same; that, under the reservation in the deed, the company has the right to enter upon the land for the purpose of boring for coal and sinking and making shafts and other openings for the purpose of extracting and removing the coal; that on the 12th day of December, 1891, the company entered upon the land for the purpose of sinking a drill hole to the vein of coal, and for the purpose of sinking a shaft and making an opening for the mining and removing the coal therefrom; that, for the purposes named, the company placed upon the land a drill and other machinery; that W. M. Harmon, F. H. Harmon, and Guy D. Harmon removed said drill and machinery from the land, and by threats, force, and violence have prevented the employes of the company from again entering upon the land, and from drilling, working, or mining thereon. To this bill the persons named, to wit, W. M. Harmon, F. H. Harmon, and Guy D. Harmon, were made defendants, and relief, by way of injunction, was prayed, restraining the defendants from in any way or manner interfering with the company in entering upon the land, and sinking for, mining, and extracting the coal from said land.

To this bill an answer was filed, wherein it was in effect denied that there was any coal underneath the premises in question, and it was averred that the exception and reservation contained in the deed did not authorize the complainant to prospect upon the land for coal, or to sink holes thereon for any purpose; that the complainant's railroad runs diagonally through the land, over a strip 100 feet in width, the fee of which is owned by the railway company; and that it was therefore within the power of the company to remove all coal underlying the land in question by shafts sunk upon the premises of complainant and levels run therefrom. It further appears that the defendants had removed the drill and other ma-

chinery belonging to the complainant from the land, and had forbidden the company from entering upon the land for any purpose whatsoever. To this answer a replication was filed, and the case was submitted to the court upon the pleadings, no proofs being taken, and the court adjudged that "the injunction prayed in complainant's bill of complaint be denied, and that the bill of complaint herein be dismissed at complainant's cost." Thereupon the complainant moved the court to set aside the decree or judgment, and for leave to take testimony upon the question of the usual manner of mining coal, and especially in regard to the manner in which the same would have to be mined upon the land described in the bill of complaint. The court refused to grant a rehearing, or to open the case for the taking of testimony, and thereupon the complainant company appealed to this court.

It is stated in the brief of counsel for the appellant that "it was intended by counsel for appellant, and we think counsel for the appellees had the same understanding, to have all the material facts necessary for a proper decision of this case embraced in the pleadings." From the character of the pleadings and the arguments of counsel, we have no doubt that this statement of the intention of counsel is well founded. With regard to part of the issues in the case, the recitals in the pleadings are sufficiently full to enable the court to deal understandingly therewith; but, upon the main question in dispute, we do not think the facts necessary to a proper adjudication of the legal rights of the litigants are admitted in the pleadings. It is not made clearly to appear that there is coal in workable quantities upon this land, nor whereabouts thereon it is located, if in fact it exists. On part of the appellees it is strenuously contended that all the coal in the land owned by them can be readily removed by means of shafts sunk upon the premises owned by complainant, and levels connected therewith, thus leaving the surface of the land purchased by the appellees undisturbed and uninjured.

From the averments of the answer it appears that the defendants forbade the company from entering upon the land for any purpose, and yet it is not made to appear clearly that the sinking of shafts upon the premises, in the number and at the points proposed by the company, is reasonably necessary to the proper enjoyment of the rights secured to the complainant company by the exception and reservation contained in the deed under which the defendants claim title to the land in question. The record being in this condition, it would have been entirely proper for the trial court to have required the parties to have submitted evidence upon the matters which were left uncertain by the allegations of the pleadings, but which were necessary to a proper disposition of the case. This, however, was not done, and the case was heard finally upon an imperfect record. As thus submitted, we cannot say that it was error to refuse the granting of an injunction as prayed for in the bill; but we are satisfied that, upon the record as it now is, the circuit court should not have undertaken to pass finally upon the rights of the parties. It is entirely possible that the circuit court did not in-

tend to do more than to refuse the injunction prayed for, but the decree, as entered, dismisses the bill upon its merits, which would probably have the effect of preventing the company from hereafter asserting the right to enter upon the land in any mode for the purpose of removing the coal therefrom. Sufficient appears upon the record to show that the complainant has some rights under the deed to the defendants, but the facts necessary to fully ascertain and adjudicate the extent of such rights are not made to appear. This court cannot, therefore, render a decree upon the merits; nor, on the other hand, do we deem it equitable to affirm a decree which in effect holds that the company has no right to enter upon the land in question, under any circumstances, or for any purpose. In our judgment, it would have been entirely proper for the circuit court to have refused to pass upon the case until evidence had been taken upon the matters in dispute, or, if that course was not deemed advisable, to have dismissed the bill, without prejudice to future proceedings in court, in case the parties could not agree upon their respective rights. Under these circumstances, the decree dismissing the bill of complaint will be affirmed, but with the modification that such dismissal shall be without prejudice to the right of the Union Pacific Railway Company to hereafter institute such proceedings at law or in equity as may be necessary for the ascertainment, protection, and enforcement of its rights in the land in question.

PEPPER v. TAYLOR et al

(Circuit Court of Appeals, Sixth Circuit. February 15, 1893.)

No. 77.

SALE—RESCISSION.

The buyer of a horse gave his notes, indorsed by a third person, for the purchase price, but subsequently sent back the horse, with a notification that he rescinded the sale. The seller accepted and kept the horse, but did not return the notes, having already negotiated them. The holder of the notes subsequently sued the maker and indorser, and a compromise judgment was entered, and paid, for part of the amount, and all of the notes were surrendered. *Held*, that the seller, by receiving back the horse, became bound to return the notes, and, as he failed to do so, he was liable to the maker and indorser for the sum they had paid thereon.

Appeal from the Circuit Court of the United States for the District of Kentucky.

In Equity. Bill by T. F. Taylor and W. M. Parrish against R. P. Pepper for the cancellation of certain promissory notes. Taylor had bought a horse from defendant, Pepper, and given his notes in payment, secured by Parrish's indorsement. Subsequently, and before any of the notes fell due, Taylor, being about to fail in business, sent the horse back to Pepper, with a request to deliver up the notes. Pepper received back the horse, but did not return the notes, having already negotiated them. Subsequently Parrish and Taylor were sued by the holder of the notes, and a compromise judgment was entered, and paid, for the amount of two of the notes, and all of them were thereupon surrendered. The circuit court entered a de-

cree in favor of the complainants for the amount which they had been compelled to pay upon the notes, and from this decree defendant appealed. Affirmed.

The following opinion was delivered by BARR, District Judge, in the court below:

"If there was any ambiguity in Taylor's letter of February 3, 1889, or doubt as to his purpose in sending the horse, 'Judge Lindsay,' to Mr. Pepper, that doubt was entirely removed by Taylor's letter of February 6, 1889. This letter, according to Mr. Pepper's evidence, was received by him at the time he accepted the delivery of the horse; and, according to Addison's statement, before he accepted the horse. It is, we think, immaterial which statement is correct. In either event, Mr. Pepper, having full knowledge that a rescission of the purchase of the horse was intended when he accepted his delivery, is bound, and became under a legal obligation, to return the notes of Taylor and Parrish, which had been given for the horse.

"It appears from the evidence that one of these notes was held by the Farmers' Bank and the other three by the Deposit Bank, at Frankfort, and Parrish was sued on the two first maturing, and judgment rendered against him. This judgment was rendered in the state of Virginia, and a compromise entered into between the banks and Parrish, by which he paid \$1,325, and the other two notes were surrendered to him. In view of this compromise, made, presumably, with the consent of Mr. Pepper, he is only liable to indemnify Parrish to the extent of the money thus paid, i. e. \$500 and \$825, with interest from the time of payment; that is, \$500, with interest from the 2d of December, 1889, and \$825, with interest from the 1st day of March, 1890. There is no evidence of the amount of the cost paid by Parrish in the suit in Virginia, and therefore a decree will not go for this cost.

"The suggestion that Parrish subsequently sold the two notes surrendered to him, and may thus have fully indemnified himself for the money paid the banks, is not to be considered. There is not an intimation anywhere in this record that Mr. Pepper was bound on those notes, and all the presumptions are the other way. It would have been absurd for the Deposit Bank to surrender two notes of Taylor, Parrish, and Pepper,—one for \$700 and one for \$725,—in consideration of the payment of the other, for \$675, of the same parties, by Parrish. Whatever may be the rights of Taylor, as against Parrish, because of the sale of these notes upon which he remained bound, is not before this court. That matter must be settled elsewhere. Mr. Pepper is entitled to the proceeds of the sale of the horse, 'Judge Lindsay,' and Parrish is entitled to a decree against Pepper for \$500, with interest from December 2, 1889, and \$825, with interest from March 1, 1890; and complainants are entitled to their costs in this suit. Let a decree go accordingly."

William Lindsay and Frank Chinn, for plaintiff in error.

Wm. C. P. Breckinridge and John T. Shelby, for defendants in error.

Before JACKSON and TAFT, Circuit Judges, and SAGE, District Judge.

PER CURIAM. The decree of the lower court is affirmed on the grounds clearly stated by the judge who heard the cause, and rendered said decree. The proof establishes that the appellant accepted a return of the horse under such circumstances and conditions as to warrant the finding that he made his election to rescind the contract of sale, and thereby became bound to indemnify the appellees for what they had to pay on the notes, which the appellant should have canceled, surrendered, or taken up himself.

The decree is affirmed, with costs.

KINNE et al. v. WEBB et al.

(Circuit Court of Appeals, Eighth Circuit. February 6, 1893.)

No. 179.

1. EQUITY—RESCISSION OF CONTRACTS—UNREASONABLE DELAY.

Where a party is entitled to rescind a contract on the ground of fraud, he must act promptly, with no vacillation, no unreasonable delay, no attempt to speculate upon his option. He must elect to rescind, and proceed as far as lies in his power to place himself and his purchaser in statu quo. This is especially true as applied to speculative property which is liable to great fluctuation in value. 49 Fed. Rep. 512, affirmed.

2. SAME.

Where the owner of mining property, thinking the same has become exhausted, sells it to one who practices no fraud to obtain it, she cannot maintain a bill to rescind the sale after the lapse of seven years, and after the discovery of additional ores, which enhance the value of the land many fold.

3. LACHES—STATE STATUTES OF LIMITATION.

A federal court should not, at the instance of a widow, set aside a transfer of personal property by her husband to his children by a former marriage, made shortly before his death, when, with full knowledge of the facts, she has remained silent for more than five years, which is sufficient under the Missouri statute to bar an action to recover personal property.

4. HUSBAND AND WIFE—ANTENUPTIAL CONVEYANCE.

A man about to marry may convey a reasonable portion of his property to his children by a former wife, and such conveyance is not a fraud upon the second wife.

Appeal from the Circuit Court of the United States for the Western District of Missouri. Affirmed.

O. H. Dean, (I. J. Ketcham and C. O. Tichenor, on the brief,) for appellants.

L. C. Krauthoff, (E. O. Brown, J. V. C. Karnes, and Daniel B. Holmes, on the brief,) for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This is a bill in equity to rescind a sale and avoid a deed made by the appellant Sarah M. Webb, now Sarah M. Kinne, April 24, 1883, of all her interest in the estate of her deceased husband, John C. Webb, to his children and devisees, Elijah T. Webb, Martha E. Hall, and Mary S. Burgner. The circuit court dismissed the bill. 49 Fed. Rep. 512.

In March, 1877, John C. Webb resided in Webb City, Jasper county, Mo., and was the owner of about 1,000 acres of land in that county, 160 acres of which was valuable mineral land, from which lessees of his were mining zinc and lead. He was a widower, and had the three children above named. He had conveyed to the defendant Martha E. Hall 20 acres of mineral land, and on the 3d day of March, 1877, he conveyed to the defendants Webb and Mary Burgner 40 acres of land of that character, in order that his gifts to each of his three children might be equal; but this deed was not

recorded, nor did the grantees take possession under it until April 24, 1883. On March 4, 1877, he intermarried with the complainant Sarah M., and died April 13, 1883. He left a will, by which he bequeathed to his widow his household furniture and the homestead and \$600 a year so long as she remained his widow. She had the right, under the statutes of Missouri, to refuse to accept the provisions of the will, and to receive in lieu thereof one fourth of the personal estate and her dower right in the lands. Rev. St. Mo. § 4517. He owned a bank at Webb City, whose capital was \$6,500. He bequeathed the lot on which the bank building stood, the building, its furniture, the profits derived from the bank capital, and \$15,000 to the defendant Webb. He made other specific bequests, and then devised the remainder of his estate to his three children. This will was made in August, 1882, and named the defendant Webb as executor. On April 7, 1883, he conveyed the bank capital and \$16,100 which he had on deposit in the bank to the defendant Webb, and he received this transfer in satisfaction of the bequest contained in the will of \$15,000 and the profits of the bank capital. The estate consisted of personal property of the value of about \$16,000, about 900 acres of land, of no great value, (unless ore should be subsequently discovered on it,) 120 acres of mineral land, from which the deceased had been receiving a royalty of from \$1,000 to \$2,000 per month, and town lots in Webb City. Webb City had from 1,000 to 2,000 inhabitants, and was dependent entirely upon the mining operations for its existence. The great value of the estate (if it had such value) was in the 120 acres of mineral land and the town lots, and that value was entirely dependent upon the successful continuance of the mining. In 1878 and 1879 mining upon these lands had been successful and lucrative, but the ore had been taken from near the surface of the ground. In 1883 and 1884 these runs of ore near the surface seemed to be nearly exhausted. The machinery upon the Webb land was insufficient to sink deep shafts and pump the water from them, so that the miners could work, and the lower runs of ore which subsequently made the land valuable had not been discovered. No one, apparently, knew they were there. Between 1879 and 1883 many miners in and about Webb City had become discouraged, and moved away from the town. Its population had diminished, some of the houses had been moved away to adjoining cities, until in 1883 lots were not salable at any price, their value was merely nominal. The stock of the mining company which was paying the royalty to the Webb estate had become of nominal value, the company itself was insolvent, and the manager was trying to sell his machinery, and abandon his operations. The complainant Sarah M. Webb was an intelligent, capable, well-informed lady, who had been familiar with her husband's property, and had at times had charge of his promissory notes and papers. She understood the precarious and speculative nature of the property of the estate; that, if the lessees ceased mining, it would become of little value, and Webb City would be an abandoned town, but that, if sufficient ore could be developed and profitably mined, the property would be of very great value.

Immediately after the death of her husband she offered her interest in the estate for sale. She offered it at different times to two of her neighbors for \$8,000 and \$10,000 respectively. They refused to buy, but suggested that the defendant Webb might do so. She persuaded them to go to him and get him to buy. They did so, and the result was that she offered to sell her interest to him for \$15,000, the household furniture, a cow, and horse and buggy, and he offered her \$8,000. She said she would consult an attorney before she would take that, and broke off the conference. She did consult the attorney of her deceased husband. He advised her that she was entitled to one fourth of the personal estate and her dower in the realty, and that she ought to get from \$30,000 to \$50,000 for her interest. She inquired of this attorney and of the lessee and learned from them the amount of royalties received monthly from the mines. She knew before she made her deed of the conveyance of the 40 acres to the defendants Webb and Mary Burgner in 1877, and of the transfer of the bank capital and deposits in April, 1883, and with all this knowledge, after consulting with at least three business men, whom she selected as friends of hers, and with her deceased husband's attorney, she sold and conveyed her interest to the three children for the exact price she first asked them for it, which amounted in the aggregate to about \$17,000.

The bill alleges that this estate was worth \$300,000; that defendant Webb was his father's confidant, and had full knowledge of this fact; that he importuned and persuaded the widow to sell her interest; that he falsely represented to her that the estate was not worth more than \$60,000; that the complainant was much fatigued; that she had no legal or independent advice, and no knowledge of the value of the estate except that given to her by the defendant Webb, and that she was induced to convey by his misrepresentations. The complainant Sarah does testify that the defendant Webb told her that the estate had been appraised, and would not reach over \$60,000 or \$80,000, and was much involved; but he denies this, and says he told her that it might be worth \$75,000 or \$100,000 or more. Every other allegation of this bill tending to prove fraud or undue influence by him is not only not established, but it is disproved by a large preponderance of the testimony. The weight of the testimony is that the estate was worth from \$45,000 to \$75,000, but that it was of such a speculative character that it was difficult to appraise it.

The original bill was filed February 7, 1890. On October 4, 1890, complainant filed an amended bill in which, in addition to the averments of the original bill, she pleaded the deed of March 3, 1877, to the defendants Webb and Mary Burgner, and the transfer to the defendant Webb of the bank capital and deposits April 7, 1883, alleged that she first learned of these in August, 1890, and prayed that they might be declared void, and that her share of the moneys and the 40 acres might be accounted for by the grantees. The record, however, conclusively proves that all the facts relative to this deed and transfer were disclosed to her in a deposition of the defendant Webb, taken at her instance in a former suit between them, in July, 1884, and that she knew of the deed soon after her marriage

in 1877, and of the transfer of the bank capital and deposits early in 1883. She received the proceeds of her sale, and invested it in real estate in Carthage, Mo., Kansas City, Kan., and in other ways, and never returned or offered to return any of it to the purchasers. On July 28, 1883, she filed in the probate court her refusal to accept the provisions of the will. On the same day she brought a suit to set aside her deed on the ground that it was procured by fraud and misrepresentation. She caused her own deposition to be taken in this suit, and March 31, 1884, she dismissed it. April 18, 1884, she commenced another suit for the same cause. July 28, 1884, she caused the deposition of the defendant Webb to be taken in that suit, and she dismissed it December 2, 1884. During the years 1883 and 1884 the depreciation in the value of property about Webb City continued, and in 1885 the defendants reduced the royalty charged their lessees about 25 per cent. The lessees then expended about \$100,000 in new and improved machinery, sunk deeper shafts, and found the lower runs of ore in quantities seemingly inexhaustible. Between 1884 and 1890 the defendants themselves expended in improvements on these lands more than \$50,000. Prosperity returned to Webb City; the miners came back; they filled the vacant houses and built new ones; the royalties derived from the lands amounted at times in 1889 and 1890 to \$4,000 a month, and averaged nearly \$3,000 monthly. The lands of the estate increased in value proportionately, and then the complainant filed this bill.

1. Conceding for the present that the deed of April 24, 1883, was obtained from the complainant Sarah by the fraud and misrepresentation of the defendant Webb, she cannot maintain this bill. She discovered every material fact she now knows relative to the matters here in dispute as early as July 28, 1884, when she took the defendant Webb's deposition, and she then had the option to rescind the sale, return the purchase price, and recover back her share of the estate, or to abandon her suit, and ratify her sale. She waited until December 2, 1884, and then elected to dismiss her suit, and presumptively to abandon her right to rescind and to ratify the sale and deed. She never tendered or offered to return any of the consideration she received for the deed. She did not do so in this bill, and much is said in appellants' brief in support of the position that she was not required to make such an offer in her bill. It is unnecessary to consider this question of pleading, because there is a more substantial and fatal obstacle to enforcing the rescission she seeks in the acts of the complainant herself before she instituted this suit. If one would invoke the aid of a court of equity to enforce such a rescission, he must act promptly, with no vacillation, no unreasonable delay, no attempt to speculate upon his option. He must elect to rescind, and steadily and consistently proceed as far as lies in his power to place himself and his purchaser in statu quo. A mere notice of his election is not enough. He cannot give notice of his election to rescind, and still retain his purchase price until the statute of limitations has almost run against his suit, and then bring it if the property has advanced in value, and abandon it if it has depreciated. He may not speculate upon his option. The vendee has the right to know whether

the claim for rescission is to be pressed or abandoned, and that speedily. If it is not pressed, if the suit to enforce it is dismissed, and no suit is instituted for five years, as in this case, he has a right to presume that the right of rescission is abandoned, that the vendor has elected to confirm the sale, and he may make improvements upon and deal with the property on the faith of that presumption. The vendor whose delay, vacillation, and attempted speculation has established the presumption, will not be heard in equity to deny it. *Rugan v. Sabin*, 53 Fed. Rep. 415, (decided by this court at the December term;) *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. Rep. 29; *Grymes v. Sanders*, 93 U. S. 55, 62; *Oil Co. v. Marbury*, 91 U. S. 587; *Hayward v. Bank*, 96 U. S. 611, 618; *Follansbe v. Kilbreth*, 17 Ill. 522, 526, 527; *Jones v. Smith*, 33 Miss. 215, 268; *Estes v. Reynolds*, 75 Mo. 563, 565; *Johnston v. Mining Co.*, 39 Fed. Rep. 304. In *Grymes v. Sanders*, 93 U. S. 55, 62, Mr. Justice Swayne said:

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. *Thomas v. Bartow*, 48 N. Y. 200; *Flint v. Woodin*, 9 Hare, 622; *Jennings v. Broughton*, 5 De Gex, M. & G. 139; *Lloyd v. Brewster*, 4 Paige, 537; *Railroad Co. v. Row*, 24 Wend. 74; *Minturn v. Main*, 7 N. Y. 220; 7 Rob. Pr. c. 25, § 2, p. 432; *Campbell v. Fleming*, 1 Adol. & E. 41; *Sudg. Vend.* (14th Ed.) 335; *Diman v. Railroad Co.*, 5 Ill. 130."

No property is more speculative in its nature, none is more liable to large and constant fluctuations in value, than mining property like that here in question. The quarter section which the lessee was about abandoning as exhausted in 1883, and which one of the witnesses says would not, if abandoned, have been worth six bits an acre, has, by the discovery of deeper runs of ore, and the expenditure of larger sums of money in working it, become worth a quarter of a million of dollars. Lots in Webb City that could not be sold in 1883 for \$500 became worth in 1890 more than \$500 a front foot. One of the witnesses testified that in 1883, when the complainant Sarah sold her interest, "she said she believed the mines were about played out; and she was not alone in that opinion at that time." She brought her suit for rescission in July, 1883, to dismiss it in March, 1884. She brought another in April of that year, but gloom and depression still enveloped Webb City and all its surroundings, and she dismissed that suit in December following. In 1890 she filed this bill. The explanation of all this is plain. In April, 1883, she preferred \$17,000 in hand to the uncertain value of her interest in this precarious and speculative property. In July, 1883, she changed her mind, and preferred her chances in the speculation, provided, always, she could still retain the certain benefits of her sale, for she never returned the \$17,000. In December, 1884, she still preferred the \$17,000, and hence dismissed her bill. In 1890, when the speculative property was worth

fivefold its value in 1883, when \$150,000 had been expended upon it by her purchasers and their lessees, she again and wisely changed her mind, and preferred the speculation. By this course of action for six years and a half she escaped every chance of loss, every possibility of that exhaustion of the mines and depreciation of the property that the testimony proves were probable when she sold, and made safe and sure for herself the \$17,000 for which she sold. She now seeks the advantage of the risks her purchasers took. Equity does not permit one for such an unreasonable length of time after the discovery of the fraud that induces a contract to retain its benefits and repudiate its burdens. Such delay and vacillation, such an evident attempt to speculate in the right to rescind, is fatal to any attempt to enforce it in a court of equity. Such a course of action is very far from that good faith and reasonable diligence that will induce favorable action from such a court.

2. But the proof fails to establish the charges of fraud and misrepresentation in the bill. The defendant Webb had not qualified as executor when this deed was made. He was not the attorney or confidential friend of the widow. He was not her agent to sell her interest in this property. On the other hand, it is clearly proved that she had no confidence in him; that she would not believe what he said, and that she looked upon every act and deed of his with suspicion. She was an active, alert, intelligent woman, in full possession of all her faculties. She had had possession of many of the papers of her late husband, and was apparently as familiar as any one with his property and its value. She consulted with three business men, whom she selected as her friends, and with her husband's lawyer, and then, with full knowledge of the facts, of the property and the royalties received from the mines, obtained by independent inquiry of the lessee and the lawyer, she fixed her own price for her interest, and, after importuning her neighbors to buy it for much less, sold it through the defendant Webb to him and his sisters. She dealt with the defendant Webb at arm's length, she dealt with him at her own solicitation and on her own terms. That, in view of the subsequent discovery of the deeper runs of ore, and the consequent rapid advance in the value of the property, she made a bad bargain, is no ground for recovery here, and yet that is all the proofs establish. They establish no importuning, no undue influence, no fraud, no misrepresentation, no concealment inducing this conveyance, and the complainants were not entitled to any relief on the merits. *Colton v. Stanford*, 82 Cal. 351, 373, 23 Pac. Rep. 16; *Cobb v. Wright*, 43 Minn. 83, 85, 44 N. W. Rep. 662; *Chambers v. Howell*, 11 Beav. 13, 14.

3. The complainants are not entitled to a decree setting aside the deed of March 3, 1877, to the defendants Webb and Mary Burgner, because there was no evidence that this deed was made with any intent to defraud the complainant Sarah. The 40 acres conveyed did not exceed a reasonable gift by the father to these two children in view of the amount and value of the property he owned. The testimony is that it was made to put these two children on an equality with the other daughter, to whom the father had already con-

veyed 20 acres. It was a reasonable gift to the children of a former marriage. It was not fraudulent in itself, and the evidence negatives any intention on the part of the grantor to defraud the complainant, whom he was about to marry, and the deed ought not now to be set aside. 1 Scrib. Dower, 589, 590; Tucker v. Tucker, 32 Mo. 464, 468; McReynold's Ex'r v. Gentry, 14 Mo. 495, 497, 498; Crecelius v. Horst, 89 Mo. 356, 359, 14 S. W. Rep. 510.

4. The complainants were not entitled to a decree setting aside the transfer of the bank capital and deposits, made April 7, 1883, and granting them a share in these or any of the personal estate left by the deceased. There is plenary proof that the complainant Sarah knew of the material facts relating to these matters in 1883, and that they were disclosed to her under oath by the defendant Webb, July 28, 1884. In the courts of Missouri all right of action to recover any of this personal property was barred five years from her discovery of these facts. 2 Rev. St. Mo. § 6775; Hunter v. Hunter, 50 Mo. 445, 451; Bobb v. Woodward, Id. 95, 103. A federal court, sitting in equity, which acts or refuses to act in analogy to the statute of limitations, ought not to be moved to set aside such a transfer, or to enforce such a constructive trust, where the complainant has, without excuse, remained silent and supine for a longer time after the discovery of the material facts constituting her cause of action than the time limited by the statutes of the state in which the action is brought for the commencement of actions for such relief. Indeed, in view of the great delay of the complainants, the absence of any excuse for this delay, the rapid and striking change in the character and value of the property in question since 1884, and the improvements and expenditures that have been made upon it since that date, it would be extremely difficult for the complainant to overcome the defense her laches has interposed to this suit, if no other defense existed. Naddo v. Bardon, 51 Fed. Rep. 493; Lemoine v. Dunklin County, Id. 487; Rugan v. Sabin, supra. There is no view of this case in which the complainants were entitled to any relief, and the decree below is affirmed, with costs.

BLINDELL et al. v. HAGAN et al.

(Circuit Court, E. D. Louisiana. February 9, 1893.)

1. COMBINATIONS IN RESTRAINT OF TRADE—EQUITY JURISDICTION.

The statute against unlawful restraints and monopolies (Act 1890, 26 St. p. 209) does not authorize the bringing of injunction suits or suits in equity by any parties except the government.

2. SAME.

The jurisdiction of the circuit court to entertain a suit to enjoin a combination of persons from interfering with and preventing shipowners from shipping a crew may be maintained on the ground of preventing a multiplicity of suits at law, and for the reason that damages at law for interrupting the business and intercepting the profits of pending enterprises and voyages must, in their nature, be conjectural, and not susceptible of proof.

3. SAME—INJUNCTION PENDENTE LITE—EVIDENCE.

Evidence that, by reason of the action of a combination of persons, the crew left complainants' ship as she was about to sail, and that another

crew could not be procured for nine days, and then only with the assistance of the police authorities and the protection of a restraining order, while other vessels in the vicinity had no difficulty in getting crews, is sufficient to authorize the court to enjoin interference with the business of the complainants by such combination, *pendente lite*.

In Equity. Bill by Blindell Bros. against C. Hagan and others to enjoin interference with their business as shipowners. On application for an injunction *pendente lite*. Granted.

Henry P. Dart and F. B. Earhart, for complainants.

J. Ward Gurley, Jr., and J. D. Grace, for respondents.

BILLINGS, District Judge. This application is made and submitted on the bill and amended bill of complaint and numerous affidavits and counter affidavits. The substance of the bill, as amended, is that the complainants are aliens, being subjects of the kingdom of Great Britain, and that the defendants are citizens of the state of Louisiana; that the complainants are owners of the steamship *Violante*, which they are using in the carrying trade between this port and Liverpool; that they are prevented from shipping a crew by the unlawful and well-nigh violent combination of the defendants; that this combination is so numerous as to make it impossible for the complainants to obtain a crew without the restraining order of this court; that this unlawful interference of the defendants is interrupting the business of the complainants, which is that of persons engaged in the carrying trade between New Orleans and Liverpool, and is doing them an irreparable injury. The injunction has been asked for, first, under the act of 1890, (26 St. p. 209,) known as "An act to protect trade and commerce against unlawful restraints and monopolies." This act makes all combinations in restraint of trade or commerce unlawful, and punishes them by fine or imprisonment, and authorizes suits at law for triple damages for its violation, but it gives no new right to bring a suit in equity, and a careful study of the act has brought me to the conclusion that suits in equity or injunction suits by any other than the government of the United States are not authorized by it.

This brings me to the second ground upon which the injunction is asked. The citizenship of the parties is such that the United States circuit court has jurisdiction, and the complainants may urge before this court any grievance which they may have in law or equity as fully as they could do in the courts of a state. That the complainants may maintain a suit at law is conceded by the solicitors for the defendants. The prohibition in the statute of 1789 against suits in equity in the courts of the United States, where the plaintiff has a plain and adequate remedy at law, has been repeatedly held to enunciate or introduce no new doctrine, but it is enforced rigidly by the courts of the United States, because, if a suit in equity is allowed, the defendant is cut off from the right of trial by jury, which is by the constitution of the United States guaranteed to him in all common-law cases involving upwards of \$20. There can be equity jurisdiction only when the case in question belongs to one of the recognized classes of cases over which equity has jurisdiction. The

question, therefore, is, does this case belong to one of those recognized classes? If it does, it is because the nature of the alleged injury is such that it would be difficult to establish in a suit at law the damage of the complainant, and because to entertain it would prevent a multiplicity of suits. Undoubtedly, Chancellor Kent lays down the correct rule in *Jerome v. Ross*, 7 Johns. Ch. 333, that cases of ordinary trespass are not within the cognizance of equity; but in *Livingston v. Livingston*, 6 Johns. Ch. 500, 501, he adds a qualification which shows the ground of discrimination between such trespasses as equity will enjoin and those which will not: "There must be something particular in the case of a trespass, * * * or to make out a case of irreparable mischief," in order to authorize equity to interfere, and an injunction to issue.

In Laussats' notes to Fonblanque's Equity, at page 3, he lays down the principle which is the fundamental one, concurred in by all the writers upon equity as the basis of equity jurisdiction in cases of trespass, as follows: "The foundation of this jurisdiction of equity is the probability of irreparable mischief, the inadequacy of a pecuniary compensation, and the prevention of a multiplicity of suits." The difficulty has been in applying this principle. Where there is a large combination of persons to interfere with a party's business by violence, the equity jurisdiction, if maintainable at all, is maintainable on either of two grounds,—the nature of the injury, including the difficulty of establishing in a suit at law the amount of actual damages suffered, or the prevention of a multiplicity of suits. The jurisdiction, for these reasons, was maintained in the following cases: *Emack v. Kane*, 34 Fed. Rep. 47; *Casey v. Typographical Union*, 45 Fed. Rep. 135, 144; *Gilbert v. Mickle*, 4 Sandf. Ch. 381, (marg. p. 357;) *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. Rep. 307. In *Osborn v. Bank*, 6 Wheat. 845, the court says:

"In those cases [wrongful transfers of stocks and other securities] the injured party would have his remedy at law; * * * but it is the province of a court of equity in such cases to arrest the injury, and prevent the wrong. The remedy is more beneficial and complete than the law can give."

With reference to another class of cases, courts of equity have sometimes taken jurisdiction for the reason which requires that they should take jurisdiction here, viz. those cases for specific performance when there could be no adequate compensation in damages. In *Taylor v. Neville*, cited by Lord Hardwicke in *Buxton v. Lister*, 3 Atk. 383, a specific performance was decreed of a contract of a sale of 800 tons of iron to be delivered and paid for in a certain number of years, and by installments. Equity enjoins in such cases, because, though the injured party may have his suit at law, his damages must be conjectural. See *Adderley v. Dixon*, 1 Sim. & S. 607, 611. So in cases of trespass, where a business is interrupted, and the profits of pending enterprises and voyages are intercepted, the party injured must fail of recovering full compensation, for his damages must at law be largely conjectural; and for this reason, as well as to prevent a multiplicity of suits, he may, by an injunction in equity, arrest the threatened wrongdoing, and prevent the

consequent injury, which is irremediable, because it consists in the loss of profits which are not susceptible of proof.

My conclusion, therefore, is that the bill of complaint in this cause states a case over which a court of equity must take jurisdiction, in that it is a case where the threatened damages are irremediable at law, as well as one where the equity suit will prevent a multiplicity of suits.

As to proof upon the question of fact. There have been filed in this case in all 49 affidavits. I subjoin to this opinion a summary of each of these depositions. The preponderance of proof establishes that the British steamship *Violante* arrived at this port from Vera Cruz November 29, 1892, and on the 30th the crew was paid off. At that time the crew made no complaint regarding the food they received, or their treatment, or the safety of the ship, and continued at their duties until about noon of December 15, 1892, without complaint, except that some of the crew had asked the captain whether they would be paid before leaving port for the days in which the ship had been lying at the wharf, to which he answered he could not do so, as it would be a violation of all agreements between the crew and the ship. On December 15, 1892, after the ship had been cleared from the customhouse, and the pilot had come aboard, the crew, with the exception of the steward and the cook, retired from the ship. Being thus deprived of its crew, the ship could not leave on December 15th, as contemplated. It is also established that the steamer *Violante*, after her crew left, on the 15th of December, did not succeed in getting a crew until December 24, 1892, after the restraining orders had been issued against the defendants in this cause, and that, during the whole period of nine days, the police authorities were called upon, and went to the assistance of the master and agents of the vessel in getting a crew; that, while other steamers in the vicinity had no difficulty in getting crews, the steamer *Violante* was unable to get a crew to stay on the vessel until they got the protection of the restraining orders from this court. I think the evidence establishes that the inability of the ship to retain the crew already shipped, and her inability to obtain another crew, except after the interference of this court by its restraining orders, were due to the acts of the defendants. The evidence fails to connect the defendant Dunn with the unfriendly acts of the other defendants. I think the case, upon the question of facts, as well as law, is with the complainants, and that the injunction pendente lite should issue against the defendants, except the defendant Dunn. As to him it is refused.

TALLEY et al. v. CURTAIN et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1893.)

No. 33.

1. CREDITORS' BILL — WHEN MAINTAINABLE — ASSIGNMENT FOR BENEFIT OF CREDITORS.

A creditors' bill to set aside an assignment of all the debtor's property for the benefit of creditors may be maintained though plaintiff's claim

has not been reduced to judgment, when such claim is recognized and provided for in the deed of assignment, and is not disputed by the pleadings, since it is obvious that a judgment and execution would afford no remedy at all, and that there is no remedy at law. 46 Fed. Rep. 580, affirmed.

2. SAME—EQUITY JURISDICTION—RIGHT OF TRIAL BY JURY.

The debt being thus solemnly admitted by all parties, and the principal question being as to the validity and construction of the trust created by the deed of assignment, equity jurisdiction cannot be defeated on the ground that, the claim being for a money payment exceeding \$20, the defendants are entitled to trial by jury under the seventh amendment to the constitution of the United States. 46 Fed. Rep. 580, affirmed. *Scott v. Neely*, 11 Sup. Ct. Rep. 712, 140 U. S. 106, distinguished.

3. SAME—PARTIES.

In such case the court has power to make a decree affecting the right of creditors preferred in the assignment, although they are not parties, for it is sufficient that the trustee who represents them is in court.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—PREFERENCES.

In Virginia, the fact that an assignment for the benefit of creditors contains preferences is not in itself a badge of fraud rendering the assignment invalid.

5. SAME—TRUSTEE—AUTHORITY TO WORK UP MATERIALS.

In Virginia, the fact that an assignee for the benefit of creditors is authorized in his discretion to complete the manufacture of material on hand and partly finished, and thus preserve it, is not an indication of fraud which will invalidate the assignment.

6. SAME—ASSIGNOR'S MISCONDUCT.

Where an assignor for the benefit of creditors, after opportunity, fails to explain his purpose in collecting sums of money, some quite large, immediately preceding the assignment, or to show what disposition, if any, he has made thereof, though no act preceding the deed of assignment suggested fraud to the assignee, and there was nothing therein to excite his suspicion, such instrument may be held good as to the assignee, though the assignor, by his conduct, has forfeited his right to a provision for release therein contained.

7. CREDITORS' BILL—PRIORITIES—STATE PRACTICE.

The fact that by statute in Virginia a complainant in a creditors' bill obtains priority of payment, does not give him such priority when the suit is brought in the United States circuit court within such state. *Scott v. Neely*, 11 Sup. Ct. Rep. 712, 140 U. S. 106, followed.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

In Equity. Creditors' bill, filed by Curtain & Corner, suing for themselves and others, against Williamson Talley, trustee, and Ernest H. Chalkley. Decree for complainants. 46 Fed. Rep. 580. Defendants appeal. Reversed in part.

J. Alston Cabell and Legh R. Page, for appellants.

A. L. Holladay and Wm. Flegenheimer, for appellee.

Before BOND and GOFF, Circuit Judges, and SIMONTON, District Judge.

SIMONTON, District Judge. Ernest H. Chalkley, a citizen of Virginia, resident in Richmond, became insolvent. He thereupon executed his deed, with the expressed desire to convey all of his property of every kind and description in trust to secure the payment of his debts. Carrying out this intent, he conveyed certain

property described to Williamson Talley, as trustee in fee, and adds these general words:

"All other property of every kind and description, whether real or personal, and all debts, claims, rights, and securities to which said Ernest H. Chalkley may be entitled, as fully and effectually as if the same were specifically mentioned herein and were hereby specifically conveyed."

Among the creditors whose names are mentioned as *cestuis que trustent* of the deed, and whose claims are specifically admitted, are Curtain & Corner. The notes due to them are set out in detail. Being dissatisfied with the terms of the assignment, they filed a creditors' bill, seeking to set it aside as fraudulent and void. The assignor and assignee answer severally. Each denies the fraud. No objection is made to the form of the bill or to the jurisdiction of the court in the pleadings. At the hearing the jurisdiction of the court was challenged. The court below overruled the objection, and this (which is the ground of the first exception) meets us at the threshold of the case. Can a general creditor institute proceedings in equity to set aside as fraudulent the deed of his debtor, there being no judgment at law on his claim, and no unsatisfied execution?

Two reasons are suggested in argument why this question should be answered in the negative: First. That the practice of the court of equity always has been to refuse its assistance to a creditor seeking to set aside the deed of his debtor for fraud until he has first secured a judgment at law, issued his execution thereon, and has procured a return of *nulla bona*. Second. That by the constitution of the United States the right of trial by jury is preserved in suits at common law when the value in controversy exceeds \$20. And that, inasmuch as the court of equity has no jury, it cannot give relief in cases in which the basis of relief is a money demand exceeding that sum, the court being called upon, in the first instance, to establish the validity of the debt.

We will examine these. Stated as a general proposition, there can be no doubt that courts of equity require a judgment and execution and return as a condition precedent to setting aside the deed of a debtor for fraud. *Day v. Washburn*, 24 How. 355; *Jones v. Green*, 1 Wall. 331; *Smith v. Railroad Co.*, 99 U. S. 401. The principle of the rule is this: Before one can come into the court of equity, it must appear that he has not a plain, adequate, and complete remedy at law. If he have a legal remedy, he must exhaust it. The requirement of the judgment at law, execution and return thereon, is the best evidence of this. Can it be shown in any other way? Equity will never require an act to be done which necessarily will result in failure, or which would be but an idle effort. "When the tender or performance of an act is necessary to the establishment of a right against another party, this tender or offer of performance is waived or becomes unnecessary when it is reasonably certain that the offer will be refused." *U. S. v. Lee*, 106 U. S. 202, 1 Sup. Ct. Rep. 240. In *Sage v. Railroad Co.*, 125 U. S. 376, 8 Sup. Ct. Rep. 887, a suit by a creditor to set aside a deed, it was objected that he had not sued out his execution, and that return thereon had not been made. The court

overruled the objection. "Suing out the execution would, according to the facts and the admission of the parties, have been an idle ceremony." In *Case v. Beauregard*, 101 U. S. 691, the general question is discussed, and the conclusion is reached that a judgment at law is not necessary if the necessity of the resort to a court of equity can be otherwise made to appear. "But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of a resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, *'bona sed impossibilia non cogit lex.'*" Now, in the deed before us the debtor not only professes to convey and assign, but in fact in express words does convey and assign, all his property and rights of property to a trustee in fee. He has thus parted irrevocably, as far as he is concerned, with all his assets. They are, under this deed, converted into equitable assets, and can be reached only in a court of equity. A judgment at law could create no lien on them; an execution consequent on such a judgment could not reach them. The return of *nulla bona* is not only a foregone conclusion; it would be an idle ceremony. The complainant not only can have no plain, adequate, and complete remedy at law; he has no remedy at law at all. The language of the supreme court in *Oelrichs v. Spain*, 15 Wall. 228, is not inappropriate:

"Where the remedy at law is of this character, [plain, adequate, and complete,] the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial of the issues of fact by a jury. But this principle has no application to the case before us. Upon looking into the record, it is clear to our minds, not only that the remedy at law would not be as effectual as the remedy in equity, but we do not see that there is any effectual remedy at all at law. Besides, there is an element of trust in the case which, wherever it exists, always confers jurisdiction in equity."

This brings us to the second objection to the jurisdiction,—that the court of equity, having no jury, cannot pass upon this money demand which exceeds \$20. Upon this branch of the case, *Scott v. Neely*, 140 U. S. 112, 11 Sup. Ct. Rep. 712, is relied on. The case of *Scott v. Neely* came from the circuit court of the United States for the district of Mississippi. Scott had been engaged in planting, having for his factors Neely's firm. He was not successful, and the complainants alleged that he owed them as his factors \$2,000 on a note, and on a balance or open account for advances, \$6,264.89. Scott, during his planting operations, had purchased real estate, the title of which he put in the name of his wife. Complainants, without establishing their claim at law, filed their bill setting up their demand, claiming judgment for it, and that the conveyance to the wife be set aside, the property sold, and the proceeds of sale first applied to their claim. There is a statute in Mississippi which authorizes the court of equity in that state to entertain such a suit and to give such relief. *Scott v. Neely* held that the Mississippi statute could not create or confer such a jurisdiction on a court of equity of the United States, and that a court of equity of the United States could not entertain such a suit, because, upon a demand like this, the adverse

party had the right, under the constitution, to his trial by jury. There was no trust. The claim of complainants was strictly on a money demand, the larger portion not liquidated, consisting of an account of advances, interest, credits, and charges. No part of the debt was admitted. It had to be established and proved after opposition and litigation. The contract itself must have been proved. There was nothing to show why the remedy at law was not plain, adequate, and complete. The complainants had first to prove their case, then to set aside the deed; and they claimed that they could enter judgment and secure the first lien. The complainants had no lien on or interest in the property. The main issue in the case was whether the courts of the United States could and would enforce the state statute. It seemed to be admitted on all sides that without such a statute the court had no jurisdiction. The inevitable conclusion was reached that, as state legislatures cannot take away, so they cannot confer, jurisdiction on the courts of the United States. In the present case we have an acknowledged debt, admitted in the most formal way, binding grantor and grantee. The pleadings dispute it in no way. The deed conveys all the property of the debtor in trust for many creditors, among them these complainants, by name and amount. The assignor cannot recall this act of his. The assignee cannot divest himself of the trusts, or diminish the interest of the complainants in them. Indeed, the interest inheres in the complainants themselves; and, although they deny the validity of the deed, and declare it void, if they fail in their contention, it would seem that they can receive their interest under it. The question made in this court—the only question—is the validity of certain trusts in this deed. They are to be passed upon and adjudicated. If their validity be sustained, they will be administered under the supervision of the court. If any of them be held invalid, they will be disregarded. If all the special trusts are invalid, one remains, and that is for all creditors, and that the court can administer with that equality, which is equity. It is true that the complainants deny the validity of the deed. But this denial cannot defeat the trusts, if any exist, nor affect creditors who have come in under this creditors' bill, nor defeat the jurisdiction, which does not depend on the attitude of the complainants. The aid of the court has been sought to construe a trust. Having jurisdiction to do this,—its peculiar province,—it can go on, and give such relief as it may think proper upon the whole case. Story, Eq. Jur. § 64k. In the case of *Oelrichs v. Spain*, above quoted, 15 Wall. 228, we have seen the court, discussing this same provision of the constitution, use the words: "Besides, there is an element of trust in the case which, where it exists, always confers jurisdiction in equity." In *Case v. Beauregard*, 101 U. S. 691, also quoted above, the point decided is that whenever a creditor has a trust in his favor, or a lien upon property for a debt due to him, he may go into equity without exhausting his legal processes or remedies. In *Scott v. Neely*, 140 U. S. 112, 11 Sup. Ct. Rep. 712, the learned justice who delivered the opinion of the court says:

"In all cases in which the court of equity interferes to aid the enforcement of remedies at law there must be an acknowledged debt, or one established by

a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment; or, to speak with greater accuracy, there must be, in addition to such acknowledged or established debt, an interest in the property, or a lien thereon, created by contract or some distinct legal proceeding."

He puts it again:

"It is the existence, before the suit in equity is instituted, of a lien upon or interest in the property, created by contract, or by contribution to its value by labor or materials, or by judicial proceedings had, which distinguishes cases for the enforcement of such lien or interest from the case at bar."

There can be no question that complainants have an interest in the property under this deed. At all events, neither of the defendants, grantor nor grantee, can aver the contrary. If, then, the case comes within the normal jurisdiction of a court of equity of the United States, either because it deals with trusts and equitable assets, or because complainants have no plain, adequate, and complete remedy at law, we escape the provision of the constitution relied on. "This provision, correctly interpreted, cannot be made to embrace the established exclusive jurisdiction of courts of equity, nor that which they have exercised as concurrent with courts of law; but it should be understood as limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law." *Shields v. Thomas*, 18 How. 262.

We overrule the exception, and sustain the jurisdiction. In this connection it must be stated that in *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. Rep. 354, a case just like this was entertained, with no suspicion on the part of the late chief justice, who heard the case on circuit, or of the supreme court, who affirmed him, that the court had no jurisdiction.

The second exception denies the right of the court below to make any order or decree affecting the rights of the preferred creditors in the deed of Chalkley without first requiring them to be made parties. The trustee of this express trust represents all the cestuis que trustent. They need not be made parties. *Kerri-son v. Stewart*, 93 U. S. 156. This exception was properly abandoned at the hearing.

The third and fourth exceptions bring up the question of the validity of the deed. The court below set it aside as fraudulent. In construing this assignment, we follow the decisions of the court of last resort in Virginia. *Lumber Co. v. Ott*, 142 U. S. 628, 12 Sup. Ct. Rep. 318. In Virginia, the grantee or assignee of a deed like this stands as a bona fide purchaser. To invalidate the deed, notice of the fraud must be brought home to him. *Peters v. Bain*, 133 U. S. 686, 10 Sup. Ct. Rep. 354. It would appear that it is not the motive or conduct of the maker of the deed which alone can invalidate it. The grantee or assignee must have cognizance of, or at least be put in the way of notice of, the fraud, before the deed can be invalidated. This notice can be had either from the provisions of the deed itself or from facts dehors the deed, known or within the means of knowledge by the grantee. From the testimony taken in the cause there is no reason to suspect that the trustee was cog-

nizant of any fact or circumstance dehors the deed from which he could conclude or be led to the conclusion that the assignor contemplated a fraud. On the notice of fraud on the face of the deed the supreme court in *Peters v. Bain* uses this language:

"The doctrine in Virginia, settled by a long and uninterrupted line of decisions, is that, while there may be provisions in a deed of trust of such a character as of themselves to furnish evidence sufficient to justify the inference of fraudulent intent, yet this cannot be so except when the inference is so absolutely irresistible as to preclude indulgence in any other."

We have carefully examined the deed, and in the light of this utterance of the supreme court we cannot see an inference of fraudulent intent so irresistible as to preclude indulgence in any other. The deed, after stating the property assigned, and adding the general clause embracing all his property and rights of property of every description, declares the trusts. It puts the trustee in immediate possession of everything connected with his business, his books and papers, and all of his personal property. It gives him discretion to complete the manufacture of leather in the course of manufacture, and to work up the material on hand, with authority to purchase such material as may be necessary for this purpose. If he do not deem this expedient, or if a majority of the creditors secured in this deed object, he is to sell everything as it stands. He has power and instructions to collect in all assets, with authority to pay all necessary expenses, to this end. The proceeds of all sales and the result of all collections are to be distributed among the creditors with preferences: First, the costs and expenses of the assignment, the commissions of the trustee, and fee to the counsel preparing the deed; second, certain debts of Chalkley, accommodation paper and notes due banks, an overdraft in one bank, and one week's wages to his employees; third, certain other debts of Chalkley, among them notes due to complainants, with a general clause, including all debts inadvertently omitted, in which he is principal debtor; fourth, his security debts; fifth, all other creditors. After the fourth class come these words:

"But this deed is made upon the distinct understanding that no creditor hereby intended to be secured in the above classes shall receive any benefit whatever under it unless he shall, within ninety days from the date of its recordation, signify in writing his acceptance of the provisions of this deed, and release the said Ernest H. Chalkley from all further liability for his debt."

The discretion given to the trustee to work up material was not in itself fraudulent; still less does it furnish an irresistible inference of fraud. The business assigned to him was a tannery, and the completion of the manufacture of material in the course of manufacture probably prevented its destruction. Indeed, this same trustee, under the sanction of the court below, did exercise this same discretion. Nor are the preferences a badge of fraud, under the decisions in Virginia. *Peters v. Bain*, 133 U. S. 680, 10 Sup. Ct. Rep. 354. The decisions of Virginia allow the requirement of a release in an assignment. *Skipwith v. Cunningham*, 8 Leigh, 271; *Paul v. Baugh*, 85 Va. 955, 9 S. E. Rep. 329. So, treating this deed from the standpoint of the trustee or assignee, and bearing in

v.54F.no.1—4

mind that no fact preceding the assignment suggesting fraud in its execution was known to him, there was nothing in the deed to excite his suspicion. It had in it provisions known in Virginia, and sanctioned by a long line of decisions of her highest court. But when we examine the facts de hors the deed as made known by the evidence, and discover the conduct of the grantor, we cannot resist the conclusion that his actions were of the most suspicious character, and the inferences of fraud on his part almost irresistible. It is proved that he was in the frequent receipt of sums of money, some of large amount, just preceding—indeed, almost up to—the day on which he made his deed. For this he has had full opportunity of making complete explanation. He has attempted none whatever. What purpose he had in collecting these sums of money, what use he made of it, whether he made any disposition of it at all,—the answers to these questions he could easily have made. He had not only the opportunity, but the right, to make them. He has said nothing. While the courts in some states, and, among them, the state of Virginia, permit a deed of this kind to require a release as a condition precedent, it is granted reluctantly. It is never permitted unless there is on the part of the assigning debtor a full and free surrender of all of his property, clearly and distinctly, and a frank, unambiguous statement of his affairs. If he demands this benefit, he must do so with clean hands. In this case the position of the assignor before this court is not of this character. So far as we are able to judge of his actions, he withholds important knowledge from his creditors, and he is entitled to no consideration. While the deed is good as to the trustee, this provision for a release, inserted wholly for the benefit of the grantor, cannot be sustained. The conveyance to the trustee can be sustained, although we hold that the debtor has forfeited this provision. Compare *Denny v. Bennett*, 128 U. S. 489, 9 Sup. Ct. Rep. 134; *Cunningham v. Norton*, 125 U. S. 77, 8 Sup. Ct. Rep. 804; *Peters v. Bain*, 133 U. S. 688, 10 Sup. Ct. Rep. 354. With this exception, we uphold the deed, and to this extent sustain the exceptions.

This is a creditors' bill. In this court the complainant in a creditors' bill of this character obtains no priority of payment. *Day v. Washburn*, 24 How. 355. Such priority may be allowed under the Virginia statute, but this cannot guide this court. *Scott v. Neely*, *supra*.

So far as the decision of the circuit court is in conflict with this opinion, it is reversed. Let the case be remanded to that court for such other proceedings as may be necessary.

BALTIMORE & O. TEL. CO. OF BALTIMORE COUNTY et al. v. INTERSTATE TEL. CO.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1893.)

No. 28.

1. CORPORATIONS—CONTRACTS—INSOLVENCY—LIABILITIES—TRUST FUND.

A railroad company, owning an extensive telegraph system, caused the incorporation of a telegraph company by its officials, furnished its entire

capital stock, and in the name of such telegraph company contracted with complainant. For breach of such contract, complainant recovered judgment against the telegraph company. The railroad company sold the entire telegraph plant, received all the consideration, and left the telegraph company insolvent, and without assets of any kind. *Held*, that the money realized by the railroad company from such sale was in its hands a trust fund properly applicable to the payment of such judgment, and that payment thereof would be enforced by a court of equity. 51 Fed. Rep. 49, affirmed.

2. SAME—CREDITOR'S BILL—MULTIFARIOUSNESS.

A creditor's bill seeking to compel payment by the railroad company of the judgment against the telegraph company, to which bill both companies are made parties, and which sets out the judgment, execution, and return thereof unsatisfied, and the insolvency of the telegraph company, by reason of the sale of its plant by the railroad company, is not multifarious.

3. SAME—WAIVER.

The fact that complainant elected to sue the agent, the telegraph company, and take judgment against it, did not preclude it from maintaining the suit against the railroad company to compel payment of such judgment.

4. SAME—RECEIVERS—APPOINTMENT.

There being no outstanding debts of the telegraph company, except that of complainant, and possibly a claim for advances on the part of the railroad company, the appointment of a receiver for the telegraph company was unnecessary.

Appeal from the Circuit Court of the United States for the District of Maryland.

In Equity. Bill by the Interstate Telegraph Company against the Baltimore & Ohio Railroad Company and the Baltimore & Ohio Telegraph Company of Baltimore County to compel the payment by the railroad company of a judgment recovered by complainant against the telegraph company. Decree for complainant. 51 Fed. Rep. 49. Defendants appeal. Affirmed.

C. J. M. Gwinn, for appellants.

N. P. Bond, R. D. Morrison, and C. E. Warner, for appellee.

Before BOND and GOFF, Circuit Judges, and SIMONTON, District Judge.

SIMONTON, District Judge. The Baltimore & Ohio Railroad Company used in connection with its railroad system lines of telegraph wires, with poles and plant. They facilitated the business of the railroad. With the view of diminishing the expense of this telegraphic system, and of increasing its usefulness, the Baltimore & Ohio Railroad Company determined to open it to use by the public. Pursuing this plan, it extended its lines in many directions. Between the years 1877 and 1885, it established a system of more than 6,000 miles of poles, and 47,000 miles of wire, costing millions of dollars. The method adopted by the Baltimore & Ohio Railroad Company in developing this plan was the formation of a number of corporations in several states of the Union, all bearing the distinctive prefix "Baltimore & Ohio," and known respectively as the Baltimore & Ohio Telegraph Company of Illinois, or of Ohio, or of New Jersey, etc., as the case may have been. Each corporation had small capital. The corporators were officials of the railroad com-

pany, and the capital stock was all paid by the railroad company. At the head of all this telegraphic system, as its general manager, was David H. Bates. He held his position by the appointment of the Baltimore & Ohio Railroad Company, directly. At one time after this appointment he filled the place of president of the Baltimore & Ohio Telegraph Company of Baltimore City, which was the central part of the system. When the use of this company was discontinued, he in like manner became the president of the Baltimore & Ohio Telegraph Company of Baltimore County. This last-named company was incorporated 2d November, 1885. Its capital stock was \$100,000. All of its corporators were officials of the Baltimore & Ohio Railroad Company. Every dollar of the capital stock was paid by this railroad company, for whom, and for whose use, the nominal stockholders held the stock. This new corporation, the Baltimore & Ohio Telegraph Company of Baltimore County, became the center of the telegraphic system. It controlled and operated all the lines theretofore controlled or operated by the railroad company and its telegraph corporations. It was in possession and control of the plant on the lines of the railroad company, and outside and beyond these lines owned valuable plant. Although its capital was but \$100,000, its outlay extended into millions and was supplied by the railroad company. The record does not disclose whether it had any money in its treasury. All requisitions for money were made by the manager upon its treasurer, who was also treasurer of the railroad company, and these were met promptly. In the mode of dealing between the railroad company and the telegraph company, these were treated as advances. At one time there was a plan projected whereby a contract of purchase should be executed between the two companies, and a bond or bonds were to be executed by the telegraph company to the extent of \$6,000,000, to be secured by a mortgage of the plant, and intended to cover all money transactions between them. The bond or bonds were executed. The mortgage never was executed. All of the transactions and expenditures of the telegraph company were under the supervision and control of the railroad company. It is difficult to fix the exact relation between these two companies,—whether the railroad company exercised its control as the sole stockholder,—that is to say, as the only person having any beneficial interest in its stock,—or whether as the principal controlling its agent, or whether the telegraph company was one of the bureaus or departments of this great railroad system, for which a charter of incorporation had been obtained simply for convenience, or whether it exercised control as lessor over its lessee, or as creditor over its debtor. Be this as it may, the identity in action of the two corporations was complete. On 17th December, 1885, the Baltimore & Ohio Telegraph Company of Baltimore County entered into a contract with the Interstate Telegraph Construction Company of Michigan, followed by a supplemental contract made 30th November, 1886. These contracts related to the extensions of the line of telegraphic communication and territory. They contained certain covenants which need not be detailed. While these agreements were in full force and operation,—that is to say, on 15th October,

1887,—the Baltimore & Ohio Railroad Company, for the sum of \$5,000,000, and the payment of \$60,000 per year for 50 years, sold and conveyed to the Western Union Telegraph Company the entire line and system operated, controlled, and owned by the Baltimore & Ohio Telegraph Company of Baltimore County, and all the plant and privileges connected therewith. It also directed and accomplished the assignment and transfer to the Western Union Telegraph Company of all the capital stock in the Baltimore & Ohio Telegraph Companies heretofore referred to. After this conveyance and transfer the Baltimore & Ohio Telegraph Company of Baltimore County could not any longer perform its covenants with the Interstate Telegraph Company, having been denuded of its property and plant thereby. Thereupon the latter company brought its suit on the law side of the circuit court for the district of Maryland and recovered judgment against the Baltimore & Ohio Telegraph Company in the sum of \$25,000. Execution was issued on this judgment, and returned nulla bona. Upon this the Interstate Telegraph Company instituted proceedings on the equity side of the same court against the Baltimore & Ohio Railroad Company and the Baltimore & Ohio Telegraph Company of Baltimore County, seeking the payment of this judgment. Each of the defendants filed its demurrer to the bill as multifarious. These demurrers were overruled in the court below, and its action thereon is the ground for the first and second exceptions.

"It is impracticable to lay down any rule as to what constitutes multifariousness, as an abstract proposition. Each case must depend on its own circumstances, and much must necessarily be left, where the authorities leave it, to the sound discretion of the court." *Oliver v. Piatt*, 3 How. 411; *Attorney General v. Cradock*, 3 Mylne & C. 85; *Story*, Eq. Pl. §§ 530, 540. The purpose of this bill is to reach certain moneys alleged to be in the hands of the Baltimore & Ohio Railroad Company, and which, it is charged, are applicable to the debts of the Baltimore & Ohio Telegraph Company of Baltimore County. It sets out the intimate relations between the two companies, whereby the affairs, business, and property of the telegraph company were controlled by the railroad company; that, taking advantage of this, the railroad company has sold to the Western Union Company a large and valuable telegraphic plant, theretofore under the operation, control, real and apparent ownership, of the Baltimore & Ohio Telegraph Company of Baltimore County, and had appropriated the money derived from said sale to its own use; that this money really belonged to the creditors of the Baltimore & Ohio Telegraph Company. It sets out its judgment, execution, and the return thereon, and the insolvency of the Baltimore & Ohio Telegraph Company, by reason of the action of the railroad company. As the complainant works out its rights through the telegraph company, it is made a party defendant. As this is a creditor's bill, it seeks no direct payment to itself, but to a receiver, whose appointment is asked for in behalf of all creditors who may come in to this suit. The scope, purpose, and proposed result of the bill are one. It could not be maintained without making both

defendants parties thereto. The judgment of the circuit court overruling the demurrers is affirmed.

Leave of the court to that end having been given, both defendants answered. Testimony was taken. The cause was heard on the merits. The court ordered the payment of this judgment by the Baltimore & Ohio Railroad Company. The remaining exceptions attack this decree.

As we have seen, the Baltimore & Ohio Telegraph Company of Baltimore County was in the operation, possession, and control of the entire telegraphic system inaugurated by the Baltimore & Ohio Railroad Company. With respect to so much of the plant as was beyond the lines of the railroad company, it would seem that the telegraph company was the owner thereof. With respect to so much of the plant as was on the lines of the railroad, the telegraph company was in possession of, and operated it, in some sort of capacity, either as lessee, agent, or under operating contract, or as vendee. In whatever capacity, and under whatever title, it held, two facts are clear: That to the world the Baltimore & Ohio Telegraph Company of Baltimore County appeared to be the owner; and in reality it was under the control, management, and direction of the Baltimore & Ohio Railroad Company. The manager of the entire telegraph system was the selection of, and employe of, the railroad company, holding the position of president of the telegraph company, simply because of his selection and employment, and not by the action of any board of directors; this manager knowing nothing of any meeting of such a board, and never having attended one. The Baltimore & Ohio Railroad Company, using this control, sold the whole of the property operated, controlled, managed, and owned by the Baltimore & Ohio Telegraph Company to the Western Union Telegraph Company, and received and appropriated the proceeds of the sale. Thereupon the telegraph company became and was totally insolvent. As this telegraph company was a corporation, under the circumstances stated, its property and assets were a trust fund for the payment of all of its creditors. *Curran v. Arkansas*, 15 How. 304; *Sawyer v. Hoag*, 17 Wall. 620. When, therefore, the Baltimore & Ohio Railroad Company took possession of, controlled, and appropriated this property and its proceeds, it took them impressed with these trusts, and is bound by them. This result follows, whether it acted as sole beneficial owner of all its stock, or as creditor who had made large advances, or as principal who had placed large and valuable assets in the hands of its agent, as ostensible owner, and thus secured its credit, or as vendor who had sold on credit without taking mortgage security, or as lessor who had entered upon the possession of its lessee.

The Baltimore & Ohio Railroad Company insists that the complainant, before his action at law, had the choice of suit against it as principal, or the telegraph company as agent; that it made the election, and having obtained judgment against the telegraph company, and entered it, it can no longer maintain an action against the railroad company, the alleged principal. We are not called upon to decide whether the rule which prevails in Westminster Hall, and

which sustains this position, (see 2 Smith, Lead. Cas. [8th Ed.] pt. 1, p. 386, etc.,) is the law of this court, or whether we will follow the broader rule adopted in some of our states. *Maple v. Railroad Co.*, 40 Ohio St. 313. The bill is not a proceeding against the railroad company for damages upon a breach of contract by its agent. The question of damages has been made and decided. The purpose of the bill is to follow in the hands of the railroad company moneys which, *ex equo et bono*, are applicable to the debts and contracts of the telegraph company, taken by the railroad company with knowledge of this. It seeks restitution.

One other exception must be noticed. The testimony in the case shows that there are no outstanding debts of the Baltimore & Ohio Telegraph Company of Baltimore County but this one held by complainant, and perhaps a claim for advances on the part of the Baltimore & Ohio Railroad Company. This being the case, the circuit court evidently saw no reason for the appointment of a receiver, and we concur in this view. The railroad company, if it be a creditor, has mixed the trust funds with its own, and must pay.

The last exception, as to costs, is within the discretion of the circuit court. The exceptions to the circuit decree are overruled, and the decree affirmed, with costs. Let the case be remanded to that court for such further proceedings as may be necessary.

PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE et al. v. MERRITT et al.

(Circuit Court, N. D. California. February 3, 1893.)

1. **CONTRACTS—VALIDITY—PROMISE NOT TO CONTEST A WILL.**

Certain heirs of a deceased testator, in consideration of property valued at about \$500,000, conveyed by deed to the testator's sister, who was the principal legatee and devisee, all the property of which the testator died seised or possessed, promising not to dispute or contest any disposition of the said property, "or of any property which may be acquired therefrom or thereby," made or to be made by her, either by deed or by will. *Held*, that the agreement applied only to the property which she derived from the estate of the deceased testator, and not to any other property which she might own at the time of her death, and was valid and upon sufficient consideration, since it was not a contract by which the promisors renounced their status as her heirs.

2. **FEDERAL COURTS—FOLLOWING STATE PRACTICE.**

Civil Code Cal. § 863, providing that every express trust in real property vests the whole estate in the trustees, subject only to the execution of the trust, and that the beneficiaries take no estate or interest in the property, but may enforce the performance of the trust, does not deprive a federal court, sitting in equity, in California, of jurisdiction of a suit by beneficiaries to remove a cloud on the legal title.

3. **TRUSTS—BENEFICIARIES.**

Where trustees neglect to defend their legal title to the trust property the beneficiaries may do so, and may sue to remove a cloud on the title, although the trust deed gives the trustees uncontrolled discretion for five years in executing the trust.

4. **SAME—PARTIES.**

Such a suit can be maintained by some of the beneficiaries without joining others as parties, when the court can do justice to the parties before it without injury to such others.

In Equity. Bill by the President and Trustees of Bowdoin College and others against James P. Merritt, Frederick A. Merritt, and others to remove a cloud on the title to certain property in which the complainants are interested as beneficiaries. Heard on demurrer. Overruled.

Statement by HAWLEY, District Judge.

This is a suit in equity brought by the President and Trustees of Bowdoin College, a corporation, and 50 different individuals, suing in behalf of themselves and of all other beneficiaries of the trust deed made and executed by the late Catherine M. Garcelon to John A. Stanly and Stephen W. Purrington who may chose to come in and unite with them in the prosecution of this suit, against J. P. Merritt and F. A. Merritt, the real defendants, and Thomas Prather and William E. Dargie, who are interested under contracts and powers of attorney from the Merritts, and John A. Stanly and Stephen W. Purrington, as trustees under and by virtue of the deed of trust set forth in the bill of complaint, bearing date April 21, 1891. The corporation known as the "President and Trustees of Bowdoin College" is alleged to be duly organized and existing under the laws of the state of Maine, and is a citizen and resident of said state. The other complainants are alleged to be citizens and residents, respectively, of certain named states, and none of them are citizens or residents of the state of California. The defendants are all citizens and residents of the state of California.

The bill is quite lengthy. It alleges, among many other things, that on the 17th of August, 1890, Samuel Merritt died testate, seised of a large estate consisting of real and personal property. That his only heirs at law were his sister, Mrs. Catherine M. Garcelon, and his nephews, J. P. and F. A. Merritt. That he gave to each of his nephews a legacy of \$500 per annum for a period of 10 years, and bequeathed and devised the great bulk of his estate to his sister, Catherine M. Garcelon. That on the 15th of September, 1890, the will of Samuel Merritt was duly probated. That the nephews, being dissatisfied with the provisions of the will, threatened to institute and prosecute a contest of said will upon the grounds that the said Samuel Merritt was unduly prejudiced and influenced against them. That an attorney was employed by them to represent their interests, and to negotiate with the said Catherine M. Garcelon for a compromise, settlement, and adjustment of their rights in and to all of the estate, real and personal, of which the said Samuel Merritt was seised or possessed at the time of his death. That such negotiations were carried on, and resulted, on the 14th of November, 1890, in a compromise agreement and family arrangement duly executed in writing. That thereafter, and between the said 14th day of November, 1890, and the 20th day of February, 1891, the said Catherine M. Garcelon did fully perform each and every promise and agreement made by her in and by said contract bearing date November 14, 1890, by paying the said J. P. Merritt and F. A. Merritt the full sum of \$125,000, and by paying to J. N. Knowles, who had been agreed upon as trustee by the said Catherine M. Garcelon and the said J. P. Merritt and F. A. Merritt, the further sum of \$6,150, and by conveying to said Knowles, as trustee, for the use and benefit of the said J. P. Merritt and F. A. Merritt, several pieces and parcels of real estate, of the estimated and appraised value of \$368,850. That as a part of said settlement, covenants, and contracts it was expressly stipulated that the nephews, J. P. and F. A. Merritt, should convey to said Catherine M. Garcelon all the estate, real and personal, of which the said Samuel Merritt died seised or possessed, and specially all interest in said property, real and personal, which the said J. P. and F. A. Merritt, or either of them, might have had or claimed if the said Samuel Merritt had died intestate. That in pursuance of said stipulation the defendants J. P. and F. A. Merritt did, on the 14th of November, 1890, execute, acknowledge, and deliver a certain deed to the said Catherine M. Garcelon, in and by which the said J. P. and F. A. Merritt did convey to her all the property, real and personal, of which the said Samuel Merritt died seised or possessed, and which deed contains the following covenants and agreements, viz.:

"And for the consideration aforesaid we do jointly and severally agree, for ourselves and for our heirs, to warrant and defend the title of the said Catherine M. Garcelon, and her devisees, legatees, and assigns, against any and all claim to the property aforesaid, and every part and parcel thereof, to be made by us or either of us, or by our heirs or the heirs of either of us, or by any one claiming or to claim by, through, or under us or either of us, saving and excepting only such claim as we or either of us may hereafter be able legally to assert as devisee or devisees, legatee or legatees, under the last will and testament of the said Catherine M. Garcelon. And for the consideration aforesaid we do hereby jointly and severally covenant, promise, and agree, for ourselves and each of our heirs, to and with the said Catherine M. Garcelon, her heirs, devisees, legatees, executors, administrators, and assigns, that neither we, nor either of us, nor the heirs of either of us, shall or will in any manner or to any extent, question, dispute, or contest any disposition of the property above mentioned or referred to, or any part thereof, or of any property which may be acquired therefrom or thereby, which the said Catherine M. Garcelon may have made or may hereafter make, either by deed or by her last will and testament. And for the consideration aforesaid we do each hereby forever release and discharge the said Catherine M. Garcelon of and from all obligation to make any other and further property provision for us, or either of us, by reason of the contingency that either of us may be one of her heirs at law, hereby acknowledging that she has already made all such provision that is reasonable and just, and to our satisfaction."

That it was further stipulated to the end of securing to said Catherine M. Garcelon the right to dispose, by will or deed, of all the property derived by her from the estate of the said Samuel Merritt, free from any right of the said J. P. Merritt and F. A. Merritt to dispute or question or contest the legality or validity of such disposition, by reason that they might be her heirs at law at the time of her death. That for the purpose of carrying into effect such stipulation and agreement, the counsel for the said J. P. and F. A. Merritt and of the said Catherine M. Garcelon did prepare a certain writing to be executed by the said Merritts, in and by which they were to covenant to and with the said Catherine M. Garcelon that they, nor either of them, nor their respective heirs, should, or would at any time thereafter, assert any right, title, or interest as heirs or heirs at law of the said Catherine M. Garcelon to the property, real or personal, derived by her under the last will and testament of the said Samuel Merritt, and the same was fully, fairly, and perfectly explained to the said J. P. Merritt and F. A. Merritt by their said counsel; and after such explanation, and with full knowledge of the purpose and effect thereof, the same was executed by the said J. P. Merritt and F. A. Merritt contemporaneously with the execution of said agreement bearing date November 14, 1890. That one of the leading motives and inducements which caused the said Catherine M. Garcelon to entertain any proposition for the compromise and settlement of the alleged claim of the said nephews to any part of the estate of the said Samuel Merritt was her earnest desire to avoid and prevent a family scandal, which might seriously affect their future prospects in life. That on the 21st of April, 1891, the said Catherine M. Garcelon made, executed, acknowledged, and delivered to the defendants Stephen W. Purrington and John A. Stanly a deed of conveyance, an assignment and transfer of a large amount of real estate and personal property, in all of the aggregate value of \$1,200,000. That all of said property, real and personal, was and constituted a part of the estate of the said Samuel Merritt, and was derived by the said Catherine M. Garcelon therefrom. That on the same day the said Catherine M. Garcelon and the said Stephen W. Purrington and John A. Stanly made, executed, and acknowledged a certain declaration of trust, declaring and specifying the trusts upon which the aforementioned deed of conveyance and assignment were made by the said Catherine M. Garcelon, and accepted by the said Stanly and Purrington. That according to said declaration of trust, after payment by the said trustees of the sum of \$211,300, in the aggregate, to a great many individual beneficiaries, including all the complainants other than the President and Trustees of Bowdoin College, the said trustees were directed, after the conversion of the estate into money or interest-bearing

securities, to divide the residue of said trust property into two unequal parts of six tenths and four tenths each, and to pay to complainants the President and Trustees of Bowdoin College the four-tenths part thereof, and to pay the remaining six tenths thereof to the trustees of the Samuel Merritt Hospital. That by virtue of said declaration of trust, the President and Trustees of Bowdoin College are directly interested in the proper administration of said trust, and in the trust property being made to produce all that the same is worth. That, upon the execution of the above-mentioned deed of conveyance and assignment, the said trustees, Stephen W. Purrington and John A. Stanly, entered into and upon the possession of all the real estate and personal property therein mentioned and described, and have continuously been, and still are, in possession thereof, and in receipt of the rents, income, and profits thereof. That the said Catherine M. Garcelon died on the 29th day of December, 1891. That immediately after her death the defendants J. P. Merritt and F. A. Merritt caused it to be publicly given out that they were about to contest and dispute the disposition which Catherine M. Garcelon had made of her property by the deed, assignment, and declaration of trust bearing date April 21, 1891, and had employed, or were about to employ, counsel to that end, and that they were about to or had formed a syndicate or combination of men of wealth or influence, who, for a contingent interest in the result of the proposed contest, would furnish them with money with which to prosecute such contest, and guaranty them from all loss they might incur by reason of a possible forfeiture of their interest in property conveyed to Knowles in trust for them. That ever since the death of the said Catherine M. Garcelon the defendants F. A. Merritt and J. P. Merritt have, in violation of their repeated covenants and promises, hereinbefore alleged, questioned and disputed the validity of the dispositions of the properties as made by the said Catherine M. Garcelon by the said trust deed, and asserted and claimed that they, as heirs at law of the said Catherine M. Garcelon, own and are entitled to all of said property in fee simple, and have claimed and do claim the ownership thereof, adversely to the title of said trustees and to the rights of the beneficiaries thereunder. That, unless they be restrained by the order and decree of this court, they threaten to and will continue to question, dispute, and contest the said disposition of said property by the said Catherine M. Garcelon. That by reason of the acts of J. P. Merritt and F. A. Merritt, and their confederates acting for them and in their interest, it will be impossible for the defendants Stephen W. Purrington and John A. Stanly to sell the real estate as long as there is a possibility and threat of the legality or validity of the deed under which they hold said property being questioned, disputed, or contested; that a large part of the real estate embraced in said trust is unimproved and nonproductive property, and is a constant source of expense; and that the keeping of the same by the trustees will result to the great impairing of the trust estate. That the trustees, Stephen W. Purrington and John A. Stanly, have been requested to institute a suit to quiet their title to the real estate conveyed to them in trust, and to secure a perpetual injunction restraining defendants from violating their repeated covenants, promises, and agreements made with Catherine M. Garcelon, and to secure a specific performance of said covenants, promises, and agreements. That said Purrington and Stanly have refused to do so, and that by reason of such refusal complainants are compelled to institute this suit in their own behalf, and in behalf of all other beneficiaries of said trust who may elect to join herein.

Blake, Williams & Harrison and John Garber, for complainants.
Horace W. Philbrook, Jas. C. Martin, A. A. Moore, and George R. B. Hayes, for respondents.

HAWLEY, District Judge, (orally.) My conclusions are that, when all the facts alleged in the bill, including the exhibits incorporated in or attached to the bill, and made part thereof, are considered, it affirmatively appears that the subject of the entire negotiation between Catherine M. Garcelon and her nephews, James

P. and Frederick A. Merritt, was the real and personal property which was owned by Samuel Merritt at the time of his death; that the sole contention between the parties which resulted in the compromise was in relation to this specific property; that the contracts, conveyances, and promises made by them had reference to this property, and to no other; that the references therein made to the property which Mrs. Garcelon now owns or may hereafter acquire, either by deed or last will and testament, was intended, and must have been understood by the parties, as having reference to the property which she derived from the estate of Samuel Merritt, deceased, and not as having reference to any other property which she might own or possess at the time of her death, and that it should not be treated, as claimed by defendants J. P. Merritt and F. A. Merritt, as a contract and agreement renouncing their status as heirs of Mrs. Garcelon, and, if right in this conclusion, it would, in my opinion, necessarily follow from the averments in the bill that the contracts and agreements were valid, and made upon sufficient consideration. I am of opinion that this court has jurisdiction to enforce the covenants and agreements entered into by the said J. P. and F. A. Merritt with Mrs. Garcelon, and that the beneficiaries of the trust have such an interest in the performance of the trust as enables them to maintain this suit. The remedies in the courts of the United States are to be according to the practice and principles of equity jurisdiction as established in English jurisprudence, and the rules and decisions are the same in all the states. Defendants rely upon the provisions of section 863 of the Civil Code of California, which reads as follows:

"Every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

If this section is controlling upon this court, it is only so to the effect of declaring that complainants have no title in the property, either legal or equitable. It is conceded by defendants' counsel that they have an equity in the proceeds of the trust property, and they are certainly interested in the performance of the trust.

It is claimed that under the declaration of trust the trustees have an uncontrollable discretion for five years to take, or abstain from taking, any steps they please towards the execution of the trust. The trust deed, however, provides—

"That immediately after the expiration of said fifteen years from the date hereof, or immediately after the death of the party of the first part hereto, should such death sooner occur, the parties of the second part hereto, or their successor or successors in this trust, shall proceed, with all the dispatch that in their uncontrolled discretion the interest of the trust estate will permit, (but within five years from and after the end of said fifteen years, or from and after the death of the party of the first part,) to convert the whole of said trust estate into money or interest-bearing securities or savings-bank deposits."

By the acts of the defendants J. P. and F. A. Merritt the trustees are deprived of the uncontrollable discretion given by the trust deed.

It is claimed by defendants that the bill fails to state a cause of action for removing a cloud on the title of the trustees, or for quieting the title. The complainants in this action are not seeking this relief upon the ground that they have any legal title to the property to be quieted. What they do claim is that the title and possession of the property is in the defendants Stanly and Purrington, and that it is held by them in trust for complainants, and for their benefit; and it is this title and this possession which it is sought in this suit to have quieted, and the cloud created thereon by the acts of the defendants J. P. and F. A. Merritt removed therefrom. If the beneficiary of a trust is allowed to go into court to enforce the performance of the trust and to protect the trust property, then it must necessarily follow that he is entitled to the advantage and benefit of every position which could be taken or maintained by the trustees themselves if they had instituted the suit in their own names. It would be idle to hold that the cestui que trust could maintain an action to "enforce the performance of the trust," and then to declare that in order to remove or dissipate any cloud upon the title to the property, or to do any other act or procure any decree necessary for the enforcement of the trust, it must first appear that he has a legal title to the property. The suit, in my judgment, is sustainable upon the ground that the beneficiaries of the trust are entitled to the same rights, privileges, and decrees that their trustees would have been entitled to if the suit had been instituted in their own names. The trustees had the right to bring the suit, and, if brought by them, full relief could have been granted. They refused to do so. The beneficiaries under the trust therefore claim the right to do what the trustees have declined to do; any judgment or decree which they may be able to secure will simply be such as the trustees would have been entitled to if they themselves had instituted the suit. The beneficiaries of the trust are not required to stand idly by when the property is threatened with injurious litigation, or by the assertion of wrongful and illegal claims thereto; but they have the right, in my opinion, to appeal directly to a court of equity for the protection of the property, in order to prevent their rights from disturbance or destruction. They are not required to await the action of their trustees. If the trustees decline to take any steps to protect the property they will be permitted to act themselves. If, therefore, this suit is to be treated as one to remove a cloud upon or quiet the title to the property, I am of opinion that it can be maintained.

In support of the conclusions I have reached I shall only refer to a few cases. In the *Baptist Church v. Branham*, 90 Cal. 22, 27 Pac. Rep. 60, the court held that, where the trustees of a corporation hold property in trust for its uses, their ownership and possession is the ownership and possession of the corporation, and the corporation has a sufficient interest in the property to bring an action in its corporate name to quiet title thereto, and to restrain by injunction a threatened interference with the possession. And in the course of the opinion it is said:

"While the dry, naked, legal title to the property may not be in plaintiff, yet its trustees hold it in trust for the uses of plaintiff, and their ownership and possession is the ownership and possession of the plaintiff. We cannot understand how it is material to the interests of defendants in the action whether the plaintiff or its trustees is technically seised of the legal title to this realty; the plaintiff certainly has sufficient interest to bring this action."

In *Fleming v. Holt*, 12 W. Va. 143, the court held that the cestui que trust might bring a suit in equity for the specific execution of a contract, made by a third party with the trustee in a deed of trust, for the purchase of a tract of land conveyed by the deed of trust, and make the trustee and purchaser of the land and grantor in the deed of trust defendants. The court in its opinion said:

"The trustee holding the legal title must be made a party in a suit in equity concerning the trust subject, and the cestui que trust must generally be also made parties. But it is very often regarded by a court of equity, though never by a court of law, that it is immaterial whether a particular party in certain cases is made a plaintiff or defendant. In the present case it seems to me immaterial whether the trustee, Conrad, was a party plaintiff or defendant. In suits of this character he has frequently been made a party defendant without the bill's assigning any reason why he was not made a plaintiff. Thus in *Cope v. Parry*, 2 Jac. & W. 538, Cope made a covenant with Jones, a trustee, to convey certain property to him in trust for certain parties. They instituted a suit against Cope's assignees to enforce a specific performance of Cope's covenant with their trustee, but they not only did not join the trustee, Jones, as a coplaintiff with them, but did not even make him a defendant. The court did not dismiss the bill on that account, but simply required the plaintiffs, the cestui que trust, to make the trustee, Jones, a party defendant. In *Hook v. Kinnear*, 3 Swanst. Ch. 417, it was contended by counsel 'that a chancery court never decrees a specific execution of an agreement but at the instance of the party with whom the contract was made.' But the lord chancellor in his decision says: 'It is certain that, if one person enters into an agreement with another for the benefit of a third person, such third person may come into a court of equity and compel a specific performance.' And this point was so expressly decided in *Cooke v. Cooke*, 2 Vern. 36. While the trustee, Conrad, might more appropriately have joined with the cestui que trust, Linn's administrator, as one of the plaintiffs in this cause, still, as he has been made a defendant, this is sufficient."

In *Grant v. Insurance Co.*, 121 U. S. 112, 7 Sup. Ct. Rep. 841, the supreme court said:

"The objection made is that the bill does not show a right in the plaintiff to maintain the suit; that each trustee vests in its trustees a legal title to the property covered by it, with power to sell; that the interest of the cestui que trust is represented by the trustees, who must enforce the trust; and that unless the bill shows a failure on their part to do so, through incapacity or otherwise, the cestui que trust has no standing in court in its own right. The bill alleges that in 12 of the deeds of trust executed January 1, 1872, to Gailaudet and Paine as trustees, the length of notice of the time and place of sale by advertisement is left blank; that this would prevent the trustees from executing such power of sale, but that in a court of equity the deeds would be considered as mortgages. It is urged on the part of Grant that this defective power of sale renders it the more necessary that the trustees, rather than the cestui que trust, should act, in either seeking a correction of the defect or in enforcing the trust; but we think there is nothing in the objection thus raised. The case is one clearly of equity cognizance, for the reasons above set forth, and those contained in the opinion of the general term, above quoted. No objection is made on the part of any of the trustees to the maintenance of the suit. The bill is taken as confessed as to all of them, and there is no

possible prejudice to the defendant Grant in the bringing of the bill in its actual shape by the cestui que trust."

In *Harrison v. Rowan*, 4 Wash. C. C. 206, Justice Washington, in delivering the opinion of the court, in a case where the trustee and others claiming the benefit of the trust were joined as plaintiffs, said:

"That, the trustee might maintain an ejectment against the defendants to recover the possession of the lands now in controversy, on the trial of which suit the validity of the disputed will might, and necessarily would, be decided, cannot be denied; nor does the court think it necessary to decide whether, were this suit brought by the trustee alone, he would or would not be entitled to the relief prayed for. The real plaintiffs in this cause are those who claim a beneficial equitable interest in the land devised by the will, and it will not, nor has it been, denied that the court of chancery has a clear, original jurisdiction in such a case. Not only so, but that jurisdiction is exclusive; the cestui que trust having no remedy at common law, either against the trustee, or against any other person holding adversely the fund charged with the trust. It is true, as has been observed, that the trustee has a remedy at law to recover the possession, and thus to enable him to execute the trust. But are the cestuis que trusts obliged to wait until this course has been pursued? They are at all times competent to assert their equitable demands, however well or ill inclined the trustee may be to perform his duty. It was not, indeed, denied by the defendants' counsel but that this bill might have been maintained by those persons if the trustee had been a defendant in the cause, but it seemed to be supposed that this acknowledged equity is tainted by the co-operation of the trustee. If, indeed, there was any weight in this argument, the court would dismiss the bill as to the trustee; but surely it could afford no good reason for dismissing it as to the other plaintiffs, who can claim relief nowhere but in equity. But there is in reality nothing in the objection. The jurisdiction of the court of chancery, upon the application of a cestui que trust, to enable the trustee to execute the trust, and to compel him to do so, stands upon the same ground. In both cases the trustee must be a party to the suit, either as plaintiff or defendant, in order that he may be bound by the decree, and that the cestui que trust may thereby have the full benefit of it."

The objection made by the demurrer that certain beneficiaries of the trust, some of whom are shown by the bill to be residents of the state of California, are not made parties, does not deprive complainants of the right to maintain this action. The rule applicable to this question is clearly stated by the supreme court in *Hotel Co. v. Wade*, 97 U. S. 20, as follows:

"Holders of such securities, otherwise entitled to sue in the circuit court to foreclose the mortgage or trust deed, are not compelled to join as respondents other holders of similar securities, if resident in other states, even if they refuse to unite as complainants, as the effect would be to oust the jurisdiction of the court. Cases of the kind frequently arise, and the rule is that such a party, if he refuses to unite with the complainant, may be omitted as a respondent, unless it appears that his rights would be prejudicially affected by the decree. But it is suggested that the proper parties for a decree are not before the court, as the bill of complaint shows that there are other holders of the securities besides the complainants. It is true, beyond doubt, that all persons materially interested in the fund to be distributed should be made parties to the litigation; but this rule, like all general rules, will yield whenever it becomes necessary that it should be modified in order to accomplish the ends of justice. Authorities everywhere agree that exceptions exist to the general rule; and this court decided that the general rule will yield if the court is able to proceed to a decree, and do justice to the parties before the court, without injury to others not made parties, who are equally interested in the litigation. *Payne v. Hook*, 7 Wall. 425."

Numerous authorities might be cited to the same effect.

In the consideration given to this case I have confined myself to the questions relating to the real estate only. If upon the trial of the case it should, from any cause, appear that the personal property should be more definitely described, leave to amend in that particular will, of course, be granted. The demurrer is overruled.

HINCHMAN v. KELLEY et al.

(Circuit Court of Appeals, Ninth Circuit. January 16, 1893.)

No. 61.

1. **EQUITY—LACHES—WHAT CONSTITUTES.**

An assignee of one claiming to be cestui que trust of the vendee named in an executory contract to convey land brought suit to establish a trust in such land 19 years after the vendor's death, and 6 years after the death of the vendee, the alleged trustee,—a period exceeding the statutory period of limitation. There was no written evidence of the trust. It did not appear that its enforcement had been requested in the lifetime of either party to the contract, or that the trust was ever admitted by the vendee's executors, and no explanation of the delay was made. *Held*, that there was such laches as would justify a court of equity in refusing its aid. 49 Fed. Rep. 492, affirmed.

2. **SAME—DEMURRER.**

When laches affirmatively appears on the face of a bill, advantage may be taken thereof by demurrer.

Appeal from the Circuit Court of the United States for the Western Division of the District of Washington.

In Equity. Bill by Walter Hinchman against George O. Kelley and Andrew C. Smith, executors and trustees under the last will and testament of Edward S. Smith, deceased, and the North Olympia Land Company, to establish a trust in land. The bill was dismissed on demurrer. 49 Fed. Rep. 492. Complainant appeals. Affirmed.

C. S. Fogg, (W. H. Doolittle, on the brief,) for appellant.

Galusha Parsons and E. T. Dunning, (Parsons & Corell and John C. Stallcup, on the brief,) for appellees.

Before McKENNA, Circuit Judge, and HAWLEY and MORROW, District Judges.

HAWLEY, District Judge. This appeal is taken from an order of the circuit court in the district of Washington sustaining a demurrer and dismissing the bill of complaint. *Hinchman v. Kelley*, 49 Fed. Rep. 492.

The bill, in substance, alleges that in February, 1872, one Ira B. Thomas held the legal title to certain land, described in the bill, and was apparently the owner thereof; that in fact the land was then owned by Philo Osgood, and the legal title was vested in Thomas in secret trust for Osgood; that the Lake Superior & Puget Sound Company, a corporation, through its agent, Edward S. Smith, in good faith, and without notice of the said trust, contracted for and

purchased of Thomas and of his wife, Sarah L. Thomas, said land, for the sum of \$3,600, and the said Thomas and his wife then and there executed and delivered to the Lake Superior & Puget Sound Company, by and through its agent, Smith, an agreement to sell and convey to Smith the said land, which agreement was duly recorded; that this money was advanced to Smith by said corporation, and that it was the real and beneficial party in interest in making said purchase; that on the 9th of October, 1872, the said Ira B. Thomas died intestate, leaving surviving him his wife, Sarah L. Thomas, and one son; that the wife was appointed administratrix of his estate, and the same has been fully settled, and the administratrix discharged; that proceedings were had in the superior court of New York, wherein Philo Osgood was plaintiff and Sarah L. Thomas and her son were defendants, and resulted in a decree declaring that Ira B. Thomas held said land and the legal title thereto in trust for Philo Osgood; that, in pursuance of said decree, said Sarah L. Thomas and her son executed and delivered to said Osgood a quitclaim deed conveying said land to him, which deed was recorded in Thurston county, Wash., where said land is situated; that thereafter the said Osgood and his wife executed and delivered a quitclaim deed of said land to one Philo Remington; that by divers quitclaim deeds the land was conveyed to several parties, and on the 1st of November, 1889, to the North Olympia Land Company, a corporation, one of the defendants; that all of said deeds were duly recorded; that the said Edward S. Smith died December 31, 1885, without having conveyed said land or assigned the said agreement to the Lake Superior & Puget Sound Company, but that by virtue of the trust before mentioned he delivered said contract to it; that said Smith died testate, leaving his property to his executors and trustees, parties defendant herein; that the said Smith at all times "admitted that said money was furnished by said company, and used by him as aforesaid, and that he held said contract and interest in said land in trust for said company;" that on the 3d of January, 1891, the Lake Superior & Puget Sound Company conveyed said land to the Whidby Land & Development Company, a corporation, and assigned the agreement before mentioned to it, and on the 20th of November, 1891, the Whidby Land & Development Company sold and conveyed the land, and assigned the agreement to complainant, Hinchman; that Osgood and all the parties who procured the quitclaim deeds "had full, complete, and actual notice and knowledge of all the matters and things in this complaint set out;" that complainant's grantor demanded of the executors and trustees of said Smith that they execute and deliver to it a deed of conveyance of said land, and assign to it the agreement before mentioned, so as to vest in it the title and ownership to said land, which they refused to do; that the North Olympia Land Company claims to have some title to said land, and thereby clouds and slanders complainant's right, title, and interest in said land; that said land is vacant and unimproved, and is not in the actual possession of any one. Complainant prays that said Ira B. Thomas be decreed to have held said land in trust, with power of sale, for Philo Osgood; that the Lake

Superior & Puget Sound Company be decreed to have furnished the money to said Edward S. Smith which he paid to said Ira B. Thomas for said contract and land, and that said Smith, in procuring said contract and land, acted as the agent and trustee of said company; that said trust be declared, and that complainant be decreed to be the absolute owner of the land, and that his title thereto be established and quieted; that defendants, and each of them, be restrained and forever enjoined from setting up or claiming any right, title, or interest therein; "and for such other, further, and additional relief as may be just and equitable."

Can this action be maintained for the enforcement of the trust? Is the right of action barred by lapse of time? Was the grantor of appellant, the Lake Superior & Puget Sound Company, guilty of such laches as to deprive it of the right to maintain this action? Can laches or lapse of time be pleaded in bar to an action for the enforcement of a trust of the character set out in the bill? There is no averment in the bill that the cestui que trust ever requested the enforcement of the trust during the life of Thomas, or during the life of Smith, its alleged trustee. No explanation is given as to why the suit was not brought in their lifetime, nor any reason given why the commencement of the action was delayed for such a long period of time after their death,—19 years after the death of Thomas, and 6 years after the death of Smith. There is no averment that the executors of Smith have ever admitted the trust. No written contract is alleged to be in existence as evidence of the trust. The assignment of the trust was not executed by the Lake Superior & Puget Sound Company until nearly six years after the death of its alleged trustee, and long after the statutory period of limitation, under the law of Washington, had fully run. Courts of equity have always refused to give any aid to stale demands when the parties seeking relief have slept upon their rights, and acquiesced for a long period of time, and have repeatedly declared that nothing can call a court of equity into activity but conscience, good faith, and reasonable diligence. Laches and unreasonable neglect are always discountenanced. This defense is peculiar to courts of equity, and is founded upon grounds of public policy, and is often based upon the mere lapse of time, and the staleness of the claim, in cases where no statute of limitations directly governs the case; the courts acting sometimes by analogy of the law of limitations, and sometimes upon their own inherent doctrine of discouraging antiquated demands by refusing to interfere where there has been gross laches in prosecuting alleged rights. This general rule is admitted. Its application to the facts of this case is, however, denied. Every case must, of course, depend upon its own peculiar facts. While it is true that one ground most frequently mentioned for the enforcement of the general rule, to wit, the possession of the party against whom the demand is made, and long and unreasonable acquiescence in the assertion of adverse rights, does not exist in this case, yet there are other grounds that are directly applicable to the facts of this case that have been recognized as equally controlling in favor of the rule. One of the particular reasons which have induced the courts to

refuse to act is the difficulty of ascertaining the necessary facts to make it safe for a court of equity to exercise its judicial power, and this is especially so in a case like the one under consideration, when the means of resisting the trust, if unfounded, cannot be obtained on account of the death of the parties. In all cases where the complaining party has slumbered over his rights for a long period of time, with no obstacle in the way to prevent him from asserting them, until the evidence upon which such rights might be questioned and overthrown is lost, and all the original actors are dead, and their affairs left to heirs or representatives, it is deemed meet and proper that the law, in the exercise of its equitable jurisdiction, should presume it to be unjust, and refuse to allow the complainant to be heard. The peace and safety of society and the property rights of the general public demand this protection. *Prevost v. Gratz*, 6 Wheat. 498; *McKnight v. Taylor*, 1 How. 168; *Jenkins v. Pye*, 12 Pet. 241. A failure to exercise reasonable diligence to enforce the trust, or the omission to specifically state the impediments to an earlier prosecution of the claim or demand, is another special reason for the application of the general rule. *Badger v. Badger*, 2 Wall. 87; *Sullivan v. Railroad Co.*, 94 U. S. 811; *Godden v. Kimmell*, 99 U. S. 211; *Landsdale v. Smith*, 106 U. S. 394, 1 Sup. Ct. Rep. 350.

The principles applicable to the case at bar are clearly stated in 2 Story, Eq. Jur. § 1520a, as follows:

"It is often suggested that lapse of time constitutes no bar in cases of trust. But this proposition must be received with its appropriate qualifications. As long as the relation of trustee and cestui que trust is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the cestui que trust. But where this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief upon the ground of lapse of time, and its inability to do complete justice. This doctrine will apply even to cases of express trust, and, a fortiori, it will apply with increased strength to cases of implied or constructive trusts."

After a careful review of the decisions upon this question, we are of opinion that the North Olympia Land Company, upon the facts alleged in the bill, has the right to rely upon the well-settled principles of equity that time and long acquiescence, the want of diligence, the failure to assign any reason for delay, and other acts of the parties, sufficient to raise the presumption that the Lake Superior & Puget Sound Company had abandoned its claim, or that it was in some manner arranged or compromised prior to its assignment to complainant, have deprived complainant of asserting any rights in the premises in a court of equity.

It affirmatively appearing from the averments of the bill that complainant is not entitled to any relief by reason of the laches and unreasonable delay of the Lake Superior & Puget Sound Company, the objection was properly taken by a demurrer. *Maxwell v. Kennedy*, 8 How. 210; *Brown v. County of Buena Vista*, 95 U. S. 159; *Bank v. Carpenter*, 101 U. S. 568; *Speidel v. Henrici*, 120 U. S.

387, 7 Sup. Ct. Rep. 610. Upon a careful examination of all the facts alleged in the bill, and of the authorities applicable to such facts, we are of opinion that the court did not err in sustaining the demurrer. The judgment of the circuit court is affirmed.

NORTHERN PAC. R. CO. v. WRIGHT, County Treasurer.

(Circuit Court of Appeals, Ninth Circuit. January 16, 1893.)

No. 59.

PUBLIC LANDS—RAILROAD GRANTS—STATE TAXATION.

The grant of lands to the Northern Pacific Railroad Company under Act July 2, 1864, (13 St. at Large, p. 365,) was a present grant, which attached to the specific sections as they became capable of identification by the definite location of the road; and upon a report by the government surveyors that the lands surveyed are nonmineral such lands become subject to state taxation, although not segregated from the public domain, and although the land commissioner refuses to issue patents therefor until further satisfied that the lands are in fact nonmineral. 51 Fed. Rep. 68, affirmed.

Appeal from the Circuit Court of the United States for the District of Montana.

In Equity. Bill by the Northern Pacific Railroad Company against F. E. Wright, treasurer of Fergus county, Mont., to enjoin the collection of taxes. A demurrer to the bill was sustained, (51 Fed. Rep. 68,) and a decree entered dismissing the same. Complainants appeal. Affirmed.

Fred M. Dudley, for appellant.

H. J. Haskell, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an appeal from an order and judgment of the circuit court for the district of Montana sustaining a demurrer to complainant's bill, which was brought against the county treasurer of Fergus county, Mont., to obtain a decree that the assessments and taxes levied for the year 1891 upon certain lands granted to complainant by the act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," (13 U. S. St. 365,) were illegal, and constitute a cloud upon complainant's title to said land, and to restrain the treasurer from selling said land for said taxes. Railroad Co. v. Wright, 51 Fed. Rep. 68.

The bill alleges, among other things, that the lands in question were within the limits of the grant; that the complainant's railroad has been completed and accepted; but the commissioner of the general land office has refused to issue patents to complainant for said lands, as required by section 4 of the act, because complainant has failed and refused to file with the commissioner affidavits showing the nonmineral character of the land; that the

question as to whether said lands passed to complainant is now pending and undecided before said commissioner of the general land office; that said lands have been surveyed by United States surveyors, and have been reported by them to be nonmineral lands; that complainant has prepared and filed lists in the United States district land offices, claiming the said lands as a portion of the lands granted to it by said act; that said lists were filed, accepted, and approved by the United States land officers, and by them transmitted to the commissioner of the general land office; that the commissioner has required complainant to file in the general land office affidavits that the lands are nonmineral, and has refused to approve or certify for patent said lists, until such affidavits are filed; that none of said lands have ever been certified or patented to complainant; that neither the government of the United States nor its agents or officers have ever determined what specific lands in the state of Montana passed to complainant by virtue of said grant; that complainant has not, nor has any one in its behalf, filed any affidavit by persons having knowledge of the mineral or nonmineral character of said lands; that the United States still holds the said lists suspended and unapproved for the reason that it is claimed that said lands may be mineral in character, and, as such, excepted from the grant; that the lands granted to complainant have never been segregated from the public lands, and have never been identified, and the boundaries of the specific lands in Montana, so granted, have never been ascertained or determined.

Counsel for appellant assails the decision rendered by the circuit court, and argues at great length, from several different standpoints, to the effect that the averments of the bill clearly show that all the facts necessary to determine whether the lands in question are within the description contained in the act of congress have never been ascertained; that they cannot be identified as lands coming within the provisions of the act, and have not been segregated from the public domain; that until such time as they are fully defined and segregated from the public domain the lands cannot be taxed by the state; that the lands are not taxable until the United States ceases to hold or claim any such interest in them as to justify the withholding of patents therefor; that they are not taxable while there remains any duty unperformed by the United States or its officers of determining the facts upon the existence of which depends appellant's right to have patents issued to it for said lands; that the determination of such facts is necessarily a condition precedent to the issuance of such patents; that the lands are not taxable until appellant has procured and filed affidavits of their nonmineral character in the interior department of the government, if the officers of that department have any authority to demand such affidavits; and, finally, that the lands are subject to exploration and location as mineral lands, and for this reason are not taxable. In support of this argument counsel cites a vast number of authorities, state and national, including numerous rulings made by the interior department. The sum and substance of the entire argument made

by counsel is that appellant is the owner of the absolute title to all the lands granted by the act of congress for every purpose except as to the right of taxation by the states.

It is conceded by both parties that the words contained in the act, "that there be and is hereby granted," are words of absolute donation, and import a grant in praesenti, and are sufficient to vest a present title in the grantee, and such have been the uniform decisions of the courts with reference to the act in question and other similar acts granting lands to other railroads. *Railroad Co. v. Smith*, 9 Wall. 95; *Schulenberg v. Harriman*, 21 Wall. 44; *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733; *Missouri, K. & T. R. Co. v. Kansas P. R. Co.*, 97 U. S. 491; *Railroad Co. v. Baldwin*, 103 U. S. 426; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 509, 10 Sup. Ct. Rep. 341; *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. Rep. 389; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. Rep. 158.

The title of appellant to the odd sections of land conferred by the act was at first an imperfect one, because, as is substantially stated in all of the decisions above cited, until the lands were identified by the definite location of appellant's railroad, it could not be known what specific tracts of land would be embraced by such sections. Until such a location was made the grant was a float. But when the route of the railroad was definitely fixed the odd sections granted became certain, and the title, which was previously imperfect, acquired precision, and became attached to such sections, and took effect as of the date of the grant; and to all such lands appellant had an indefeasible right or title, and was entitled to a patent thereto, if not mineral land excluded from the operation of the act, or "not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights," as specified in section 3 of the granting act. The issuance of a patent to such lands was not, therefore, essential to the title of appellant to the lands in controversy here, although it would undoubtedly have been of some service to it. From the averments of the bill it appears that the line of appellant's road was definitely fixed on the 6th of July, 1882, long prior to the assessment and levy of the taxes on the lands. It is specifically alleged in the bill that the lands are agricultural, nonmineral lands, and that no mineral of any character has been discovered thereon, and that the lands were "free from pre-emption or other claims or rights" on the 6th of July, 1882. It therefore necessarily follows that the lands in question were subject to assessment and levy for taxes, notwithstanding the fact that patents from the government of the United States had not been issued to appellant therefor, and that the proper officers of the government had refused to issue the patents until proof by affidavits was made that the lands were nonmineral. According to the allegations of the bill, the lands had been surveyed, their identification fixed, and their character as nonmineral lands ascertained. It seems to us too clear to require any extended discussion that appellant cannot, under the facts alleged in its bill, defeat the right

of the state to tax such lands by declining to make the proofs in the interior department of the government which would entitle it to a patent. Appellant, upon the principles of the law which we have announced as applicable to the facts stated in the bill, is the beneficial owner of the land, and, not being excluded from its enjoyment, it should not be permitted to use the title of the government to avoid its "just share of state taxation." Wisconsin Cent. R. Co. v. Price County, supra.

The judgment of the circuit court is affirmed.

KELLY v. SPARKS et ux.

(Circuit Court, D. Kansas. January 26, 1893.)

HOMESTEAD—ACQUISITION BY INSOLVENT—VALIDITY.

A homestead claim of 160 acres of land, together with extensive improvements thereon, purchased and improved by an insolvent debtor with moneys realized by the sale and disposal of nonexempt assets, is exempt, under Const. Kan., exempting such land and all improvements thereon from forced sale under process, though such purchase, improvements, and claim were with knowledge by the debtor of his insolvency, and fraud cannot be imputed to such act.

In Equity. Bill by James O. Kelly against Richard M. Sparks and Mary Sparks, his wife, to subject real estate claimed as a homestead to the payment of a judgment. Dismissed.

David Overmeyer and J. S. Brown, for complainant.
Hurd & Dunlap and E. Sample, for defendants.

FOSTER, District Judge. This is a proceeding in the nature of a creditors' bill to subject real estate occupied by defendants as a homestead to the payment of a judgment recovered by complainant, in the district court of Kingman county at the May term, 1887, for \$23,557, a transcript of which was subsequently filed in Barbour county, where said land is situated. It is alleged in the bill that said Richard M. Sparks is now, and was at the time said debt was contracted and said real estate purchased, insolvent, and largely indebted to various parties; and that between the months of November, 1885, and May, 1886, said defendant Richard M. Sparks sold and disposed of a large amount of his property, real and personal, which was subject to the payment of his debts, with the purpose and intent to hinder, delay, and defraud this complainant and his other creditors; and that said Sparks, with the said fraudulent intent, and to keep the proceeds of said sale from being subjected to the payment of his just debts, did about April, 1886, with said proceeds purchase the land in controversy, 160 acres, and did expend large sums of money, to wit, \$5,000, in erecting buildings and making other improvements on said land, and now occupies and claims the same as his homestead; that said land was so purchased and improvements made by said defendant with the intent and purpose of defrauding his creditors by covering up and concealing his money and property under a homestead claim, and thereby

placing it beyond the reach of his creditors with the fraudulent intent aforesaid, etc., and praying that said land may be ordered sold, and the proceeds subjected to the payment of the complainant's judgment. For answer to said bill, defendants admit the complainant's debt, and that defendant R. M. Sparks is insolvent, but deny he was insolvent when said debt was contracted, and deny that he disposed of his property with intent to hinder, delay, or defraud his creditors, or that he purchased said land and made the improvements thereon with such intent, but admit that he purchased said land, and improved the same, and now occupies and claims the same as a homestead, and aver that it is exempt from the payment of complainant's debt, etc. The constitution of the state of Kansas contains the following provision:

"A homestead to the extent of 160 acres of farming land, or one acre within the limits of an incorporated town or city, occupied as the residence by the family of the owner, together with all the improvements on the same, shall be exempt from forced sale under any process of law," etc.

It will be observed there is no limit to the value of the improvements which may be placed upon the homestead by the debtor. The testimony in this case shows the land and the improvements to be worth about \$7,000; that there is a mortgage on the same for about \$1,500; that defendant's family consists of a wife and several children, and the family are now occupying the premises as a homestead. The complainant's debt had its origin in Lafayette county, Mo., where both of said parties formerly resided. Complainant at various times during the years 1882 to 1885 signed as surety for defendant several promissory notes to banks and individuals at Lexington, Mo., which notes complainant was afterwards compelled to pay. The proceeds of these notes were used by defendant R. M. Sparks in dealing in land and live stock in Missouri, Colorado, and Kansas. About the years 1882 and 1883 said defendant came to Kansas, and purchased a large amount of land in Barbour county, and stocked it with cattle and sheep, and carried on the business of buying, feeding, and selling live stock until the fall of 1885, when he failed, and became insolvent. About that time he sold his ranch and all his stock, and used about \$7,000 of the proceeds in purchasing and improving the place he now occupies as a homestead. The improvements cost about \$4,000. At that time he knew he was insolvent, and in securing the homestead doubtless had in view primarily the purpose of providing a home for himself and family, which should be exempt from the claims of his creditors. The dealings of said defendant were so various, and his loans of money so numerous, and extending over several years' time, it is impossible to trace the funds used in purchasing and improving the homestead to any particular source, although it fairly appears that some of the purchase money came indirectly from the money realized on these notes. At about the time this debt was incurred, Sparks was supposed to be in good financial circumstances. At that time he owned and lived on a valuable homestead in Lafayette county, Mo., valued at about \$20,000, and he was supposed to be worth about \$50,000.

The question presented in this case is simply this: Knowing himself to be insolvent, and unable to pay his debts, at the time he purchased the property, could he convert his assets, in the manner stated, into a homestead, and thus place it beyond the reach of his creditors? This question has been before the courts, and has been repeatedly adjudicated, but unfortunately the adjudications are not entirely in harmony. In *Pratt v. Burr*, 5 Biss. 36, where a defendant, a merchant in failing circumstances, and being insolvent, purchased a large amount of goods on credit, and soon thereafter transferred the goods, and received in part payment a house and lot, which was claimed as a homestead, the court held the transfer of property was made to defraud creditors, and that the homestead claim could not be allowed. To the same effect, see *Long v. Murphy*, 27 Kan. 380; *Riddell v. Shirley*, 5 Cal. 488. An insolvent debtor claimed a homestead exemption in a stock of goods transferred to hinder and delay creditors, and the claim was disallowed. *Rose v. Sharpless*, 33 Gratt. 153. The fraudulent concealment of a debtor's property is a bar to defendant's right under the homestead law. *Emerson v. Smith*, 51 Pa. St. 90. Per contra, in *Cipperly v. Rhodes*, 53 Ill. 347, it was held that an insolvent debtor could purchase and hold a homestead, although it withdrew assets subject to the payment of his debts. A late case in point, and a very strong one in favor of an insolvent debtor's right to acquire a homestead, is by the supreme court of Minnesota,—*Jacoby v. Distilling Co.*, 43 N. W. Rep. 52,—in which the court says:

"A debtor, in securing a homestead for himself and family by purchasing a house with nonexempt assets, * * * takes nothing from his creditors which the law gives to them, or in which they have any vested right. * * * It is a right which the law gives him, subject to which every one gives him credit, and fraud can never be predicated on an act which the law permits."

—Citing *Tucker v. Drake*, 11 Allen, 145; *O'Donnell v. Segar*, 25 Mich. 367; *Culver v. Rogers*, 28 Cal. 521; *Randall v. Buffington*, 10 Cal. 491. In *King v. Goetz*, 11 Pac. Rep. 658, the supreme court of California uses the following language:

"The law, for wise and beneficent purposes, secures to the family a right to have a homestead selected in the manner indicated by the statute, and this right may be exercised as well against existing as against future creditors without the imputation of fraud for so doing."

In *Backer v. Meyer*, 43 Fed. Rep. 704, Judge Caldwell uses the following language:

"The homestead of the defendant was purchased by Meyers after his insolvency, in the name of his wife; but this fact does not make it any the less the family homestead," etc.

See, also, *Thomp. Homest.* §§ 305-307, and cases cited.

It seems to be well settled on principle and the preponderance of authority that an insolvent debtor, knowing himself to be insolvent, may acquire a homestead for himself and family, and hold the same exempt from his creditors, although purchased with nonexempt assets, and that fraud cannot be imputed to such act. The beneficent object of a wise and just homestead law must be conceded; but it seems harsh and unjust that a debtor may live in wealth, un-

der the provisions of a homestead law, while his creditors are kept out of what is justly due them; but that matter rests in the discretion of the lawmaking power, and credit is given the debtor in full view of this comprehensive exemption. It follows that this bill cannot be sustained, and must be dismissed.

**CITIZENS' BANK OF LOUISIANA v. BOARD OF ASSESSORS FOR
THE PARISH OF ORLEANS et al.**

(Circuit Court, E. D. Louisiana. January 23, 1893.)

No. 12,112.

1. TAXATION—EXEMPTIONS—PRESUMPTIONS.

The presumption is always against an exemption from taxation, and the burden is on the party claiming the exemption to establish a legislative intent to that effect by a clear preponderance of persuasive facts.

2. SAME—BANKING CAPITAL—CONSTITUTIONAL LAW.

By the charter of the Citizens' Bank of Louisiana, as amended by Acts La. 1836, p. 16, the state loaned to the bank \$12,000,000 of its bonds, of which \$7,000,000 were actually used. These bonds were to constitute the capital of the bank, and were indorsed by it and sold. The stockholders were not immediately to pay anything upon their subscriptions, but were merely to furnish mortgages upon cultivated lands and slaves. These mortgages were to be held as security for payment of the bonds, and were to bear 5 per cent. interest. The bank was to build certain railroads and canals, which were ultimately to be turned over to the state, and the state was to have a small share of the profits of the bank, but only a small fraction of the profits were to be distributed either to the state or to the shareholders until after the successive installments of the bonds had been paid. Thus, practically, all the stock, securities, and profits of the bank were pledged and impounded for the payment of the bonds. The act provided that the capital of the bank should be entirely exempt from taxation "during the continuance of its charter." *Held* that, as the exemption was for the purpose of facilitating the repayment to the state of the capital thus advanced, the exemption must be construed to continue, not only for the duration of its charter as then fixed, but for as long as the charter should exist as extended by the state at any future time, for the purpose of securing the repayment of such advances; and, the charter having been extended in 1874, the exemption also continued, although, by the constitution of 1868 then in force, the power of exempting property from taxation, except such as was used for church, school, or charitable purposes, was denied to the legislature.

3. SAME—WAIVER OF EXEMPTION.

None of the bonds having been paid, the legislature, in 1880, (Acts 1880, No. 79,) authorized the bank to compromise and settle the liability of the stockholders upon their mortgages, the sums realized therefrom to be applied in satisfaction of the state bonds, but provided that the act should not take effect unless within 12 months it was accepted, under the conditions prescribed in articles 234 and 237 of the state constitution. Article 234 provided that the legislature should not renew, alter, or amend the charter of any existing corporation, or pass any general or special law for the benefit thereof, except upon condition that such corporation should thereafter "hold its charter subject to the provisions of this constitution." *Held* that, by accepting the act of 1880, the bank consented to waive the exemption from taxation, and the exemption would then have ceased if the legislature had power under the constitution to impose this condition.

4. CONSTITUTIONAL LAW—RIGHT OF PETITION—CORPORATIONS.

Article 5 of the constitution of Louisiana, which declares that the right of the people peaceably to assemble and petition the government, or any

department thereof, shall never be abridged, secures to every person, natural or artificial, the right to apply to any department of the government, including the legislature, for the redress of grievances, or the bestowal of a right, and is also a guaranty of the enjoyment of such redress or right, when obtained, free from all forfeiture or penalty for having sought or obtained it; and when this article is read in connection with article 234, forbidding the legislature to remit the forfeiture of the charter of any existing corporation, or renew, alter, or amend the same, or pass any law for the benefit of such corporation, except upon condition that such corporation shall thereafter hold its charter subject to the provisions of the existing constitution, it is clear that the legislature is prohibited from at all impeding the right of petition, except that, when it has thus granted a favor to a corporation, it may interfere with that right so far as to exact a surrender of all privileges other than those which could be granted under the existing constitution.

5. SAME—EXEMPTION FROM TAXATION—WAIVER.

It appearing that it would have been ruinous to the stockholders, and detrimental to the credit of the state, to enforce the payment of the stock mortgages according to the terms of the Citizens' Bank's charter, owing to the destruction of slave property, and the devastation of the war, the act of the state in authorizing the bank to compromise the liability of the stockholders upon their mortgages was for the benefit of the state, and for the purpose of ultimately securing payment of its bonds, and was therefore not a privilege or favor granted to the bank. Hence the legislature had no authority under the constitution to impose upon the bank the condition that the exemption from taxation should be thereafter waived; and, although the bank, by its acceptance of the act, intended to waive the exemption, the attempted waiver was of no effect, and the capital of the bank is still exempt from taxation.

6. TAXATION—BANK SHARES.

The imposition of a tax upon the shares of the bank according to the Louisiana statute, which requires the bank to pay the tax, and then look to the dividends upon the shares and to the stockholders for reimbursement, is a tax upon the bank itself. *New Orleans v. Houston*, 7 Sup. Ct. Rep. 198, 119 U. S. 265, followed.

In Equity. Bill by the Citizens' Bank of Louisiana against the board of assessors for the parish of Orleans and others to enjoin the collection of taxes. Heard on application for an injunction pendente lite. Granted.

Henry C. Miller, for complainant.

E. A. O'Sullivan and Henry Renshaw, for city of New Orleans and board of assessors.

M. J. Cunningham, Atty. Gen., and R. Lyons, for tax collectors.

BILLINGS, District Judge. This case has been submitted upon an application for an injunction pendente lite. The defendants are about to levy and collect a tax upon the shares of the bank. The question to be passed upon is whether the shares are exempted from taxation. The original charter was granted in 1833. Acts 1833, p. 172. That act contemplated that the capital of the bank, which was fixed at \$14,000,000, would be obtained by the issuance by the bank of its own bonds. The subscribers for the stock were to pay nothing upon their subscriptions, but were to furnish mortgages upon cultivated lands and slaves to secure the payment of their subscriptions. These mortgages were to be held as a security for the payment of the bonds. The bank, after three years of

effort, found itself unable to negotiate its own bonds. Consequently, in 1836, (Acts 1836, p. 16,) the charter of the bank was amended, and the bonds of the state were loaned to the bank as its capital, to the amount of \$12,000,000. The state was to have a graduated interest in the profits of the bank,—a one-sixth interest in case the loan of bonds should be taken to the amount of the full capital. The amount of state bonds actually used by the bank was \$7,000,000. In 1852 the charter of the bank, having been forfeited for a failure to comply with the law with reference to specie payment, (Acts 1852, p. 109, No. 141,) was restored to the corporation, and it was reinvested with all the rights and privileges which it enjoyed under the original and amended charter. The original and amended charter of the bank, which was for 51 years, and would have expired in 1884, was in 1874 (Acts 1874, p. 77, No. 40) extended for the further period of 27 years, viz. till 1911. At the time of the granting of the original and amended charters,—i. e. in 1833 and 1836,—there was no constitutional prohibition which directly or inferentially prevented the legislature from exempting from taxation the capital of the bank. In 1874, when the charter was extended, the constitution of 1868 was in force. Article 118 of that constitution is as follows:

"Taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law. The general assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes. The general assembly may levy an income tax upon all persons pursuing any occupation, trade, or calling; and all such persons shall obtain a license, as provided by law. All tax on incomes shall be pro rata on the amount of income, or business done; and all deeds of sale made, or that may be made, by collectors of taxes, shall be received by courts in evidence as prima facie valid sales. The general assembly shall levy a poll tax on all male inhabitants of this state over twenty-one years old, for school and charitable purposes, which tax shall never exceed one dollar per annum."

The first question is as to the meaning and intent of the legislature in that part of the amended charter of 1836 upon the subject of the exemption of the bank from taxation; that is, the first question is, did the legislature, in the amended charter,—having established certain relations of the state to the bank, and declaring in section 4, p. 17, Acts 1836, "And the capital of said bank shall be exempted from any tax laid by the state, or by any parish or body politic under the authority of the state, during the continuance of its charter," it being provided that "the charter should continue fifty-one years," (section 30, p. 192, Original Charter Acts 1833),—mean that the exemption should arbitrarily cease at the end of 51 years, or that the exemption should continue so long as the existing relations of the state to the bank should require that the charter should continue?

In dealing with this question, regard must be had to the rule that, when it is claimed a statute creates an exemption from taxation, it is to be strictly construed, and that the presumption is against it. The foundation of this rule shows its meaning. It is founded upon the doctrine that taxation is so essential to the welfare of the state that the contract of exemption must be clearly

shown; that every reasonable doubt should be resolved against it. But this rule does not mean that the inference must, under all circumstances, be against the exemption. It means that the inquiry must be an impartial one; the burden of satisfactorily establishing the exemption being upon him who claims its existence. It must be made to appear to the court affirmatively that the intention of the legislature was to exempt. To apply the rule to this case, the burden is upon the complainants; they must show that by the terms of the exemption, and under the facts as they existed at the time it was granted, the exemption claimed was intended by the legislature, or the right to tax will be inferred. This intent will not be deemed established in case of mere doubt, or a merely ambiguous set of facts; there must be a clear preponderance of persuasive facts in favor of the exemption, or it will be rejected. Thus, in *Tennessee v. Whitworth*, 117 U. S. 145, 6 Sup. Ct. Rep. 649, notwithstanding this presumption, it was held that "the right to have shares in a corporation exempt from taxation was conferred upon a corporation by a grant which gave to it all the rights, powers, and privileges of another corporation, if the latter possessed such right of exemption." I will consider under this rule whether the words "during the continuance of its charter" mean "during the continuance as fixed herein," or "during the continuance as fixed herein, and as the interests of the state may require the legislature hereafter to continue the corporation in existence." The answer to this question will, as it seems to me, depend upon the object of the legislature in granting the exemption. This object will best appear from the relations of the state to the bank in 1836. Out of 12 directors, the legislature originally appointed 6, and now it appoints 5. The state was to have an interest on a graduated scale ranging from one-sixth to one twenty-fourth in the profits of the bank, according to the amount of bonds taken by it. The bonds, to the amount of \$12,000,000, to be issued by the state, were made by the state to the order of the bank, and by the latter indorsed, and were thus payable to bearer. The stock mortgages were transferred to the state, and to whomsoever might be the holders of the bonds. They were to bear interest at the rate of 5 per cent., and were payable in five installments,—one fifth at February 1st in each of the years 1850, 1859, 1868, 1877, and 1886. The bank was to build certain railroads and canals, which ultimately were to be turned over to the state, and that portion of the profits belonging to the state should, when available to the state, be devoted to the cause of education in declared proportions throughout the state. The profits of the bank were to be added to the capital of the bank. There were to be no dividends among the stockholders, nor distribution of earnings to the state, except out of a small fraction of the profits, and then not till after the successive installments of the bonds had been paid. It may be remarked that none of the installments of the bonds have been paid.

I will sum up the statutory relations of the state to the bank thus disclosed by saying: The state furnished the entire capital by the loan of its own bonds, and, till the bonds were paid, all the stock,

securities, or mortgages made by the stock subscribers, were transferred and hypothecated, and all the profits of the bank were pledged and impounded, for the payment of the bonds. This summary suggests the way to reach an answer to the question, how long was the exemption to continue? For 51 years, or so long as the charter relations of the state to the exempted property continued? The object of the exemption must determine its originally expressed period of exemption. Here was an institution which had, and was to have, nothing for itself till its profits had with the stock mortgages paid the state's bonds. The exemption of its capital from taxation was the exemption of something out of which the state's own obligations were to be paid, and the public works—the railroads and canals—which the bank was to build were to be constructed. The exemption was therefore, till the bonds should be paid, a reservation of the state's own property from taxation. One-fifth part of these bonds were not to mature till two years after the original period for the existence of the charter had elapsed. It seems to me that the chief object of the exemption being to facilitate the payment of the state's own bonds, the period of exemption declared must be construed to be so long as the charter was by the legislature continued in order that the state's bonds might be paid. It is true 51 years was a long period, but even in 1836 it was found necessary to make the last installment of the bonds payable 53 years after the original charter commenced. The enterprise was of such great public moment that the state advanced the entire capital, possibly \$12,000,000, actually \$7,000,000. The exemption was for the purpose of facilitating the repayment to the state for this advance, and the provision for it in the amended charter "during the continuance of its charter" meant, not only as therein fixed, but as the payment of the state's obligations should lead the state afterwards to extend it.

It is the whole charter, the object of the exemption, and the destination of the profits of the institution, which require this inference. The supreme court, in *Bank v. Bouny*, 32 La. Ann. 245, held that, without regard to this clause expressly exempting from taxation the capital, the reservation of the profits for the extinguishment of the bonds of the state contained in the charter of 1836 prohibited the taxation of the accumulations by the state. If a corporation without capital, save as derived from its profits, is, by the scope and meaning of its charter, so destined and dedicated to the purposes of the state that, even without specific exemption of its accumulations, they cannot be taxed by the state, it must follow that when, in the same charter, the capital is expressly exempted during its existence under the charter, the express exemption is in keeping with the implied, and inheres in the charter throughout its original and prolonged term, if it be kept alive by the state, to render this exclusive destination or dedication available to itself. This was the view of the legislature in 1874, when they extended the charter. The act making that extension is Act No. 40, p. 77, and, with its title and preamble, is as follows:

"Whereas, by reason of the great loss suffered by the agricultural interest of the state in consequence of the late war, it would be ruinous for the stock-

holders to pay within the next thirteen years, before the limitation of the charter of the Citizens' Bank of Louisiana, the amount of arrearred installments and interest due by them, as well as the balance of their indebtedness; and whereas, the sacrifice of the lands mortgaged for the payment of the state bonds issued in favor of the bank would endanger the security of the state; and whereas, it is the interest of the state that a prolongation of the charter of the Citizens' Bank of Louisiana be allowed, so as to enable said institution to collect the debts due by the stockholders, and thereby facilitate the payment of the state bonds:

"Section 1. Be it enacted by the senate and house of representatives of the state of Louisiana, in general assembly convened, that the provision of the thirtieth section of the act entitled 'An act to incorporate the Citizens' Bank of Louisiana,' approved April 1, 1833, which reads as follows: 'And the charter shall continue for and during the space of fifty-one years from the passage thereof,' be amended and re-enacted as follows: 'That the charter of the Citizens' Bank of Louisiana shall continue for and during the space of twenty-five years from and after the time fixed for its liquidation by the said charter, and shall expire on the thirtieth of January, 1911.'

"Sec. 2. Be it further enacted, etc., that the Citizens' Bank of Louisiana, through its board of directors, be, and is hereby, authorized to extend, with the consent of the holders thereof, all the state bonds issued in its favor under the second section of the act entitled 'An act amendatory and supplementary to the several acts relative to the act to incorporate the Citizens' Bank of Louisiana,' approved January 30, 1836, now outstanding, as well as all interest warrants issued by said bank falling due from and after the passage of this act, to such time and on such conditions as may be agreed upon with the holders of said bonds and interest warrants; provided, said extension be not made for a longer period than twenty-five years from the respective maturities, and at no higher rate of interest than the said bonds now bear.

"Sec. 3. Be it further enacted, etc., that the present act shall be in force from and after its passage, any law to the contrary notwithstanding."

There certainly are grave difficulties in the way of maintaining that under this statute, which is a tripartite contract,—that is, a contract between the state, the bank, and the bondholders,—the state can secure the extension of its own bonds for the period of 25 years, and the continuation of the charter which, in effect, destines the profits of the bank to the payment of its bonds for 2 years beyond that period, and at the same time disregard that destination by imposing a tax which, by the decision of the supreme tribunal of the state, is held to be so inconsistent with that destination as to be prohibited by it. It is to be observed that the legislature merely extended the charter, inferring that the original words "during its continuance" carried with them the original exemption throughout the period of the extension. I think in this the legislature drew the inference from the entire charter, which a study of it requires.

The reason in the original charter, as amended in 1836, for making the duration of the exemption coextensive with any prolongation of the charter, inhered in the purpose which was paramount with the state upon the subject of time in connection with the existence of the bank, in that the bank and the exemption must endure till the bonds she had borrowed had been paid; but in the extension of the charter, and the continuance of the exemption, two other parties also had an interest and fixed rights,—the bank and the bondholders.

It is unnecessary to speak of the interest of the bondholders, and there is a complication as to their right to insist upon the exemp-

tion springing from their release of the bank, except so far as relates to the stock mortgages. It may, however, be remarked that, as between the holders of the bonds and the obligors upon the bonds, the state was the maker and principal, and the bank the indorser and surety, though, as between themselves, the bank was under the obligation to pay as the principal. The release of the surety did not discharge the principal, and the state was still left liable as a principal obligor, who had the right to look to the bank for repayment; and thus there exists the same necessity to consider the question of exemption as though there had been no release of the bank by the holders, for the bank had and has an interest subordinate only to that of the state in having the exemption maintained. The period of its existence, and with it the right of the state to participate in its profits, to the extent of reserving one-sixth part thereof, and the pledge and impounding of all its profits, were continued along with its existence for the further period of 27 years. It was the payee and second obligor upon the state bonds whose payment was by the same act postponed. It has a right, therefore, as trustee for its own stockholders, to insist upon the exemption, unless it has by some act waived this right.

The respondents, the tax officers, say it has waived this right by assenting to the condition of Act No. 79, Acts 1880. It is conceded that the directors of the bank gave the assent, as required by that act. The act is as follows:

"Whereas, due proof has been shown to the house in which this bill originated that article 48 of the constitution has been complied with, therefore:

"Section 1. Be it enacted by the general assembly of the state of Louisiana, that the Citizens' Bank of Louisiana, in addition to the powers now conferred by law, shall have power to compromise and settle the liability of the mortgage stockholders of said bank arising out of the stock mortgages granted by them to secure their subscriptions to the capital stock of said bank; said compromises to be made when deemed judicious by said bank, and with the assent of the bondholders: provided, the same be approved by the directors on the part of the state, as provided in this act, on such terms as may be agreed upon; and, when effected, the said stock mortgages to be released and canceled.

"Second. That all sums realized from said compromises, as well as from the enforcement of said mortgages, by the usual legal proceedings, shall be held and applied by the banking department of said bank to the satisfaction of the bonds of the state, issued in aid of the bank, and to the legal liabilities of said mortgage stock department, and to the necessary expenses of said department.

"Third. That the directors for the state on the board of said bank shall be increased to five, to be appointed by the governor, when this act shall be accepted by the bank, whose duties shall be the same as now provided by law; and, in addition thereto, they shall supervise the compromise, as contemplated in section one of this act, and for this purpose they shall hold meetings, when called upon so to meet by the president of the board of directors of the Citizens' Bank, and shall keep a record of their meetings, and no compromises under the provisions of this act shall be effected without the approval of the majority of said directors on the part of the state.

"Fourth. That this act shall not be binding or confer any right upon the bank unless accepted within twelve months from the date of this act, and under the conditions prescribed in articles 234 and 237 of the constitution; such acceptance to be manifested by the bank in writing, and filed in the office of the secretary of state. * * *

It is claimed, and I think justly, that the meaning of the assent is that the directors agreed to waive the exemption, as they did all other special privileges enjoyed by the bank, as required by the legislature. If the legislature had a right, under the constitution, to require this agreement as a condition of an act or statute inuring to the benefit of the bank, then the agreement to waive is valid and obligatory. If the legislature, under the constitution, had not the right to require this agreement as such a condition, then the agreement is void, and the rights of the bank are unaffected by it. In order to determine this question, we must look at two provisions of the constitution,—article 234, and article 5. These articles are as follows, (article 234:)

"The general assembly shall not remit the forfeiture of the charter of any corporation now existing, nor renew, alter, or amend the same, nor pass any general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution."

Article 5 is as follows:

"The right of the people peaceably to assemble and petition the government, or any department thereof, shall never be abridged."

I take it to be undeniable that the "right of petition," as that expression is used in the constitution of the state, means the right of every being, natural and artificial, to apply to any department of government, including the legislature, for the redress of grievance or the bestowal of right, and is a further guaranty of the enjoyment of such redress or right when obtained, free from all forfeiture or penalty for having sought or obtained it. If these two provisions are read together, it is clear that they mean that the constitution prohibited the legislature from at all impeding the right of petition, except that in case it remitted a forfeiture to a corporation, or altered its charter, or passed any general or special law for its benefit, it might interfere with that right, so far as to exact a surrender of all privileges other than those which could be granted under the existing constitution. This was a power given to the legislature in case the alteration or amendment or general or special law was for the benefit of the corporation, and not, as in this case, where the amendment—the special law—was to enable the bank to apply certain securities to the payment of obligations upon which the state was an obligor, and thus to protect the credit of the state.

The question turns upon whether the thing sought was such a thing as is meant and specified in article 234. The thing granted was for the bank, with the assent of the directors appointed by the state, to realize for the state and bondholders out of the stock mortgages by compromise, i. e. without a foreclosure and sale. These stock mortgages were hypothecations of plantations and slaves. The destruction of slavery had reduced the value of the hypothecations more than half, or possibly two thirds. It was necessary to find a purchaser for the mortgaged property, and at a price equal to the par value of the stock of the subscriber, or for the bank itself to become the purchaser of the property. The

first was impossible; the second was ruinous for the state. Therefore it was enacted that, with the consent of the state's representatives, the bank might, upon receipt of a fair sum, by way of adjustment, release any of the mortgaged property, and apply the sum realized to the payment of the state's bonds. This was in no true sense a law passed for the benefit of the bank. It was rather a legislative permission to resort to the only practicable method of making the mortgages available to the extinguishment of the state's bonds, and should be denominated as a law passed by the state for the benefit of itself. Again, it was in no sense the creation of a special right, but was rather the recognition by the state of a right evidently existing, which any court of equity would, in a case where all the parties were before the court, have recognized, without the act of 1880. It would follow that the legislature, in compelling the bank to make any renunciation in order to have force and operation given to that statute, acted, not only without authority, but in defiance of the constitutional prohibition which forbade it to impede the right of petition, except in a certain class of cases, of which the application for the grant of recognition contained in the act of 1880 was not one; and that the renunciation exacted from the bank by the legislature, in violation of the constitution of the state, is void.

My conclusion, therefore, is that the original charter contemplated and declared that the exemption should be coextensive with the charter, and that the bank has done nothing which can prevent her from insisting upon her capital being exempt from taxation, in accordance with the terms of her charter. The thing sought by this bill to be preserved from taxation is the shares of the stockholders. The thing exempted in the charter *eo nomine*, is the capital of the bank. In *Bank v. Bouny*, *supra*, the supreme court of this state held that, since the profits were pledged and impounded for the payment of the state's bonds, taxation by the state of the accumulations and of the shares was prohibited. In *New Orleans v. Houston*, 119 U. S. 265, 7 Sup. Ct. Rep. 198, the supreme court of the United States held that under the statute prescribing the manner of collecting a tax upon the shares of a corporation, as it then existed, (and it is unchanged,) since the corporation is required to pay the tax, and must look to the dividends upon the shares and to the stockholders for reimbursement, it was a tax upon the corporation itself. *A fortiori* would this be true when dividends are prohibited, and the profits or earnings of the corporations are otherwise destined. Let, therefore, the injunction *pendente lite* issue.

CLEVELAND CITY FORGE IRON CO. v. TAYLOR BROS. IRON-WORKS CO., Limited. PRENTISS TOOL & SUPPLY CO. v. SAME. NILES TOOL WORKS v. SAME.

(Circuit Court, E. D. Louisiana. February 13, 1893.)

Nos. 12,154, 12,152, 12,153.

CORPORATIONS—DISSOLUTION—NOTICE—RIGHTS OF CREDITORS—ATTACHMENTS.

A provision in the charter of a corporation, requiring the advertisement of 10 days' notice of a stockholders' meeting for the purpose of altering or amending the charter, is so far for the benefit of creditors that a resolution to dissolve the corporation, passed at a meeting called without such notice, is ineffectual to prevent a subsequent attachment of the corporation's property by existing creditors.

At Law. These were three actions commenced by attachments brought, respectively, by the Cleveland City Forge Iron Company, the Prentiss Tool & Supply Company, and the Niles Tool Works against the Taylor Bros. Iron-Works Company, Limited. Heard on motion by the liquidating commissioners of the defendant corporation to dissolve the attachments and dismiss the suits. Denied.

The motion to dissolve the attachments was based upon the ground that the defendant corporation had been dissolved before the attachments were levied, and the question was as to whether the dissolution had taken place as against creditors. A resolution purporting to dissolve the corporation had in fact been passed at a meeting of the stockholders held November 16, 1892, but this meeting was held without any advertisement of notice thereof. Article 5 of the corporation's charter required that 10 days' notice should be given of any meeting to be held for the purpose of altering or amending the charter; and article 7 declared that whenever the corporation was dissolved its affairs should be wound up by three stockholders, to be appointed as liquidators at a general meeting of the stockholders, convened after 30 days' advertised notice.

Denegre, Bayne & Denegre, for plaintiff Cleveland City Forge Iron Co.

W. S. Parkerson, for plaintiffs Prentiss Tool & Supply Co. and Niles Tool Works.

T. J. Semmes, B. K. Miller, and A. H. Wilson, for defendants.

BILLINGS, District Judge. In all these cases the same question is presented. In each the suit was commenced with an attachment of the property of the defendants. In the first the attachment was levied and the citation served before any steps were taken on the part of the defendants towards recording the dissolution. In the last two cases the meeting of the stockholders of the defendant corporation had been held, and the resolution to dissolve had been passed, but not recorded before the filing of the suit. According to the return of the marshal in all of the cases, service was made on December 7, 1892, and according to the certificate of the recorder of mortgages the resolution of the

stockholders to dissolve was not recorded till January 6, 1893. But these dates do not, in my opinion, vary the rights of the respective plaintiffs. In each case the parties who appear are the liquidating commissioners, elected by the majority of the stockholders of the defendant corporation, who appear only for the purpose of moving that the attachments be dissolved and the suits dismissed, for this: that the corporation of the defendants has been dissolved. I find as a fact that at a general meeting of the stockholders, of which there was no advertised notice, a majority of them voted to dissolve the corporation, and elected the above-named liquidating commissioners, and agreed to waive the notice of the meeting called for by the seventh section of the charter. Some question was made by the plaintiffs as to whether the waiver applied to the notice required by the fifth section, as the waiver specified for notice called for by section 7, and also that no evidence was submitted showing that the meeting was called for the purpose of effecting the dissolution. But, in my opinion, it is not necessary to decide whether the waiver was intended to apply to the advertised notice of 10 days as well as to the 30-days notice, and, in the absence of proof, I think, *prima facie*, the call was for the purpose for which the meeting acted.

This brings me to the question whether the provision in the defendant corporation's charter that at a general meeting called for that purpose upon a notice of 10 days, published by advertisement in one of the daily newspapers, is so far for the benefit of the creditors of the corporation that they can insist that there must be the advertised notice for the period of 10 days, and therefore, if at a meeting called without such advertised notice, though the proper majority vote for a dissolution, the corporation, so far as the creditors are concerned, is not dissolved. It is to be observed that this meeting in question was to be advertised in one of the daily newspapers. It was therefore to be a notice to stockholders, and to creditors, if the latter were interested in the meeting. The question turns upon the ulterior one whether they could have been affected by such a notice. I think it must be conceded that even as to future credits the existing creditors were interested, for such a notice would almost preclude credits of that sort. No corporation could get credit that had advertised its meeting to dissolve. The amount of debt might, therefore, be kept down by the advertisement. Again, existing creditors might be induced by such an advertisement to take proceedings in equity to preserve their interest in the assets of the corporation, and to take or hasten proceedings at law against the corporation before it should become dissolved. If the creditor, in consequence of the advertisement, commenced suit, *non constat* but that the corporation might confess judgment, or, if he had already commenced suit, he might obtain judgment in such suit. In the absence of precedents in the books upon this question, I concur in the opinion of Judge Theard in *Simon v. Taylor Bros., Limited*, that, if a corporation puts into its charter such a provision, which is required to be recorded, and parties give credit to the corporation upon its recorded charter, so far as concerns creditors, the

stockholders cannot waive this clause. Article 5 of the defendants' charter is in the nature not only of an internal regulation, but also of an external obligation; and, so far as creditors are concerned, there can be no dissolution without the advertisement for the prescribed period of time.

My conclusion is that in any case, whether the liquidators can present this question in this cause or not, upon the facts proved and found above there has been no dissolution, by reason of the absence of the advertisement of the meeting, and therefore the motion of the liquidators in each of the cases must be refused.

I append to this opinion a copy of article 7 of the charter of the defendant corporation and of the proceedings of the meeting of stockholders at which the resolution to dissolve was passed.

"Art. 7. Whenever this corporation is dissolved, either by limitation or from any other cause, its affairs shall be liquidated under the superintendence of three stockholders, to be appointed for that purpose at a general meeting of the stockholders, convened after thirty days' prior notice shall have been published in one of the daily newspapers of the city of New Orleans, and with the assent of a majority in amount of the entire capital stock. Said commissioners shall remain in office until the affairs of said corporation shall have been fully liquidated; and, in case of the death of one or more commissioners, the survivor or survivors shall continue to act."

"[Stamp.]

[Stamp.]

"[Copy.]

"New Orleans, Nov. 16|92.

"A general meeting of the stockholders of this company was held this day, Vice Prest. J. C. Meyer in the chair. The following stockholders were represented either personally or by proxy: J. C. Meyer, Geo. Taylor, Jas. O'Rourke, W. A. Taylor, J. C. Meyer, Jr., C. Wedderin, and J. C. Finney, Jr.

"Mrs. Jessie A. Taylor, absent, represented by Geo. Taylor, 101 shares; W. R. Taylor, absent, represented by C. Wedderin, 229 shares.

"On motion of Mr. O'Rourke it was resolved that this company do hereby dissolve, and proceed to a liquidation of its affairs, and the appointment of three liquidating commissioners, under section No. 7 of the charter. Carried unanimously.

"There were filed with the Sect'. the written consent of the absent stockholders to waive the notice and publication required by section 7 of the charter.

"The following stockholders were elected liquidating commissioners of the company: Carl Wedderin, Walter A. Taylor, and J. C. Finney, Jr.

"There being no further business before the meeting, same was adjourned.

"J. C. Meyer, Vice Prest.

"W. A. Taylor, Secty."

"Personally appeared Walter A. Taylor, who, being duly sworn, deposes and says that the foregoing is a true and correct copy of the minutes of a general meeting of stockholders of the Taylor Bros. Iron-Works Company, Limited, held November 16th, 1892.

W. A. Taylor.

"Sworn to and subscribed before me this 6th day of January, 1893.

"Jas. D. Rankin,

"[Seal.]

Deputy Clerk, Civil District Court
for the Parish of Orleans.

* "Recorded in margin of Book 444, fo. 222, in mortgage office.

"New Orleans, January sixth, 1893.

"[Seal.]

Jos. Batt, R. M.

"Recorder Rec'd. Jan. 6, 1893, 12:10 P. M. Mortgages."

CLEVELAND CITY FORGE IRON CO. et al. v. TAYLOR BROS. IRON-
WORKS CO. et al.

(Circuit Court, E. D. Louisiana. February 22, 1893.)

No. 12,170.

1. CORPORATIONS—DISSOLUTION—NOTICE—RIGHTS OF CREDITORS—ATTACHMENT.

Where the charter of a corporation provides that notice of a meeting to alter or amend the charter shall be advertised for a stated time, the dissolution of such corporation by its stockholders before the expiration of its charter period is as to existing creditors an alteration of an important character, which cannot be effected at a meeting held without such notice, so as to prevent them from levying an attachment. 54 Fed. Rep. 82, followed.

2. SAME—INJUNCTION AGAINST DISSOLUTION.

Creditors with attachments against a corporation cannot enjoin the stockholders thereof from dissolving the corporation, in the absence of fraud or of damage other than that caused by previous gross mismanagement, and that which will result from the dissolution. *Fisk v. Railroad Co.*, 10 Blatchf. 518, distinguished.

In Equity. Bill by the Cleveland City Forge Iron Company, the Prentiss Tool & Supply Company, and the Niles Tool Works, attaching creditors, against the Taylor Bros. Iron-Works Company, Limited, to enjoin the dissolution of defendant. Injunction denied. Motions made in the attachment suits to dissolve the attachments were heretofore denied. See 54 Fed. Rep. 82, where additional facts are stated.

W. S. Parkerson and Denegre, Bayne & Denegre, for complainants.
Thomas J. Semmes, for defendants.

BILLINGS, District Judge. This cause is submitted on an application for an injunction pendente lite. The defendants are a corporation, limited, organized under the laws of Louisiana, and the stockholders therein. The complainants are plaintiffs in this court, who have commenced suit, two by attachment, and the other by sequestration. The chief object of the injunction sought is to restrain the stockholders from dissolving the corporation. Two points are involved in this application, and must be considered: First, has the corporation been already dissolved? and, second, if not, does the bill make a case for an injunction?

1. As to the claimed dissolution. In the suits at law a suggestion of the dissolution was made. An agreement was made to waive a trial by jury, and the court found against the dissolution.

It has been insisted in the argument of this application that the proposition of law upon which the court founded its decision, viz. that the stockholders could not waive the clause in the charter of the corporation requiring the advertisement in the papers of the meeting called to dissolve the corporation, was erroneous. The whole matter turns upon whether the creditors had an interest in receiving such a notice. For the reasons I gave in the law cases, my opinion, notwithstanding the second argument, is unchanged. It seems to me they had interests to protect which gave them the

right to insist upon the clause requiring the advertisement, and that without it, as against them, there could be no dissolution.

A point not presented to the court at the former argument has been made now, viz. that the notice of 10 days, required by the charter, is simply for altering or amending the charter, and that dissolution, not being specifically mentioned, does not require the notice. As it seems to me, with reference to a corporation, the charter of which provides that the corporation shall have and enjoy succession in its corporate name for the period of 99 years, its dissolution before that time, at least so far as existing creditors are concerned, is an alteration of its charter, and that of an important character. The statute gives a right to a proper majority of the stockholders to change the charter as to the term of continuance of the corporation by a previous dissolution; but the manner in which all changes, including this, are to be effected, is fixed by the charter. Treating this argument as, in substance, upon this question, one for a new trial, with my convictions at first and now as to the meaning and effect of the charter, I must refuse it.

2. Does the bill make a case for injunction if the corporation exists? The substance of the bill is that the complainants are creditors with attachment; that the defendants have made an attempt to dissolve the corporation, and, unless prevented by injunction, will dissolve, to the irreparable injury of the complainants. There is no charge of fraud or damage, save by previous gross mismanagement, and what will be accomplished by dissolution. Unless the institution of an attachment suit gives a creditor the right to thus interfere to prevent a dissolution of an indebted corporation, he has none; for the authorities seem to be to the effect that a mere creditor has no right to prevent. The solicitors for the complainant relied upon the case of *Fisk v. Railroad Co.*, 10 Blatchf. 518. A careful study of that case leads me to the conclusion that it is distinguishable upon principle from this. There the party obtaining the injunction had already instituted a suit in equity, averring waste of the assets of the corporation, for the purpose of winding up the entire business of the corporation and distributing all its effects. The attempt to dissolve was, therefore, a defiance of the entire purpose of the jurisdiction with which the circuit court was seised. Here there is simply a suit at law with an attachment, the force of which, as carrying any privilege, is dependent upon a judgment. It is a proceeding of individual creditors to secure and collect individual debts. The dissolution would defeat the creditors' object, but is in no sense a defiance of the court's jurisdiction; and, as it seems to me, after thoroughly considering the Case of *Fisk*, the protection of a previously acquired jurisdiction of a particular subject-matter, viz. the winding up of the affairs of a corporation, and the distribution of its assets from being supplanted, was the ground of the injunction there, which here is wanting. While in each case the object of the suit is defeated, and the dissolution is the medium of ushering in a final administration of the corporation's estate, in the *Fisk Case* that administration was the sole object of the suit, and was, so to speak, circumvented by the dissolution and conse-

quent administration. The pending suit has a different object,—the collection of a debt,—and is only incidentally interrupted by a suit which, like bankruptcy or insolvency proceedings, absorbs, rather than circumvents, the object of the original suit. The Fisk Case is the only case which has been cited, or which I can find, which seems to sustain the injunction. I think that case inapplicable, and that, upon the doctrines of law, independent of that case, the creditors, who are complainants, upon the ground set forth in the bill, have no more right after an attachment suit has been commenced than they had before to enjoin a dissolution. The attaching creditors, by a dissolution of a defendant corporation, may lose all priority over the other creditors, but their right in equity to enforce their claim to their ratable portion to the corporation's assets by suitable proceedings, which is all that a court of equity can recognize with reference to a dissolution of the defendant corporation, would be left to them. The injunction is therefore refused.

BARNES v. UNION PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 155.

1. DECEIT—FALSE REPRESENTATIONS IN SALE OF LANDS—WHEN ACTION MAINTAINABLE.

In an action to recover damages for a false representation as to the ownership of land, whereby the vendee, having no knowledge of the title, was induced to purchase, the complaint need not allege that, at the time of making such statement, defendant knew it was not owner, nor that the representation was fraudulently made to induce the purchase.

2. SAME.

An action for damages for false representations as to title, made in a sale of lands, may be maintained, although the deed contained no covenants.

3. WRIT OF ERROR—REVIEW—DEMURRER.

On writ of error from a judgment sustaining a demurrer to an amended complaint, suggestions made by the defendant in error, based upon the answer to the original complaint, cannot be considered.

4. LIMITATION OF ACTIONS—PLEADING—DEMURRER.

Under the Colorado Code and practice, a general demurrer on the ground that the complaint fails to state a cause of action does not raise the question of the effect of the statute of limitations.

In Error to the Circuit Court of the United States for the District of Colorado.

At Law. Action by Thomas H. Barnes against the Union Pacific Railway Company to recover for false representations as to the ownership of land purchased by plaintiff. Judgment sustaining demurrer to amended complaint. Plaintiff brings error. Reversed.

Statement by SANBORN, Circuit Judge:

This writ of error was sued out to reverse a judgment sustaining a general demurrer to the plaintiff's amended complaint. In this complaint the plaintiff alleged: That the defendant was the grantee from the United States of a railroad land grant. That about September, 1881, the defendant represented to him that a certain tract of land in Boulder county, Cole., was a part of its railroad land grant, and that it was the sole owner thereof. That he trusted

to and relied on these representations, and in reliance thereon purchased the land of the defendant, paid it \$2,376.60 therefor, and took its deed thereof, without covenants. That the land was never in fact granted to the defendant. It was never in possession of it, and it never had any title to or right in it. But the plaintiff did not know this fact until 1890, because the defendant continued to assert that the land had been granted to it, and in a contest before the local land office obtained a decision favorable to its contention, in 1883, in a cause which was not finally settled adversely to it by the decision of the secretary of the interior until 1890. That the plaintiff has been compelled to and has bought the land of the United States, by exercising his right as a homesteader, under its laws, and has entirely lost the amount he paid the defendant. That he demanded the repayment of this amount before the commencement of this action, and that it was refused.

Charles M. Campbell, for plaintiff in error.

Willard Teller, (John M. Thurston, H. M. Orahoad, and E. B. Morgan, on the brief,) for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge, (after stating the facts.) A vendor who makes a false statement regarding a fact material to the sale, either with knowledge of its falsity, or in ignorance of its falsity, when from his special means of information he ought to have known it, and thereby induces his vendee to purchase, to his damage, is liable, in an action at law, for the damage the purchaser sustains through the misrepresentation, or to have the sale rescinded in a suit in equity, at the option of the purchaser. The boundaries, description, and title of the subject-matter of a sale are peculiarly within the range of the vendor's knowledge, or means of knowledge; and the purchaser has the right to presume that the positive statements regarding them, made by the vendor to induce the sale, are knowingly made, and to rely upon these representations. If such statements are false, and result in damage to the purchaser who acts on them, they are fraudulent, in the eye of the law, and actionable. This complaint states, in substance, that the defendant had a grant of land from the United States; that it represented to the plaintiff that the tract it gave him a deed of was a part of that grant, and that it was the sole owner of it; that plaintiff knew nothing about this title, but relied upon this statement, and was thereby induced to pay the defendant \$2,376.60 for its deed of the tract, when in fact it had no title, or color of title, to the land, it was not in possession of it, and the deed it delivered conveyed no right whatever. Here was a misrepresentation of a material fact, which was peculiarly within the defendant's knowledge. It was made with the intention to induce the purchase. It was acted on by the plaintiff, and the misrepresentation caused him serious damage. In the eye of the law the complaint alleges fraud on the part of the defendant, and damage directly caused by that fraud.

That there is no express allegation that the defendant knew the land was not within its grant, and that it was not the owner thereof, when it made this false representation, and no express allegation that it made the same fraudulently to induce the plaintiff to purchase, is not material. The misrepresentation was made

in apt time to induce the purchase, and did induce it. The inference is irresistible that this was its purpose. Every one is presumed to intend the natural consequence of his acts. The fact misrepresented was one that the defendant ought to have known, one that it had extraordinary facilities for knowing, one that a purchaser would naturally assume, and have the right to assume, the defendant did know, when it made positive statements concerning it; and the presumption is, from the allegations of this complaint, that it did have full knowledge that its statement was false at the time it was made. Even if it could be assumed that the defendant had no actual knowledge of the fact misrepresented, this would not relieve it from liability. It represented the fact to be, as of its own knowledge, that this land was within its grant, and that it was the owner of it. If it knew this to be false, that was fraud of the most positive kind. If it did not know whether its statement was true or not, the positive statement, of its own knowledge, that it was so, was a false and fraudulent statement that it did know this to be the fact; and, as this statement caused the same damage to the plaintiff, the defendant is equally liable in either event. In *Cooper v. Schlesinger*, 111 U. S. 148, 155, 4 Sup. Ct. Rep. 360, Mr. Justice Blatchford, delivering the opinion of the supreme court, declared that a statement recklessly made, without knowledge of its truth, was a false statement, knowingly made, within the settled rule. In *Kiefer v. Rogers*, 19 Minn. 32, 36, (Gil. 14,) where the defendant, in ignorance of the existence of a mortgage of \$2,250 on his property, had stated that no such incumbrance existed, and had thereby induced the purchaser to buy, the supreme court of that state said, speaking of the time when the representation was made:

"Although the defendant was then ignorant of the existence of the incumbrance thereon of the mortgage for \$2,250, there is no doubt but that, under the circumstances, his representation must be treated as fraudulent; as much so as if he had told a willful falsehood."

In *Slim v. Croucher*, 1 De Gex, F. & J. 518, where one sought to borrow money upon a lease for 98 years and a half, which the borrower represented he was entitled to, the lender required an intimation from the proposed lessor that he would grant such a lease. The lessor knowingly gave it for this purpose. The loan was made upon it. The lease was afterwards made, and mortgaged by the lessee to the lender. It turned out that the lessor had some time before made a lease of the same premises to the same lessee for the same term, and that the latter had, since the loan was made, assigned this lease for value; but, at the time the lessor gave the intimation, he did so innocently, because he had forgotten the former lease. The high court of chancery held that, although he did not know his intimation was false when he made it, it was a fraud, in the eye of the law, and he must repay to the lender the amount of his loan. In that case it was urged that the complainant had a complete remedy at law, and hence that the court of chancery had no jurisdiction. Lord Chancellor Campbell said:

"The defense set up in this suit is that there was a remedy at law, and that that is the only remedy competent to the plaintiff. Now, that there was a remedy at law I think is quite clear. Here was a misrepresentation made by the defendant of a fact which ought to have been within his knowledge. It was made with the intention of being acted upon. It was acted upon, and thereby a loss accrued to the plaintiff, and there is no doubt, in my mind, that an action would lie, and that it would be for a jury to assess the damages."

In *Litchfield v. Hutchinson*, 117 Mass. 195, 198, which was an action at law for damages for inducing one to purchase a horse by a false statement that he was sound, the supreme court of that state thus laid down the law on this subject:

"If one states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts to be true."

To the same effect are *Hazard v. Irwin*, 18 Pick. 96; *Savage v. Stevens*, 126 Mass. 207, 208; *Frost v. Angier*, 127 Mass. 212, 218; *Jewett v. Carter*, 132 Mass. 335, 337; *Cole v. Cassidy*, 138 Mass. 437, 438; *Masson v. Bovet*, 1 Denio, 69, 73; *Lockbridge v. Foster*, 4 Scam. 569, 573; *Joice v. Taylor*, 6 Gill & J. 54, 58; *McFerran v. Taylor*, 3 Cranch, 270; *Doggett v. Emerson*, 3 Story, 700, 732, 733; *Burrows v. Lock*, 10 Ves. 470, 475; *Ayre's Case*, 25 Beav. 522; *Rawlins v. Wickham*, 3 De Gex & J. 304, 313; *Sears v. Hicklin*, 13 Colo. 143, 152, 21 Pac. Rep. 1022; *Haight v. Hayt*, 19 N. Y. 464, 470, 471.

Nor is it a valid objection to the maintenance of this action that the misrepresentations related to the title to land, and the defendant used a deed without covenants as a means of perpetrating its fraud. That deed was worthless from its execution. It took nothing from the defendant. It vested nothing in the plaintiff. Its only effect was to assist the defendant in wrongfully obtaining plaintiff's money by false representations, and no principle of law or equity occurs to us that requires this court to give it the further effect of perpetuating the wrong, or preventing its redress. Why should a fraudulent misrepresentation of the soundness of a horse, or of his ownership, be ground for an action at law after the bill of sale has been delivered; why should a fraudulent misrepresentation as to boundaries, location, the timber upon, or any other material fact, relating to the description of land, be actionable at law after the deed has passed, although the damages are often small and partial,—and a fraudulent misrepresentation of title, where the purchaser has lost the entire consideration, as in this case, be remediless? When a sale of land is consummated by a deed, the parol agreements made by the parties during the negotiations are presumed to be merged in the deed. The deed is conclusive evidence of their contracts relative to the subjects there treated. Their parol contracts spoken of in the negotiations, even their representations made in good faith, may be conceded to be merged in the deed, and no action can thereafter be maintained upon them. But while their parol contracts and their representations made in good faith may be so merged, and not actionable, their fraudulent misrepresentations, their torts, are not. The obligations of honesty and good

faith, the obligations not knowingly or recklessly to falsely represent things material to the sale, to practice no fraud or deceit, which rested upon both parties during the negotiations, and the right of action for the tort that results from the breach of these obligations,—these are neither abrogated, merged, nor affected by the deed. They remain in full force, and may be enforced at law or in equity, regardless of it. In *Haight v. Hayt*, 19 N. Y. 464, 474, the plaintiff brought and maintained an action at law to recover damages for the false statement made by the vendor at the sale that one Delevan had no mortgage on the land. He was then asked if he would guaranty that Delevan had no mortgage, and he replied that he would not, and the purchaser accepted a deed without covenants. At the trial the judge was requested to charge that if Hayt refused to give covenants of title the action could not be sustained, and his refusal to give this request was assigned as error. The New York court of appeals sustained the ruling, and Judge Denio, in delivering the opinion of the court, cited *Doggett v. Emerson*, 3 Story, 700, 733, and *Masson v. Bovet*, 1 Denio, 72, and said:

"If the purchaser consents to waive the usual covenants he is none the less entitled to the exercise of good faith and honesty on the part of the vendor."

In *Wardell v. Fosdick*, 13 Johns. 325, 327, (decided in 1816,) the defendants, who had a deed, with full covenants, describing 450 acres of land that had no existence, made by one Corlies, sold and pretended to convey the same land to the plaintiff by a deed with covenants that they had done no acts to impeach the title, only, and at the same time assigned him the deed from Corlies. The plaintiff brought an action on the case for the deceit, and the court said:

"The evidence is sufficient to support the allegation of fraud against both the defendants, and there appears no legal objection to this form of action. Where the party has been induced by such a fraudulent representation to pay his money and accept a deed, it is immaterial whether any, or what, covenants are contained in the deed. The purchaser so defrauded has a right to treat the deed as a nullity, and may maintain an action on the case for the deceit."

In *Ward v. Wiman*, 17 Wend. 193, 196, (decided in 1837,) an action on the case for deceit was maintained against the vendor for making the false statement that the lands sold were free from incumbrances, although he had given a warranty deed with full covenants. Mr. Justice Nelson, subsequently of the supreme court, then chief justice of the supreme court of New York, delivered the opinion of the court, and said:

"The only question presented upon the pleadings in this case is whether an action on the case will lie against the defendant for a false and fraudulent representation made in respect to an incumbrance upon a lot of land sold and conveyed by him by a warranty deed to the plaintiff. * * * The principle of the case of *Wardell v. Fosdick*, 13 Johns. 325, appears to me to be decisive in favor of maintaining the action; and that, too, whether the deed contains a covenant or not. * * * It was attempted upon the argument to distinguish that case from the present upon the ground before mentioned,—that there was no such land in existence as the deed purported to convey; but it can in no wise be important to the decision how or in what way the title

falls or is embarrassed. The defect of title is the material point. Besides, the only reason that can be urged against sustaining this action is that the grantee should be compelled to look to his covenants. That reason applies with as much force in the case of a failure of title on account of the nonexistence of the land described as where the title falls by reason of some other defect."

In *Culver v. Avery*, 7 Wend. 380, an action on the case for deceit was maintained, based on the false affirmation that the premises were clear of any other incumbrances than the mortgage under which the sale was effected, and that the purchaser would require a perfect title. In *Whitney v. Allaire*, 1 N. Y. 305, (decided in 1848,) Gardiner, J., delivering the opinion of the court, reviews some of the decisions, and declares:

"For more than thirty years it has been the settled doctrine of the courts of this state that fraudulent representations in reference to the title of real estate, accompanied with damage, is a good ground of action, and that it is immaterial whether any, or what, covenants are contained in the deed of conveyance."

To the same effect are *Slim v. Croucher*, 1 De Gex, F. & J. 518, 523; *Clark v. Baird*, 9 N. Y. 183, 197; *Monell v. Colden*, 13 Johns. 402, 403.

To the effect that a suit in equity for the rescission of the sale or for a repayment of the money wrongfully obtained by false representations as to title may be maintained, notwithstanding that a deed has been delivered and accepted, are *Quesnel v. Woodlief*, 2 Hen. & M. 173; *Darling v. Osborne*, 51 Vt. 148; *Paine v. Upton*, 87 N. Y. 327; *Lockbridge v. Foster*, 4 Scam. 569, 573; *Prout v. Roberts*, 32 Ala. 427; *Crutchfield v. Danilly*, 16 Ga. 432; *Kiefer v. Rogers*, 19 Minn. 32, (Gil. 14); *Joice v. Taylor*, 6 Gill & J. 54, 58. Thus in *Lockbridge v. Foster*, 4 Scam. 569, 573, a bill in chancery was filed to set aside a deed with covenants of warranty, for the false representation that the vendor had good title to 240 acres of land described in the deed, when he had no title to four elevenths of 58 acres of it, and the court refused to set aside the deed, and decreed an allowance to the complainant of the difference in the value of the title as represented, and as it was in fact. The like relief was granted in *Quesnel v. Woodlief*, *Darling v. Osborne*, and *Paine v. Upton*, *supra*.

Finally, Mr. Justice Field, in delivering the opinion of the supreme court in *Andrus v. Refining Co.*, 130 U. S. 643, 648, 9 Sup. Ct. Rep. 645, cites with approval *Wardell v. Fosdick*, 13 Johns. 325, and lays down the rule as to false representations of title thus:

"Such representations by the vendor, as to his having title to the premises sold, may also be the ground of action where he is not in possession, and he has neither color nor claim of title under any instrument purporting to convey the premises, or any judgment establishing his right to them."

Such, according to this complaint, was the situation of this vendor. It was not in possession. It had neither claim nor color of title under any instrument purporting to convey the land to it, or any judgment establishing its right. To induce the plaintiff to buy, it falsely, and, in the view of the law, fraudulently, represented that it had a grant of this land from the government, and was the sole owner of it. The plaintiff acted on that representation,

and was thereby damaged. This is the statement of a good cause of action, and the demurrer should have been overruled.

The answer filed to the original complaint is not before this court, and the suggestions made by counsel for defendant in error, based upon it, cannot be considered. The amended complaint, subsequently filed, to which no answer has been interposed, and the demurrer to it, frame the only issue that can be considered on this writ of error.

The demurrer is upon the sole ground that the complaint does not state facts sufficient to constitute a cause of action. This general demurrer does not raise the question of the effect of the statute of limitations upon this action under the Code and practice in Colorado, and that question has not been considered. *Rev. St. U. S. § 914; Hexter v. Clifford, 5 Colo. 168, 172; Chivington v. Springs Co., 9 Colo. 597, 603, 14 Pac. Rep. 212; Hunt v. Hayt, 10 Colo. 278, 281, 15 Pac. Rep. 410; Jennings v. Rickard, 10 Colo. 395, 401, 15 Pac. Rep. 677; Cross v. Moffat, 11 Colo. 210, 212, 17 Pac. Rep. 771.* The judgment below is reversed, with costs, and with directions to allow the defendant to answer.

WAPLES-PLATTER CO. v. LOW, (HANCOCK, Intervener.)

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 139.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—FRAUD — RIGHTS OF CREDITORS—ATTACHMENT.

Plaintiff sued a merchant in the Indian Territory for a debt, (in which suit he subsequently had judgment,) and on the same day sued out an order of attachment, and placed it in the hands of the deputy marshal, whereby, under the statutes of Arkansas in force in the Indian Territory, (Mansf. Dig. § 325,) it became a lien on all defendant's property which had not then been assigned. On the same day the defendant made a general assignment, preferring certain creditors, and joined issue with the plaintiff on the allegations of the affidavit for attachment,—a mode of procedure allowed by the statutes of Arkansas. The assignee filed an interpleader, claiming the property under the assignment, and the two issues were tried together before a single jury. *Held*, that proof that defendant at the commencement of the action was about to sell or dispose of the property with the fraudulent intent to cheat, hinder, or delay his creditors was sufficient to justify a verdict against him. But to justify a verdict against the assignee plaintiff must also prove either that the order of attachment was delivered to the deputy marshal before the delivery and acceptance of the assignment, or that the assignee had knowledge of and took part in the defendant's fraud.

2. SAME—PRACTICE.

In such a case the better practice is to first and separately try to the court the issue between plaintiff and the assignor, arising under the attachment affidavit, and thereafter try the issue between plaintiff and the assignee. *Sanger v. Flow, 48 Fed. Rep. 152, 1 C. C. A. 56, followed.*

3. SAME—INSTRUCTIONS.

An instruction that the jury, before rendering a verdict for plaintiff, must find that the assignee was aware of or participated in defendant's fraud, was erroneous, in that such proof was not necessary to a verdict for plaintiff against the assignor only, nor even against the assignee, if the order of attachment was delivered to the marshal before the delivery and acceptance of the assignment; for in that event the assignee took the property subject to the lien of the attachment.

4. SAME—EVIDENCE OF FRAUD.

The preference by an assignor for the benefit of creditors of one creditor for \$1,500, knowing that he owed such creditor but \$500, with the intent to subsequently direct the application of the surplus \$1,000 to the payment of another debt, not preferred, is conclusive evidence against the assignor of the fraudulent character of the assignment. *Farwell v. Maxwell*, 34 Fed. Rep. 727, distinguished.

5. SAME—ASSIGNMENT AND ATTACHMENT—PRIORITY—BURDEN OF PROOF.

The burden of proof was on the assignee to establish the delivery and acceptance of the assignment before the order of attachment came to the hands of the marshal; and, it appearing that the assignment was not acknowledged or filed until after that time; that the assignee was not in the town where it was drawn and signed on the day of its execution; and that the only delivery (which seems to have been before the assignment was acknowledged, and before the order of attachment was delivered) was to an attorney at law, whose power to bind the assignee by his receipt and acceptance of it is not established,—such evidence is not such conclusive proof of the priority of the assignment as to render the erroneous instructions immaterial.

6. ATTACHMENT—WHEN AUTHORIZED—DEFAUDING CREDITORS.

Where, under *Mansf. Dig. § 303*, which provides that a plaintiff may have an attachment when the defendant has sold, conveyed, or otherwise disposed of his property with the fraudulent intent to cheat, hinder, or delay his creditors, or is about to sell, convey, or otherwise dispose of it with such intent, the plaintiff alleges only that the defendant is about to sell or convey his property with such intent, an instruction that the plaintiff must prove that the defendant had, at the date of issuing the attachment, sold or disposed of his property with such fraudulent intent is erroneous, for proof that he was about to do so with such intent is sufficient.

In Error to the United States Court in the Indian Territory.

Action by the Waples-Platter Company against Charles H. Low to recover a sum of money. The action was commenced by an attachment, and one J. S. Hancock intervened, claiming the property as assignee of Low for the benefit of creditors. Issue was joined on the questions of the validity of the attachment, and its priority to the assignment, and the verdict and judgment were against the plaintiff and in favor of both the defendant and the assignee. Plaintiff brings error. Reversed.

Statement by SANBORN, Circuit Judge.

This is a writ of error to reverse a judgment against the plaintiff in error in favor of the defendant, Low, upon the issue tendered by an affidavit for attachment made by the plaintiff, and in favor of the interpleader, Hancock, upon the issue tendered by his interplea in the attachment suit. The defendant, Low, was a merchant in the Indian Territory, and the plaintiff was his creditor. On January 12, 1891, the plaintiff brought suit to recover his claim, and subsequently had judgment against the defendant for its amount. On the same day that he brought this suit he sued out an order of attachment, and placed it in the hands of the deputy marshal at 12:20 P. M., so that it then became a lien for the amount of plaintiff's claim on all the property of the defendant, Low, here in question that had not at that time been assigned to the intervener. *Mansf. Dig. § 325; 26 St. at Large, p. 95.* On the same day the defendant, Low, made a general assignment to the interpleader, which preferred certain of his creditors. Whether the assignment was delivered to and accepted by the interpleader before or after the order of attachment was delivered to the marshal was one of the disputed questions submitted to the jury. The statutes of Arkansas, in force in the Indian Territory, permit the defendant to contest the rightfulness of the attachment by controverting upon oath the allegations of the affidavit therefor, and allow any third

person claiming the property attached to file an interplea in the attachment proceeding setting forth his claim to the property, and to have it there determined. The defendant accordingly joined issue with the plaintiff on the allegations of the affidavit for attachment, and the interpleader, Hancock, filed his interplea, claiming the property under the assignment, and the two issues thus formed were tried together before a single jury, who returned a verdict against the plaintiff on both. The errors assigned relate chiefly to the charge of the court to the jury, and are stated and considered in the opinion.

A. G. Moseley, for plaintiff in error.

L. P. Sandels, (J. M. Hill, on the brief,) for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge, (after stating the facts.) There were three questions that under some phases of this case it might be necessary for the jury to determine in this action. They were: (1) Was the defendant, Low, about to sell, convey, or otherwise dispose of his property with the fraudulent intent to cheat, hinder, or delay his creditors at the commencement of the action? (2) Was the order of attachment delivered to the deputy marshal before or after the assignment to the interpleader was delivered and accepted? (3) Did the interpleader have any knowledge of or part in the defendant's scheme to cheat, hinder, or delay, his creditors (if he had any such scheme) before he accepted the assignment? If the jury answered the first question in the affirmative, the plaintiff would be entitled to a verdict against the defendant, regardless of either of the others; but an affirmative answer to this question would not authorize a verdict or judgment against the interpleader unless an affirmative answer was also given to one of the two other questions presented. In other words, to warrant a verdict against the interpleader, the jury must have found not only that the defendant was about to sell, convey, or otherwise dispose of his property with the fraudulent intent to cheat, hinder, or delay his creditors when the action was commenced, but they must also have found, either that the order of attachment was delivered to the marshal before the delivery and acceptance of the assignment had been completed, or that the interpleader before or at the time of his acceptance of it participated in or was aware of the intended fraud.

Thus it will be seen that the issues between the plaintiff and defendant and those between the plaintiff and the interpleader were not identical, and to prevent confusion and error it was imperatively necessary that the court should keep the broad distinction between them clearly in mind, and should carefully and distinctly present it to the jury in its charge. The practice of trying these issues together and to the same jury is deprecated. The better practice is to first and separately try to the court the issue between the plaintiff and defendant arising under the attachment affidavit. *Sanger v. Flow*, 1 C. C. A. 56, 61, 48 Fed. Rep. 152; *Holliday v. Cohen*, 34 Ark. 707, 716. The difficulty, confusion, and error that are liable to result from a trial of both issues together to the same jury are well illustrated in this case.

Three of the instructions given to the jury, and here assigned as error, were as follows:

"Third. If the jury believe from the evidence that the plaintiff's attachment was levied upon the property assigned before the execution and delivery of the deed of assignment to either the assignee or his agent, and before the acceptance thereof by the assignee or his agent, and if you shall also believe from the evidence that the defendant, Low, had at the date of the issuing of such attachment sold, conveyed, or otherwise disposed of his property, or was about to sell, convey, or otherwise dispose of his property, with the fraudulent intent to cheat, hinder, and delay his creditors, then you will find for the plaintiff."

"Fifth. The court instructs the jury that before you can find the issues for the plaintiff as to the property attached, which is claimed by the interpleader, Hancock, the plaintiff must have established by the greater weight of the testimony not only that the defendant, C. H. Low, made the deed of assignment with the fraudulent intent to cheat, hinder, and delay his creditors, but that the assignee, J. S. Hancock, knew of said fraud, or that he participated therein.

"Sixth. The court instructs the jury that, although they may believe from the evidence that C. H. Low was indebted to Colbert La Flore in the sum of five hundred dollars only, and that he intentionally preferred said Colbert La Flore for the sum of one thousand dollars in excess thereof, with the fraudulent intent to appropriate the same to his own use, yet, unless the jury shall also believe from the evidence that the assignee or the preferred creditors knew of said Low's fraudulent intention, or participated therein, then you should find for the interpleader, Hancock."

The third instruction we will not stop to criticise, but the fifth and sixth clearly contradict it, and are obviously erroneous. They are too broad. It is true that, if the jury found that the order of attachment was not delivered to the marshal until after the assignment was delivered to and accepted by the interpleader, they must, in that event, have found that the interpleader knew of or participated in the defendant's fraudulent scheme before they could find for the plaintiff upon the issue between him and the interpleader. *Emerson v. Senter*, 118 U. S. 3, 6 Sup. Ct. Rep. 981; *Baer v. Rooks*, 50 Fed. Rep. 898. But no such finding was required to warrant them in returning a verdict for the plaintiff against the defendant. The only issue there was whether or not the defendant was at the commencement of the action about to sell, convey, or otherwise dispose of his property with the fraudulent intent to cheat, hinder, or delay his creditors. The fact that the defendant in his assignment preferred Colbert La Flore for \$1,500, when he knew he owed him but \$500, with the intent to subsequently direct the application of the surplus \$1,000 to the payment of another debt, not preferred by the assignment, was conclusive evidence against Low of the fraudulent character of this assignment. It may be admitted that, where an assignor by mistake or through ignorance or uncertainty as to his liability erroneously but in good faith states the amount of his liability to some creditor too high, the assignment may yet be sustained, (*Farwell v. Maxwell*, 34 Fed. Rep. 727;) though it will be noticed that the assignment in the case just cited was not one giving preferences, and stands upon very different ground from a preferential assignment like that in the case at bar, where the assignee is required by statute to give a bond conditioned that he will "sell the property to the best ad-

vantage, and pay the proceeds thereof to the creditors mentioned in said assignment according to the terms thereof." Mansf. Dig. § 305; *Rice v. Frayser*, 24 Fed. Rep. 460, 464. In this case, however, the defendant admitted on the trial that he knew he owed Colbert La Flore but \$500 when he preferred him in his assignment for \$1,500, and his only excuse was that he secretly intended thereby to secure the payment not only of the \$500 he owed Colbert La Flore, but also of \$1,000 that he owed to one William La Flore, who was in no way connected in business with Colbert. If upon such a state of facts such a preference is a lawful exercise of the power of the assignor, no reason is perceived why a preferential assignment securing a single creditor to whom the defendant owes but a dollar for an amount equal to the entire value of his assets might not be sustained upon the testimony of the assignor, subsequently given, declaring to what creditors, and to what amounts, he intended to apply the proceeds of his property.

The effect of this state of facts upon the assignee will not now be considered, because this case must be retried, and a different state of facts may then be presented. It is sufficient to say that the assignment is not void on its face, since its vice does not there appear, and hence the assignee may have received and accepted it in good faith without notice of the intended fraud of the assignor; but, so far as the assignor is concerned, when he knowingly prefers a creditor in his assignment for an amount far in excess of the debt he actually owes him, for the express purpose of creating a secret trust in the surplus above his debt, to the end that he may subsequently dispose of it according to his own secret intention, which he may change at any moment, he thereby presents conclusive evidence of his fraudulent intent in making the assignment upon every principle applicable to such instruments. Nothing is better settled than that the assignment in this class of cases, where preferences are permitted, as at common law and by the statutes of Arkansas, must definitely fix the rights of the parties beneficially interested, and that nothing shall be left to the discretion or further control of the assignor. Thus in *Haydock v. Coope*, 53 N. Y. 68, where a debtor made a preferential assignment, and his son at the same time borrowed of a class of the preferred creditors a large portion of the amount secured to them on a credit of five years, the court treated the son's control of the proceeds of the property as that of the father, and held the assignment void, because it practically left so large a portion of the proceeds under the debtor's control, and declared that—

"To hold that a debtor may exercise his right of giving preferences among his creditors so as to secure to himself the future control of the property assigned, or its proceeds, would give facilities for the grossest frauds, and utterly defeat the ends for which assignments have been sustained, which are the application of the property to the payment of their debts."

In *Averill v. Loucks*, 6 Barb. 470, where a preferential assignment provided that the debts should be paid in the order provided in schedules to be filed within 60 days after its date, Judge Paige declared it void, because it did not fix definitely the rights of the par-

v.54p.no.1—7

ties, but reserved to the assignor the control over the proceeds of his property. To the same effect are *Pierson v. Manning*, 2 Mich. 444, 450; *Grover v. Wakeman*, 11 Wend. 187; *Lukins v. Aird*, 6 Wall. 78; *Mackie v. Cairns*, 5 Cow. 547, 580; *Seaving v. Brinkerhoff*, 5 Johns. Ch. 329, 333; *Barney v. Griffin*, 2 N. Y. 365, 371; *Gazzam v. Poyntz*, 4 Ala. 374, 380; *Wiswall v. Ticknor*, 6 Ala. 179, 185. To give judicial sanction to an assignment making such a preference as this in question would enable assignors to force compromises with their unpreferred creditors by presenting exaggerated statements of their preferred liabilities, would permit the creation and execution of secret trusts, and would enable the assignors to control at will the proceeds of their property after assignments had been made; and these are the very vices in assignments against which courts have constantly guarded, and must continue to guard, the public. It is plain, therefore, that, so far as the issue between plaintiff and defendant was concerned, there was error in the fifth instruction, which charged the jury that, before they could render a verdict for the plaintiff, they must find that the interpleader was aware of or participated in the defendant's fraud. No such finding was required to warrant a verdict upon that issue.

Not only this, but no such finding was requisite to warrant a verdict even against the interpleader in the event that the jury found that the order of attachment was delivered to the marshal before the assignment was delivered and accepted, and that question was submitted to them to determine. In that event the attachment became a first lien upon the property, and any assignee taking the property of the debtor under a subsequent assignment took no more than the debtor had, and that was the property subject to this lien. The assignee's guilt or innocence, knowledge or ignorance of the debtor's fraudulent acts or purposes could not give him more. *Bergman v. Sells*, 39 Ark. 100. These views of the issues tried were fairly presented by the evidence, and were vital to the support of the plaintiff's contention. He was entitled to have the law applicable to them fairly presented to the jury, while by these instructions it was entirely withdrawn from them.

It is insisted by counsel for defendants in error that the evidence was conclusive that the assignment was delivered and accepted before the order of attachment was placed in the hands of the marshal, and hence that these instructions worked no prejudice to the plaintiff and constitute no reversible error. The burden of proof was on the interpleader to establish the delivery and acceptance of the assignment before the order of attachment came to the hands of the marshal. The evidence found in the bill of exceptions is far from furnishing conclusive proof of this fact. Indeed, it appears from it that the assignment was not acknowledged or filed until after that time; that the assignee was not in the town where it was drawn and signed on the day of its execution; that the only delivery (which appears to have been before the assignment was acknowledged, and before the order of attachment was delivered) was to an attorney at law, whose power to bind the assignee by his receipt and acceptance of it is established by no proof. These circumstances were

certainly competent, and somewhat persuasive, evidence that there was no competent delivery and acceptance of the assignment until after the attachment was in the hands of the marshal.

The giving of the following instruction to the jury is another error assigned:

"Second. The court instructs the jury that the burden of proof in this case is on the plaintiff, and, in order that he recover, he must have established by the greater weight of the testimony that the defendant, O. H. Low, had, at the date of the issuing of the plaintiff's attachment herein, sold, conveyed, or otherwise disposed of his property with the fraudulent intent to cheat, hinder, and delay his creditors."

Section 309 of Mansfield's Digest, under which the order of attachment was issued, provides that the plaintiff may have an attachment in an action for the recovery of money in certain cases,—two of which are where the defendant—

"(7) Has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors; or (8) is about to sell, convey, or otherwise dispose of his property with such intent."

The affidavit for attachment alleged that—

"Said defendant, Charles H. Low, is about to sell, convey, or otherwise dispose of his property, or suffer or permit it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors."

The second instruction was erroneous for two reasons: First. The plaintiff had not alleged, and consequently was not required to prove, that the defendant *had* sold, conveyed, or otherwise disposed of his property with the fraudulent intent at the time of the commencement of the action. His ground of attachment was that he was then *about* to sell, convey, or otherwise dispose of it with such intent. Second. The fraudulent intent the statute requires the plaintiff to establish is to cheat, hinder, or delay his creditors, while the instruction imposed upon him the burden of proving an intent to cheat, hinder, and delay his creditors.

There are other assignments of error, but it is unnecessary to notice them. The result is that, upon the trial of an issue between the plaintiff and defendant, raised by the denial by the latter of the plaintiff's allegation in his affidavit for attachment that the defendant was at the commencement of the action about to sell, convey, or otherwise dispose of his property with the fraudulent intent to cheat, hinder, or delay his creditors, the knowledge or participation of an assignee of the defendant for the benefit of his creditors in his fraud is not material. An assignment whereby an insolvent assignor knowingly prefers a creditor for an amount in excess of his indebtedness to him with the secret intent to cause the surplus above his actual indebtedness to such creditor to be subsequently applied to the payment of a debt he owes to another creditor, who is not secured by the assignment, is conclusive evidence of the assignor's intent thereby to cheat, hinder, or delay his unsecured creditors; and where the lien of an attaching creditor becomes fixed upon the property of the debtor before the delivery and acceptance of an assignment preferring creditors, made by him with the fraudu-

lent intent to cheat, hinder, or delay his creditors, in the trial of the assignee's right to the property under the assignment as against the lien of the attaching creditor, it is not material whether the assignee was aware of or participated in the debtor's fraud. In the charge of the court these rules were disregarded, and the judgment below is reversed, with costs, and with instructions to grant a new trial.

NATIONAL BANK OF COMMERCE v. TOWN OF GRANADA.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 138.

1. MUNICIPAL CORPORATIONS—BONDS—VALIDITY.

Under Mills' Ann. St. Colo. § 4431, the proper method of procedure in the issuing of town bonds to fund a floating debt, as provided for in section 4541, is by an ordinance of the board of trustees, ordering an election.

2. SAME—PUBLICATION OF ORDINANCE.

Laws Colo. 1887, p. 445, § 1, provides that all town ordinances shall be recorded in a book kept for that purpose, and authenticated by the presiding officer of the board and the clerk, and all by-laws of a general or permanent nature shall be published in some newspaper, and such by-laws and ordinances shall not take effect until the expiration of five days after they are so published, but the book of ordinances provided for in the act shall be prima facie evidence of publication. *Held*, that an ordinance calling an election to authorize the funding of the floating debt of a town, which was passed, but not recorded or published, never went into effect, and that bonds authorized by such an election were void. 48 Fed. Rep. 278, affirmed.

3. SAME—ESTOPPEL.

A recital in such bonds that they are issued under the ordinance does not estop the town from showing that the ordinance was never published, and is therefore void, since neither the mayor nor clerk, who signed the bonds, have any duty in relation to publishing ordinances, or determining when they had been published according to law. 48 Fed. Rep. 278, and 44 Fed. Rep. 262, affirmed. *Dixon Co. v. Field*, 4 Sup. Ct. Rep. 315, 111 U. S. 83, followed.

In Error to the Circuit Court of the United States for the District of Colorado.

Action by the National Bank of Commerce of Kansas City, Mo., against the town of Granada, state of Colorado, to recover on certain town bonds. The circuit court gave judgment for plaintiff. 41 Fed. Rep. 87. A new trial was thereafter granted, (44 Fed. Rep. 262,) and judgment thereon given for defendant, (48 Fed. Rep. 278.) Plaintiff brings error. Affirmed.

Statement by CALDWELL, Circuit Judge:

This action is founded on interest coupons cut from bonds purporting, on their face, to have been issued by "the city of Granada, in the county of Bent, state of Colorado."

The following is a copy of one of the bonds:

"\$500.	State of Colorado.	\$500.
"Number	City Funding Bond	Number
9	of the	9
	City of Granada.	

"The city of Granada, in the county of Bent, state of Colorado, acknowledged itself indebted to the bearer in the sum of five hundred dollars, payable fifteen years after the first day of December, 1887, redeemable after five

years at the pleasure of the city, with interest at the rate of eight per centum per annum, payable semiannually on the first day of June and the first day of December, in each year, at the treasury of the city, or at the National Park Bank, New York, on presentation and surrender of the proper coupons hereto attached.

"This bond is issued under an ordinance of the city council of the city of Granada, adopted on the 11th day of November, 1887, to provide for the issuing and paying of bonds of the city of Granada, for the purpose of funding and paying the existing debt of the city of Granada.

"W. H. Cale, Mayor of Granada.

"Ed. Walsh, City Clerk.

"Registered:

"Darwin P. Kinsley, [Seal.]

"Auditor of the State of Colorado.

"Recorded:

"E. S. Wiggins,

"Treasurer of the City of Granada."

The following is a copy of one of the coupons:

"20. \$20. 20.

"The city of Granada, in the county of Bent, in the state of Colorado, will pay the bearer on the first day of December, 1902, at the city treasury or at the National Park Bank, New York, twenty dollars, being six months' interest on bond No. 9.

W. H. Cale, Mayor.

"Ed. Walsh, City Clerk."

This cause was tried below on an agreed statement of facts, which, in the view the court takes of the case, it is not needful to set out in full.

The town of Granada, styled, by mistake, "City of Granada," in the bonds, on the 4th day of November, 1887, entered into a contract with Thomas Doak, whereby the latter, for the consideration of \$36,000, to be presently paid in warrants on the town treasury, undertook to build a water reservoir of the capacity of 1,000 barrels, the water to be obtained from the Arkansas river by means of a ditch, for the purpose of supplying the town with water for domestic and other purposes. This contract contained a stipulation that the town should immediately fund the warrants upon its treasury into bonds bearing 8 per cent. interest, payable semiannually. On November 11, 1887, the board of trustees of the town passed the following ordinance:

"Be it ordained by the mayor and board of trustees of the incorporated town of Granada, Colorado:

"Section 1. That there be submitted to the vote of the qualified electors of the incorporated town of Granada, Colorado, who shall have paid taxes upon property assessed to them in said incorporated town for the last preceding year, the question whether the board of trustees of said incorporated town shall issue bonds of such incorporated town under the provisions of the act of the legislature of the state of Colorado, being an act entitled 'An act to enable the several cities and towns of the state to fund the floating indebtedness in exchange, at par, for the warrants of said incorporated town of Granada, at par, issued prior to the date of the first publication of a notice heretofore published in this behalf, in accordance with a petition heretofore presented to the said board of trustees, signed by fifty of the electors of said incorporated town of Granada during the preceding year. Such question to be submitted at a special election hereafter provided.

"Sec. 2. That the foregoing proposition set out in section one of this ordinance be submitted, as aforesaid, at a special election to be held in the incorporated town of Granada, Colo., at the usual place of holding elections, on the 12th day of December, 1887, between the hours of 1 o'clock P. M. and 4 o'clock P. M. of the same day.

"Sec. 3. That upon the return of the canvass of the vote of said election according to law, if it shall be found that a majority of the electors of said incorporated town of Granada, Colo., who shall have paid taxes on property assessed to them in said town the preceding year, shall have voted in favor of said proposition, and the result of said election be so declared, then, and in that event, the mayor and clerk of said incorporated town of Granada, Colo.,

are hereby authorized and directed to exchange bonds of said incorporated town to the amount of thirty-six thousand dollars, and no more, at par, for and on account of certain warrants in the amount heretofore issued, to one Thomas Doak, in payment for the construction and operation of waterworks within said incorporated town of Granada, as per the ordinance heretofore passed in that behalf, and the said mayor and clerk are hereby authorized and directed, upon the proper surrender and exchange of said warrants, to execute and deliver said bonds.

"Sec. 4. That notice of said election be published according to said law."

It is admitted that this "alleged or supposed ordinance was never recorded in the town ordinance book, never signed by the mayor or attested by the clerk, and was never published in any paper, or in any form or manner whatever."

An election was held on the 12th day of December, 1887, and it was declared that the proposition to fund the floating debt of the town was carried, and thereupon the mayor and clerk of the town, by order of the board of trustees, executed and delivered to Doak \$36,000 in bonds in exchange for the \$36,000 in town warrants previously issued to him.

The waterworks were never constructed, nor any part thereof. The plaintiff purchased the bonds from which the coupons in the suit were cut, for value, before maturity. The act of the legislature under which the board of trustees acted reads as follows:

"It shall be [the] duty of the city council or board of trustees of any city or town having a floating indebtedness exceeding (10) ten thousand dollars, upon a petition of fifty electors of said city or town, who shall have paid taxes upon property assessed to them in said city or town in the preceding year, to publish for the period of thirty days, in a newspaper published within said city or town, a notice requesting the holders of the warrants of such city or town to submit, in writing, to the city council or board of trustees, within thirty days from the date of the first publication of such notice, a statement of the amount of warrants of such city or town, with accrued interest thereon, which they will exchange at par for the bonds of such city or town, to be issued under the provisions of this act, taking such bonds at par. It shall be the duty of such city council or board of trustees, at the next general election occurring after the expiration of thirty days from the date of the first publication of the notice aforesaid, upon the petition of fifty of the electors of such city or town, who shall have paid taxes upon the property assessed to them in said city or town the preceding year, to submit to the vote of qualified electors of such city or town who shall have paid taxes upon the property assessed to them in said city or town, the preceding year, the question whether the city council or board of trustees shall issue bonds of such city or town, under the provisions of this act, in exchange, at par, for warrants of such city or town, at par, issued prior to the date of the first publication of the aforesaid notice, or they may submit such question at a special election, which they are hereby empowered to call for that purpose, at any time after the expiration of the thirty days from the date of the first publication of the notice aforesaid, on the petition of fifty qualified electors as aforesaid; and they shall publish, for the period of at least thirty days immediately preceding such general or special election, in some newspaper published in such city or town, a notice that such question will be submitted to the duly-qualified electors, as aforesaid, at such election. The treasurer of the county in which such city or town is located shall make out and cause to be delivered to the judges of election of each election precinct, prior to said election, a certified list of the taxpayers of such city or town, who shall have paid taxes upon property assessed to them in the preceding year, and no person shall vote upon the question of funding the city or town indebtedness unless his name shall appear upon such certified list, nor unless he shall have paid all city or town taxes assessed against him in such city or town the preceding year. If a majority of the votes lawfully cast upon the question of such funding of the city or town indebtedness shall be for funding of such indebtedness, the city council or board of trustees may issue to any person or corporations holding any city or town warrant or warrants issued prior to the date of the first publication of the aforesaid notice coupon

bonds of such city or town in exchange therefor, at par. No bonds shall be issued of less denomination than \$100, and, if issued for a greater amount, then for some multiple of that sum, and the rate of interest shall not exceed eight per cent. per annum, the interest to be paid semiannually at the office of the city or town treasurer, or in the city of New York, at the option of the holders thereof. Such bonds to be payable at the pleasure of the city or town after five years from the date of their issuance, but absolutely due and payable fifteen years after the date of issue. The whole amount of bonds issued under this act shall not exceed the sum of the city or town indebtedness at the date of the first publication of the aforementioned notice; and the amount shall be determined by the city council or board of trustees, and a certificate made of the same, and made part of the records of the city or town, and any bonds issued in excess of said sum shall be null and void; and all bonds issued under the provisions of this act shall be registered in the office of the state auditor, to whom a fee of ten cents shall be paid for recording each bond." Section 4541, Mills' Ann. St. Colo.

The cause was first tried before Judge Phillips, who gave judgment for the plaintiff upon the grounds stated in his opinion. 41 Fed. Rep. 87. A new trial was granted for reasons stated in his opinion, reported in 44 Fed. Rep. 262. The cause was last tried before Judge Parker, who rendered judgment for the defendant, (48 Fed. Rep. 278,) and the plaintiff sued out this writ of error.

Elijah Robinson, for plaintiff in error.

James B. Belford and Alvin Marsh, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge, (after stating the facts.) Unwonted haste and great irregularities characterized all the proceedings leading up to the issue of the bonds in suit. The town received no consideration for them; and if they had remained in the hands of Doak, to whom they were originally issued, he could not have recovered upon them. Whether the plaintiff, as a purchaser for value, without notice of the frauds which would avoid the bonds in the hands of Doak, is in any better position, turns upon the question whether the officers of the town, who issued them, had any lawful authority to do so. The act of the legislature is silent as to the mode of carrying into effect the powers conferred by it on the board of trustees.

We think the principal and vital question in this case is whether the powers thus conferred on the board of trustees may be exercised without an ordinance containing the usual and necessary provisions to guide, control, and bind the town and its officers, and the public, in the execution of the funding scheme, and to protect all persons in their rights acquired thereunder. We entertain no doubt but that the appropriate mode for the town to proceed under the act in question is by ordinance of its board of trustees. The proceeding involves the appointment and holding of an election, and the conversion of a nonnegotiable floating debt into the form of negotiable bonds drawing a high rate of interest, payable semiannually, and which must run 5, and may run 15, years. A measure requiring an expression of opinion from the voters of the town, at the ballot box, and involving such large values, and of so much interest to the taxpayers of the town and the holders of its securities, through so many years, ought not to be carried into effect except by the most

solemn and deliberate mode of proceeding known to the law for giving expression to the corporate will. That mode is by ordinance. This is the mode that is prescribed by the statute of Colorado, which declares:

"Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this act, and such as shall seem necessary and proper to provide for the safety, preserve the health, and promote the prosperity, and improve the morals, order, comfort, and convenience, of such corporation, and the inhabitants thereof." Section 4431, Mills' Ann. St. Colo.

The statutes of the state which authorize the issue of refunding bonds, (Id. § 4548,) the creation of new indebtedness, (Id. § 4403, 6th subd.,) and the appropriation of aid to public libraries, (Id. 76th subd.,) require, in terms, that the same shall be done by ordinances. We think the board of trustees of this town had a correct conception of the proper mode of proceeding when they passed the ordinance in question.

A statute of the state provides:

"All ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose, and be authenticated by the signature of the presiding officer of the council or board of trustees and the clerk; and all by-laws of a general or permanent nature, and those imposing any fine, penalty, or forfeiture, shall be published in some newspaper published within the limits of the corporation, or, if there be none such, then in some newspaper of general circulation in the municipal corporation; and it shall be deemed a sufficient defense to any suit or prosecution for such fine, penalty, or forfeiture to show that no such publication was made: provided, however, that if there is no newspaper published within, or which has no general circulation within, the limits of the corporation, then and in that case, upon a resolution being passed by such council or board of trustees to that effect, such by-laws and ordinances may be published by posting copies thereof in the public places to be designated by the board of trustees, within the limits of the corporation; and such by-laws and ordinances shall not take effect and be in force until the expiration of five days after they have been so published or posted. But the book of ordinances herein provided for shall be taken and considered in all courts of this state as prima facie evidence that such ordinances have been published as provided by law." Section 1, Laws 1887, p. 445.

It is admitted that the ordinance in question was not "recorded in a book kept for that purpose," and was not "authenticated by the signature of the presiding officer of the * * * board of trustees and the clerk," and "was never published in any paper, or in any form or manner whatever."

It is obvious to our minds that the ordinance in this case was of a "general or permanent nature," and as such could "not take effect and be in force until the expiration of five days" after its publication. It provided for an election, and therefore concerned every legal voter of the town. It affected every taxpayer, whether a voter or not. It affected the creditors of the town, present and future. It involved the making and execution of contracts, and various other matters relating to funding the floating indebtedness of the town. If such an ordinance is not of a "general or permanent nature," it would be extremely difficult to suggest one that is.

The provision of the act that such ordinances shall not take effect

or be in force until they are published in the mode provided by the act is mandatory. This ordinance, never having been published, never went into effect. Not being in force, it conferred no authority on the board of trustees, or any officer of the town, to do any act under it; and no one could acquire any right based on it, or on any act of the officers of the town assuming to act under it. It had no more legal effect than if it had never been passed by the board of trustees. 1 Dill. Mun. Corp. §§ 331-334, and notes.

But the learned counsel for the plaintiff in error contends that the recital in the bonds that they "are issued under an ordinance" of the town relieves the plaintiff from the burden of showing that the ordinance was published, and estops the defendant from showing that it was not.

It has never yet been held that a false recital in a bond can make that a law which never was a law. When an ordinance has been duly enacted, and has taken effect, authorizing the officers of a town to issue its negotiable bonds upon certain precedent requirements or conditions, such as a petition of a given number of taxpayers, or a majority vote or other like conditions, and the officers issuing the bonds are the appointed tribunal to decide whether there has been a compliance with such precedent conditions, and the bonds issued recite that they are issued in pursuance of such ordinance, it is probably true that such recital, in favor of bona fide purchasers for value, would import a full compliance with the requirements of the ordinance, and preclude inquiry as to whether the precedent conditions were performed before the bonds were issued. But that doctrine has no application to this case. Here there was no ordinance in force under which the board of trustees, or any officer of the town, could perform any act. The authority to issue the bonds never attached, on any terms or conditions. The action of the mayor and clerk was not simply irregular, but was without the sanction of any law. The point was never reached at which they could lawfully do any act under the supposed ordinance. It is a case of a total want of authority to do the act upon any conditions, and not a case where the authority to do the act existed, but the conditions precedent to the exercise of the authority were not observed.

The statute which provides that ordinances shall not take effect until they are published is a public statute, of which all persons are bound to take notice. The statute makes the recording of an ordinance in the ordinance book prima facie evidence that it has been published according to law. But this ordinance was not recorded, nor authenticated as an ordinance by the signatures of the mayor and clerk, as required by law. Moreover, it is not shown that the mayor and clerk, or either of them, had any duty or function to perform in relation to publishing ordinances, or determining when they had been published according to law. The determination of this fact, when it becomes material, and is contested, and the ordinance has not been recorded, is, under the statute, a matter for judicial inquiry.

The statute itself provides that it shall be a sufficient defense to any suit or prosecution for a fine, penalty, or forfeiture to show

that the ordinance imposing it was not published as required by the statute, and it is obvious that the same defense must prevail against any civil right grounded upon an ordinance which was never published, no matter by or against whom such right is asserted. The plaintiff was bound to know, independently of the recital in the bond, that there was such an ordinance in existence. This fact once established, it might well assume that the recital was sufficient evidence that the conditions prescribed by the ordinance for issuing the bonds had been complied with. It was as much the right and duty of the plaintiff to determine this question as it was of the clerk and mayor, and the determination of either, in any form, would not bind or conclude the town. It is only when officers are invested by law with the authority to determine or adjudicate upon the fact that their recital operates as an estoppel.

If the recital in this case had stated, in terms, that the ordinance had been duly published, it would not have estopped the town, because neither the mayor nor the clerk, nor both together, are invested with the authority to determine that question, and anything they might say or certify to on the subject, save as witnesses in court, would not be evidence anywhere, or bind any one. "If," says the supreme court, "the officers authorized to issue the bonds upon a condition are not the appointed tribunal to decide the fact which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of bonds depends upon an estoppel claimed to arise upon the recital of the instrument, the question being as to the existence of the power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals, and to make them conclusive. The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject." *Dixon Co. v. Field*, 111 U. S. 83, 94, 4 Sup. Ct. Rep. 315; *Sutliff v. Lake County Com'rs*, (Oct. term, 1892,) 13 Sup. Ct. Rep. 318.

The law does not refer the public to these officers, or to either of them, for information as to the publication of town ordinances; and their statements upon that subject have no more significance or binding force than those of any other citizen of the town.

The view taken of the question renders it unnecessary to consider other defenses to the bonds set up and relied on by the defendant in error. The judgment of the court below is affirmed.

UNITED STATES v. McCOY et al.¹

(District Court, S. D. Alabama. January 21, 1893.)

1. PLEADING—AMENDMENT—ADDING INDIVIDUAL TO JOINT CLAIM.

When suit for a trespass committed by a partnership is brought against individuals as doing business under the firm name, it is not permissible to amend by adding a claim against one partner alone.

2. SAME—SURPLUSAGE.

When a suit for a trespass committed by a partnership is brought against individuals as doing business under the firm name, it is surplusage, and not allowable, to amend by adding the name of one partner individually, inasmuch as by the form of the action he is already embraced.

At Law. On motion to amend complaint brought against Franklin J. McCoy and B. E. Brooks, doing business under the firm name and style of the Wilson Lumber Company, by adding the name of "Franklin J. McCoy, individually." Denied.

M. D. Wickersham, U. S. Dist. Atty., for the motion.

G. L. & H. T. Smith, opposed.

TOULMIN, District Judge. The two defendants, Franklin J. McCoy and B. E. Brooks, are individually liable for the acts of the partnership of which they were members, and the complaint is against them individually as well as against the partnership for the trespass complained of as having been committed by them doing business under the firm name and style of the Wilson Lumber Company. Superadding the name of Franklin J. McCoy and the word "individually" could not make him any more liable therefor, if that is the purpose. The amendment proposed is therefore useless and unnecessary, would be mere surplusage, and should not be allowed for that reason. *Beavers v. Hardie*, 59 Ala. 573. But if the purpose of the amendment is to embrace in the same suit an individual demand against Franklin J. McCoy, and a demand against the partnership of which he was a member, it is not permissible. The two separate demands cannot be joined in the same suit. *Beavers v. Hardie*, supra; *Miller v. Bank*, 34 Miss. 412; *Lynch v. Thompson*, 61 Miss. 360.

The statute of Alabama authorizes the amendment of the complaint by adding new parties defendant upon such terms and conditions as the justice of the case may require; but this statute is construed to mean that only such parties defendant may be added as were liable in the given cause of action at the time of the commencement of the suit. *Burns v. Campbell*, 71 Ala. 289. The given cause of action, as shown by the complaint in this suit, is a trespass committed by Franklin J. McCoy and B. E. Brooks, doing business under the firm name and style of the Wilson Lumber Company, and is not a trespass committed by Franklin J. McCoy individually. If the name of Franklin J. McCoy as one of the company had been omitted, it could be added by amendment. But it was not omitted. The amendment proposed is therefore not allowable, and the motion for leave to make the same must be denied.

¹Reported by Peter J. Hamilton, Esq., of the Mobile, Ala., bar.

LAPHAM v. NOBLE

(Circuit Court, S. D. New York. February 6, 1893.)

LIBEL—WHAT CONSTITUTES—WORDS TENDING TO INJURE BUSINESS.

A circular letter of and concerning an agent and broker for government supply contractors, composed, published, and sent by the secretary of the interior to intending bidders for such supply contracts, and stating that "any interference on the part of W. R. L., [plaintiff,] a former chief of the stationery and printing division, with the business in any way, will not be to the interest of any person or firm represented," is capable of a libelous interpretation, and a complaint which properly pleads the same is good as against a demurrer.

At Law. Action by W. R. Lapham against John W. Noble for libel. Defendant demurs to the complaint. Overruled.

Edward M. Groat, for plaintiff.

Myers & Anable, for defendant.

WALLACE, Circuit Judge. The defendant's demurrer raises the question whether the complaint states facts sufficient to constitute a cause of action. The action is to recover damages for the publication of a circular letter concerning the plaintiff, upon the theory that it was a libel. The complaint alleges that at the time of publication the defendant was, and for some time prior thereto had been, the secretary of the department of the interior of the United States; that for many years prior to December 15, 1891, the plaintiff had been an employe in the stationery and printing division of said department, and for some time had been chief of such division; that on December 15, 1891, the plaintiff resigned his position, and entered upon, and has since continued in, the business of a government contractor for supplying the various departments of the government at Washington with stationery and office supplies, and also in that of an agent or broker for others in that business, employed by them to arrange their bids, and negotiate and procure the acceptance of the same. The complaint further alleges that on March 28, 1892, while the plaintiff was still prosecuting his said business, the defendant composed, of and concerning the plaintiff and his business, a circular, and, with the intent of injuring the plaintiff in his business, caused it to be sent to all persons who were, or had been, or were likely to be, bidders for government contracts for supplies for the use of the several departments. The circular is as follows:

"Department of the Interior, Washington, March 28, 1892.

"Sir: In order that there may be no misapprehension on the part of persons intending to submit bids for furnishing envelopes and stationery for the use of this department during the ensuing year, you are informed that any interference on the part of Mr. W. R. Lapham, a former chief of the stationery and printing division, with the business in any way, will not be to the interest of any person or firm represented.

"Respectfully,

John W. Noble, Secretary."

The complaint alleges that the defendant meant by the word "interference" in the circular to say falsely that the plaintiff, by the prosecution of his business, was meddling with matters which

were not of his concern; and by the words, "any interference * * * will not be to the interest of any person or firm represented," the defendant meant to say falsely that the plaintiff was incompetent in his business, and his services to intending bidders would be and were of no value; and that by said circular the defendant falsely gave those to whom it was sent to understand that the plaintiff had been an incompetent and untrustworthy government official, and that the defendant had reason to distrust him. The complaint also alleges that special damage was sustained by the plaintiff by reason of the publication of the circular, and sufficiently sets forth the facts constituting the special damage.

There is no statutory law and no principle of the common law which prohibits the plaintiff from pursuing the business in which he was engaged. The fact that he had shortly before been an employe of the government, and in that position had acquired peculiar information of the wants of the departments, their modes of conducting business, and of the most advantageous way of preparing bids and presenting proposals for furnishing supplies, did not militate against his right to act as an agent or broker for others in their dealings with the department. There was no impropriety in his doing so, provided he did not assume to enjoy some illegitimate advantages by reason of his former position. There is no merit in the point that the plaintiff's business was not a lawful one, and that he therefore cannot maintain an action for defamation in respect to it.

Any publication concerning an individual which tends to prejudice him in his employment is a libel. The circular is capable of a meaning which brings it within this definition. As the complaint alleges, it may be read as intending to state that the plaintiff's services would be of no value to persons proposing to employ him. It is capable of a much more vicious meaning. In the light of the circumstances under which it was sent, it may be read not only as an imputation of the plaintiff's incompetency as a broker, but also as an intimation that his employment would be regarded by the department of the interior as an intermeddling and an officious interference therewith. One meaning of "interference" is "intermeddling." The circular implies quite definitely that persons having business to do with the department will consult their interests by not employing the plaintiff.

When words spoken or published are ambiguous in their import, or may permit in their application more than one interpretation, and in some sense may be defamatory, the question whether they are such is for the jury. *Lewis v. Chapman*, 16 N. Y. 369; *Sander-son v. Caldwell*, 45 N. Y. 398; *Woodruff v. Bradstreet Co.*, 116 N. Y. 217, 22 N. E. Rep. 354; *Williams v. Smith*, 22 Q. B. Div. 134.

The demurrer is overruled, with costs.

MURPHY v. UNITED STATES.

(Circuit Court, N. D. California. January, 1893.)

No. 11,486.

1. GOVERNMENT EMPLOYE—NAVY YARDS—SUSPENSION—COMPENSATION.

The suspension by the commandant of a government navy yard, upon charges preferred, of a foreman mason appointed by him, and receiving a per diem compensation, is equivalent, so far as the right of compensation is concerned, to a dismissal.

2. SAME.

The fact that a board of investigation is subsequently appointed by the secretary of the navy to inquire into the charges against the foreman, which board recommends his dismissal, is not a recognition of his status as a government employe, and the fact that he was not formally dismissed is immaterial.

3. SAME—CLAIMS FOR TRAVELING EXPENSES.

Such foreman cannot recover from the United States his expenses in travelling from Washington to Mare Island navy yard, Cal., to be present at the investigation, when it appears that his presence in Washington was for the purpose of procuring a reinstatement, and that the board was appointed on his application.

At Law. Action by Charles Murphy against the United States to recover compensation alleged to be due him as foreman mason at the Mare Island navy yard. Heard on demurrer to the petition. Demurrer sustained.

H. B. M. Miller, for plaintiff

Charles A. Garter, U. S. Atty., and Charles A. Shurtleff, Asst. U. S. Atty.

GILBERT, Circuit Judge. The plaintiff filed his petition under the act of congress approved March 3, 1887, entitled "An act for the bringing of suits against the government of the United States." The petition contains two causes of action. The first is, in substance, that on July 23, 1885, the plaintiff was, by the commandant of the United States navy yard, at Mare island, Cal., appointed foreman mason of said navy yard, "at the understood and agreed compensation of six dollars per day;" that he forthwith entered upon the performance of his duties as such foreman, and continued to perform the same until September 29, 1885, when he was suspended by the commandant, by reason of certain charges which had been preferred against him; that on November 30th following, a board of investigation met at Mare island under the direction of the secretary of the navy, to investigate said charges, and on January 7, 1886, the board reported to the secretary, recommending the plaintiff's dismissal; that the plaintiff was never discharged, and that the proceedings of the board, for reasons alleged in the petition, were illegal, and of no effect; that ever since the 23d day of July, 1885, plaintiff has been, and now is, the regularly and duly appointed foreman mason at said navy yard; that there is due the plaintiff his compensation as such foreman from the date of his suspension to the commencement of this action, in the sum of \$10,430.

In the second cause, in addition to the facts above stated, plaintiff alleges that while such foreman mason, and acting under orders from the secretary of the navy, he was compelled to and did travel from the city of Washington to said Mare Island navy yard for the purpose of being in attendance upon said board of investigation, and that he was compelled to and did expend \$240 in so doing.

Plaintiff waived all of his claims in excess of the jurisdictional limit of \$10,000. The defendant demurs upon the ground that the plaintiff has not stated facts sufficient to constitute a cause of action upon either of his demands.

I am of the opinion that the demurrer must be sustained as to both. In the first cause there is no allegation of employment for any definite or fixed time. The plaintiff did not hold an office, nor was he paid a fixed salary. He was a workman employed by the day at a compensation of six dollars per diem. He received his appointment from the commandant. The authority that appointed subsequently suspended him from his position. The suspension, so far as his right to compensation was concerned, was equivalent to a discharge. The plaintiff was under no contract to serve the United States for any definite period, or at all. The position was one that he could abandon whenever he so desired. From the time of his suspension he has been free to seek other employment. Since that date he has rendered no service to the United States, and the government owes him nothing. The fact that subsequently, and presumably at his instance, the secretary of the navy ordered a board of investigation to consider and report upon the charges that were preferred against him was no recognition of his status as an employe. Neither does the fact that no formal dismissal was had in pursuance of the report in any way affect the case. The plaintiff was to all intents and purposes discharged when he was suspended from his position. The provision of the second clause of section 1545 of the Revised Statutes would seem to be applicable to this case:

"Sec. 1545. Salaries shall not be paid to any employes in any of the navy yards except those who are designated in the estimates. All other persons shall receive a per diem compensation for the time during which they may be actually employed."

As to the second cause of action, the complaint does not contain information sufficient to show that the money paid by plaintiff in returning from Washington was expended in the service of the United States, or that the orders of the secretary of the navy came to the plaintiff in the capacity of an employe, officer, or agent of the government, or that he was under obligation to obey them. Having been suspended from his former position, he was no longer an employe of the navy yard at Mare island; and, even if we concede that his suspension by the commandant was not the equivalent of a discharge, it is not explained how the duties of a foreman mason at Mare island could have required plaintiff's presence at Washington, or rendered the return trip necessary. I think it sufficiently appears from the complaint that after the plaintiff:

suspension from his position at the navy yard he went to Washington to petition either for reinstatement or an investigation of the charges that had been preferred against him, and that, in pursuance of his application, the meeting of the board of investigation was ordered, and that in returning to Mare island the plaintiff came of his own motion to attend the meeting of that board. If such were the facts, (and there is nothing in the complaint to negative that assumption,) the plaintiff is not entitled to recover his traveling expenses. The demurrers are sustained.

UNITED STATES v. BEE et al.

(Circuit Court of Appeals, Ninth Circuit. January 16, 1893.)

1. CONSULS—SALARY—WHEN SERVICE BEGINS.

Under Rev. St. § 1740, a person residing at Apia in the Friendly and Navigators' islands, who received notice from the department of state in June, 1874, to proceed to San Francisco, and there await his instructions and commission as consul at Apia, and who left Apia July 3, 1874, arrived in San Francisco August 21st, took the oath of office September 14th, executed his bond September 15th and sailed for Apia November 18th, arriving January 1, 1875, is not entitled to salary prior to January 1, 1875, except for the time he was awaiting instructions, (from September 15th to October 14th,) and for the time occupied in the voyage, (from November 14th to January 1st.)

2. SAME—OVERPAYMENT—LIABILITY OF BONDSMEN.

Bondsmen who undertake that a consul shall truly and faithfully discharge the duties of his office, and faithfully pay over and deliver up all moneys which shall come into his hands, are liable for moneys which he gets as overpayments of salary, and fails to return to the government.

3. SAME—NEGLECT OF GOVERNMENT TO SUE.

The neglect of the treasury department in claiming or suing for moneys paid to a consul in excess of his salary does not discharge the sureties on his bond from their liability therefor, although such neglect continues long enough to afford the sureties a good defense against any but the government, for the public interest should not be prejudiced by the neglect of public officers.

In Error to the Circuit Court of the United States for the Northern District of California.

At Law. Action by the United States against Frederick A. Bee and William Bell, bondsmen of S. A. Foster, to recover an excess of salary paid to Foster while acting as United States consul. The district court gave judgment for plaintiff, but this was reversed on writ of error by the circuit court. Plaintiff brings error. Judgment of circuit court reversed.

Charles A. Garter and Willis G. Witter, for the United States.

Thomas D. Riordan, for defendants in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. This case involves the construction of section 1740 of the Revised Statutes of the United States, which reads as follows:

"Sec. 1740. No ambassador, envoy extraordinary, minister plenipotentiary, minister resident, commissioner, charge d'affairs, secretary of legation, assistant secretary of legation, interpreter to any legation, or consulate, or consul general, consul, or commercial agent, mentioned in Schedules B and C, shall be entitled to compensation for his services, except from the time when he reaches his post and enters upon his official duties to the time when he ceases to hold such office, and for such time as is actually and necessarily occupied in receiving his instructions, not to exceed thirty days, and in making the direct transit between the place of residence, when appointed, and his post of duty, at the commencement and termination of the period of his official service, for which he shall in all cases be allowed and paid, except as hereinafter mentioned, and no person shall be deemed to hold any such office after his successor is appointed and actually enters upon the duties of his office at his post of duty, nor after his official residence at such post has terminated, if not so relieved. But no such allowance or payment shall be made to any consul general, consul, or commercial agent, not embraced in Schedules B and C, or to any vice consul, vice commercial agent, deputy consular, or consular agent for the time so occupied in receiving instructions or in such transit as aforesaid; nor shall any such officer as is referred to in this section be allowed compensation for the time so occupied in such transit at the termination of the period of his official service if he has resigned, or been recalled therefrom for any malfeasance."

In June, 1874, S. A. Foster, who was residing at Apia, in the Friendly and Navigators' islands, received notice from the department of state to proceed to San Francisco, and there to await his instructions and commission as consul at Apia. He left Apia on July 3, 1874, and arrived at San Francisco August 21, 1874. On September 14, 1874, he received notice of his appointment as consul, and took his oath of office, executed his bond, and on the following day forwarded the same to Washington. On November 18th he sailed for Apia, where he arrived on January 1, 1875. He immediately entered upon the discharge of his duties as consul, and continued to act as such until September 28, 1876. On July 3, 1875, he notified the department that he had drawn for one year's salary from July 1, 1874, to July 1, 1875, at \$1,000 per annum. The draft was forwarded to the secretary, and was paid. In September, 1875, on an adjustment of his accounts, the department decided that he was not entitled to salary prior to January 1, 1875, except for the time he was awaiting instructions, to wit, from September 15, 1874, to October 14, 1874, and for the time occupied in transit, from November 18, 1874, to January 1, 1875, and fixed the amount due from him on account of overpayment at \$298.93. After this adjustment Foster continued to make drafts for his salary, and the drafts were regularly paid, without deduction of the amount which was claimed to be due. Foster's term expired in September, 1876, and he died in 1877. The matter rested thus for 12 years, when the account was again adjusted, and Foster was allowed a credit of \$85 for errors made by himself in drawing his drafts, and this action was commenced in the district court against Foster's bondsmen to recover \$213. A judgment was rendered in the district court in favor of the United States for that amount, and on writ of error to the circuit court that judgment was reversed, whereupon the cause was brought on writ of error to this court.

The case is presented on an agreed statement of facts. The defenses made to the action are threefold: First, that Foster was entitled to all the money paid him; second, that the terms of the

v.54r.no.1--8

bond do not render the sureties liable for the money; third, that the negligence of the treasury department was of such a character as to release the sureties.

So far as the first defense is concerned, it is sufficient to say the statute is plain, and susceptible of but one interpretation, and under its provisions and the stipulated facts there can be no question that Foster was overpaid the full amount sued for.

Does the bond, by its terms, hold the defendants liable for this money? Their undertaking was that Foster should "truly and faithfully discharge the duties of his said office according to law, and truly and faithfully pay over and deliver up all moneys, etc., which shall come into his hands." It would be a narrow and unreasonable interpretation of this instrument to say that it held the bondsmen liable for moneys that came into Foster's hands from other sources, but that it did not hold them liable for moneys that the government might overpay him for salary. The money having been received by Foster in excess of the salary then justly due him, it was his duty to repay the excess to the government. The performance of that duty, and the accounting for this money, were just as fully secured to the United States by the terms of the bond as was the discharge of any duty pertaining to his office, or the payment of any other moneys that might come into his hands as such officer.

Neither does the negligence of the treasury department release the sureties. It is true, as urged, that the officers of the government might have refused to pay the overdraft in the first instance, and it was their duty to have deducted the overpayment from the subsequent drafts for salary. If the obligee in the bond were any other than the government, this defense might avail in behalf of the sureties. But the neglect of the United States officials does not excuse Foster's wrong, in the first instance, in drawing for more money than was due him, or his subsequent failure to refund the same. All the property of the United States is held in trust for the people, and it is now well settled upon grounds of public policy that the public interests shall not be prejudiced by the neglect of the officers or agents to whose care they are confided. *U. S. v. Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120, 6 Sup. Ct. Rep. 1006; *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 6 Sup. Ct. Rep. 670; *U. S. v. Insley*, 130 U. S. 263, 9 Sup. Ct. Rep. 485.

The judgment of the circuit court is reversed, with instructions to enter judgment for plaintiff, and for costs.

UNITED STATES v. ADAMS et al.

(Circuit Court, D. Nevada. November 7, 1892.)

UNITED STATES MARSHAL—BOND—LIABILITY OF SURETIES—LACHES.

The failure of the United States to present their claim against the estate of a deceased United States marshal constitutes no defense to an action against the sureties on his official bond. Laches can never be imputed to the government in any case brought to enforce a public right.

At Law. Motion to strike out averments in answer. Granted.

J. W. Whitcher, U. S. Atty.

Clayton Belknap, for defendants.

HAWLEY, District Judge. This is an action against the sureties on the official bond of Thomas E. Kelley, as United States marshal for this district, to recover the sum of \$2,339, alleged to be due the plaintiff. The defendants, in their answer, among other things, allege that at the time of the death of Kelley, in July, 1888, his estate was valued at \$1,483.14; that this amount was insufficient to pay his debts; that during the time the estate was in process of settlement the plaintiff was notified that said estate was being settled, and plaintiff was requested to present any claim which it might have against said Kelley; that the plaintiff failed and neglected to present any claim to the administrator of the estate; that by reason of the carelessness and negligence of the plaintiff the preference and priority of payment of the United States (Rev. St. U. S. § 3466) was wholly lost, and the entire estate was distributed to other creditors, and defendants were prevented from exercising the right of subrogation. Plaintiff moves to strike out these averments upon the ground that the facts therein stated, if true, constitute no defense to this action. Defendants, in opposition to the motion, rely upon the doctrine announced in *U. S. v. Flint*, 4 Sawy. 43, and *U. S. v. Beebe*, 17 Fed. Rep. 37, to the effect that when the United States voluntarily appears in a court of justice it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants. But this statement is always qualified by the rule that neither the statute of limitations nor laches will bar the government of the United States as to any claim for relief in a purely governmental matter. *U. S. v. McElroy*, 25 Fed. Rep. 804; *U. S. v. Southern Colorado Coal & Town Co.*, 18 Fed. Rep. 273. "The United States are not bound by any statute of limitations, nor barred by laches of their officers in a suit brought by them as sovereign, to enforce a public right, or to assert a public interest; but where they are formal parties to the suit, and the real remedy sought in their name is the enforcement of a private right for the benefit of a private party, and no interest of the United States is involved, a court of equity will not be restrained from administering the equities between the real parties by any exemption of the government, designed for the protection of the rights of the United States alone." *U. S. v. Beebe*, 127 U. S. 338, 8 Sup. Ct. Rep. 1083.

The general rule that laches is not imputable to the government is essential to the preservation of the interests and prosperity of the public. It is founded upon public policy. Any other doctrine would be ruinous in the extreme. The government can only transact its business by and through its officers and agents, and its fiscal operations are so various, and its agencies and officers so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses if the doctrine of laches could be applied to its transactions. The supreme court of the United

States has uniformly and repeatedly declared that in a case like the present one laches cannot be set up against the government. *U. S. v. Kirkpatrick*, 9 Wheat. 735; *U. S. v. Van Zandt*, 11 Wheat. 190; *U. S. v. Nicholl*, 12 Wheat. 509; *Dox v. Postmaster General*, 1 Pet. 318; *Gibson v. Chouteau*, 13 Wall. 99; *Gaussen v. U. S.*, 97 U. S. 584; *U. S. v. Thompson*, 98 U. S. 489; *Steele v. U. S.*, 113 U. S. 129, 5 Sup. Ct. Rep. 396; *U. S. v. Nashville, C. & St. L. Ry. Co.*, 118 U. S. 125, 6 Sup. Ct. Rep. 1006; *U. S. v. Insley*, 130 U. S. 263, 9 Sup. Ct. Rep. 485. The motion to strike out is granted.

MEYER v. ST. LOUIS, I. M. & S. RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 153.

1. CARRIERS—INSANE PASSENGER—INJURY TO FELLOW PASSENGER.

On trial of an action against a railroad company and a sleeping-car company to recover for the death of plaintiff's intestate, there was proof that deceased, a passenger, while seated in a sleeping car, was approached by an insane person, who made a remark, overheard by the sleeping-car conductor, that "It's a sad thing that they are trying to kill me, and I am a defenseless man," and that shortly afterwards he shot deceased, thereby causing death; that such insane person was recognized by the conductor and porters of the sleeping car as having been transported over the line 19 days before, at which time he was in chains, violent, in charge of police officers, laboring under a delusion of pursuit by Jews, and expressed regret at having no gun to protect himself. At the time of the shooting he was unattended, and prior thereto had frequently stated to a number of persons that he was pursued by Jews who were trying to kill him, and that he was defenseless. The proof further showed that he had a dull, heavy, and sullen look, which might indicate insanity, and had applied to the conductor of the train for protection. *Held*, that an instruction that the defendant railroad company had no right to refuse transportation "on suspicion that such person was dangerous to others from insanity, or any other cause, if such person, at the time of offering to become a passenger, was apparently harmless, and conducted himself in no way different from other passengers applying for passage," was reversible error, as the jury might fairly infer therefrom that defendant was bound to receive an apparently harmless passenger, though it knew that he was insane in fact, or had grounds of suspicion that by reason thereof he might be dangerous.

2. SAME—DUTY OF CARRIER—INSTRUCTIONS.

In such a case the degree of care imposed upon the carrier is the highest, and an instruction that the railroad company was bound to use the utmost care and diligence that prudent and careful men should have exercised is erroneous, in comparing the carrier's legal obligation with any degree of care required of prudent men.

3. SAME.

In such a case a judgment in defendant's favor should be reversed, where, after proper request, the court failed to properly instruct the jury as to the duty and obligation of defendant railway company, or to affirmatively instruct the jury that if the company became chargeable, through its employees, with knowledge of the condition of the insane passenger, it had the right, and it might be its duty, to place him under guard or restraint, or remove him from the cars, if such action was necessary for the protection of the other passengers.

4. SAME.

An instruction that the carrier was not obliged to provide guards or means of restraint or confinement, in anticipation of passengers becoming suddenly insane, or that, if the event occurred after the passenger had begun his journey as an apparently sane person, it would be the duty of

the carrier to refuse to carry him further than necessary to place him in charge of an officer of the law, and to use all reasonable care to prevent injury to passengers by him in the meantime, places too narrow a limit upon the power and right of the carrier in dealing with insane persons on its trains.

6. SAME.

An instruction limiting the carrier's right to exercise physical restraint over, or eject, an insane person, to cases wherein the conduct of the insane person indicates that he will probably do violence to those about him, does not adequately inform the jury of the carrier's power and right, as a reasonable possibility as well as a probability of danger may require action.

6. SAME

Nor are the carrier's duty and obligation properly defined by an instruction that the law did not justify restraint if the insane person was neither violent in word or act, and the only outward indications of insanity were expressions of fear and apprehension of violence, as the jury might infer that no physical restraint could be exercised so long as the insane person remained quiet.

7. SAME.

The railroad company would not be negligent, by reason of nonaction, if its employes, exercising the high degree of care demanded of them, could not have reasonably anticipated the effect of failure to restrain or eject such insane passenger.

8. SAME.

To charge the defendant railway company with the duty of restraint, it need not necessarily have been foreseen that the killing would take place unless for such restraint. If a reasonable possibility of injury to any of the passengers could have been foreseen, the obligation arose to take proper action for their protection, although it could not be anticipated which one of the passengers might be injured by such insane person, nor whether his violence would cause death or not.

9. SAME—SLEEPING-CAR COMPANIES.

Instructing the jury that the sleeping-car company was not a common carrier, but failing to charge that such company had the right to restrain or eject the insane passenger, was erroneous, in that, from the entire charge, the jury might naturally infer that such company's rights were even more limited than those of the railroad company.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

At Law. Action by Sallie Meyer, as administratrix of Isador Meyer, deceased, against the St. Louis, Iron Mountain & Southern Railway Company and Pullman's Palace Car Company, to recover for the killing of said Isador Meyer by an insane fellow railway passenger. Verdict and judgment for defendants. Plaintiff brings error. Reversed.

Statement by SHIRAS, District Judge:

This case comes before this court on a writ of error to the United States circuit court for the eastern district of Arkansas, and the facts material to an understanding of the questions arising on the record are set forth as follows in the bill of exceptions contained in the record:

"During the trial of the case evidence was introduced on the part of the plaintiff to show that on the 28th day of January, 1891, John W. Graeter was in an insane condition in the city of Ft. Worth, Tex., having displayed there, within a day or so previous, homicidal tendencies. That on the day last aforesaid, upon a telegram received from his brother, living in Vincennes, Ind., the said Graeter had been arrested, and put in confinement at Ft. Worth, and was sent in charge of two policemen, with chains around his

ankles, and handcuffs on his hands, over a line of railway extending from Ft. Worth to the city of St. Louis, Mo., including the line of the defendant railway company, which extends from Texarkana to St. Louis. That said Graeter was thus transported in irons, and that during the time he was on the train of the defendant railway company he was violent, and imagined that he was being pursued by Jews. That he frequently expressed a regret that he did not have a gun with him, to protect himself. That it was difficult to keep him in his seat, and that at one time the conductor of the train telegraphed to the station ahead for a doctor to administer medicine to Graeter. That he was accordingly treated by the doctor.

"That on the 16th day of February, 1891, about 9 o'clock P. M., he came to the train of the defendant railway company at St. Louis, in company with two persons unknown, one of whom entered the car with him, and talked with him a few minutes before the train started. That during the evening and the subsequent day he frequently talked about Jews, and complained that they were pursuing him, and trying to kill him, and said that he was defenseless.

"That when Graeter was taken north to St. Louis, in January, the conductor on the Pullman sleeping car attached to the passenger train in which Graeter was being carried, though on another car, was the same conductor who had charge of the sleeping car upon which Graeter took passage on the evening of February 16th, and that he had notice of the insanity of Graeter at the time that Graeter was going on his first trip, and also when he was going south on his second trip. That when Graeter got on the train to go south, on the last-named trip, he was recognized by said sleeping-car conductor, whose name was Leach, as being the same person who had been taken northward in January, in irons, as an insane person, and that the porters in the sleeping car also recognized him as being the same person.

"That deceased, Meyer, on the same day, came from Memphis to Bald Knob, in the day car, over the line belonging to said defendant railway company. That when Meyer got to Bald Knob he changed his car, and got on the sleeper, where Graeter was; the sleeper at that time not being in motion. That he took with him into the sleeper his valise and walking cane, first remarking to a fellow passenger on the day car, 'that he was going to leave that car, and go into the sleeper, because the car that he was then in was too much crowded.' That after he got on the sleeper he washed himself, sat down, and gave an order to the porter for something to eat. That the porter went to the buffet for the purpose of preparing the meal ordered by Meyer, and that, while Meyer sat there, Graeter came up to him, and said, 'It's a sad thing that they are trying to kill me, and I am a defenseless man.'

"There was also evidence tending to show that this remark was heard by Leach, the conductor. That soon afterwards, and while Meyer was reading a paper, Graeter took a seat immediately behind him, drew his pistol, and shot Meyer through the head, producing a wound from which Meyer afterwards died. That Graeter immediately walked to the rear end of the car, which had started on its journey before Meyer was shot, and that finding Leach, the conductor, on the rear platform of the car, he shot him, and killed him. That the train was thereupon stopped, and that soon afterwards Graeter was taken into custody, was proved to be insane, and was sent off to an asylum. There was some conflict in the testimony as to whether Graeter's insanity was delirium tremens, produced by the excessive drinking of intoxicating spirits, or whether it was of a more permanent character. There was also evidence tending to show that, while Graeter was on the train going south from St. Louis, he had a dull, heavy, and sullen look, which might indicate insanity, as well as the fact that he complained to a number of persons that he was in danger from Jews who he imagined were pursuing him. That he told the conductor of the train he was a defenseless person, and claimed his protection, offering to show him letters of recommendation, and that the conductor told him that he would protect him."

The jury returned a verdict in favor of the defendants, and the plaintiff brings the case to this court.

U. M. Rose, W. M. Beckner, and G. B. Rose, (Beckner & Jouett on the brief,) for plaintiff in error.

George E. Dodge and S. Johnson, for St. Louis, I. M. & S. Ry. Co., defendant in error.

Percy Roberts, for Pullman's Palace Car Company, defendant in error.

Argued before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge, (after stating the facts.) In considering the questions arising on the errors assigned in this record, we deem it best not to take them up in the order followed in the assignment of errors and in the briefs of counsel, believing that a clearer understanding of the questions involved can be had if we follow the sequence of the events that gave rise to this controversy.

In the petition it is averred that the defendant companies had knowledge of the insane condition of John W. Graeter when he sought to become a passenger on the train leaving St. Louis on the evening of February 16, 1891. Assuming that there was evidence to be submitted to the jury, tending to support this charge of knowledge on part of the defendants, the first question arising upon the facts was that touching the duty and rights of the railway company when Graeter sought to become a passenger upon the train. The claim on behalf of the plaintiff was that as Graeter was then an insane person, the company had the right—and, if the company was chargeable with knowledge of his insane condition, it became its duty, for the protection of the other passengers—to refuse to accept him as a passenger. The defendant railway company denied knowledge of Graeter's condition when he was admitted as a passenger upon the train. If, upon the evidence, the jury should find that at the time Graeter became a passenger the railway company was not chargeable with knowledge of his insane condition, then it would not be possible to hold that the company was derelict in its duty in merely permitting him to take passage on the train; and the jury would not, in such case, be called upon to consider either the right or duty of the company to refuse to accept him as a passenger. If, however, the jury, under the evidence, should find that the railway company was chargeable with knowledge of Graeter's insanity at the time he sought passage on the train, then the question of the right and duty of the company under such circumstances would properly arise. Upon this aspect of the case the court charged the jury as follows:

"(5) The jury are instructed that the defendant railway company was at the time of the occurrence in question a common carrier of passengers; that, as such common carrier, it was its duty to receive upon its trains all persons who apply for passage, and pay, or offer to pay, the usual and customary fare; and that such carrier would have no legal right to refuse such transportation to any one on mere suspicion that such person was dangerous to others, from insanity or any other cause, if such person, at the time of offering to become a passenger, was apparently harmless, and conducted himself in no way different from other persons applying for passage."

From the language used in this instruction the jury might fairly infer the law to be that a common carrier was bound to receive as

a passenger a person who offered to pay the proper fare, if he at that time was apparently harmless, even though the carrier knew he was in fact insane, or had grounds for suspicion that such person, by reason of his insanity, might be dangerous to others upon the carrier's vehicle. Clearly this is not the law. It is well settled that a common carrier is not obliged, as a matter of law, to receive as a passenger an insane or drunken person, or one whose physical or mental condition is such that his presence upon the vehicle of the carrier may cause injury or substantial discomfort to the other passengers. *Wood, Ry. Law*, 1035; *Putnam v. Railway Co.*, 55 N. Y. 108; *Pearson v. Duane*, 4 Wall. 605. In the latter case the supreme court states the rule to be that—

"Common carriers of passengers, like the steamship *Stevens*, are obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal. If there are reasonable objections to a proposed passenger, the carrier is not required to take him."

The law imposes upon a common carrier the duty of exercising a very high degree of care and foresight for the safe transportation of the passengers who intrust themselves to him for that purpose; and in the performance of this duty, which the carrier cannot evade or escape from, the carrier certainly has the right to exclude from his vehicle any one whose condition is such that a possibility of danger may be thrown upon the other passengers if he is admitted as a passenger. It would cast an unjust burden on the carrier to hold, on the one hand, that he must exercise the highest degree of care and caution for the protection of his passengers, and, on the other hand, to hold that he has not the right to exclude from his vehicle one whose condition is such that he may cause danger to the other passengers, simply because, at the moment he offers himself as a passenger, he is quiet, well-behaved, or apparently harmless. The fact is made clear, beyond dispute, that when *Graeter* took passage on the railway train, on the evening of February 16, 1891, he was then a dangerous lunatic, liable at any moment to be seized with a homicidal frenzy; and he was therefore a wholly unfit person to be at large, or to take passage on a railway train, unaccompanied with proper attendants to restrain him from injuring others. The railway company, in view of the undisputed facts of the case, had unquestionably the legal right to refuse to accept *Graeter* as a passenger; and, if it had knowledge of his actual condition, it was derelict in its duty, in consenting to accept him as a passenger without taking sufficient precautions to protect the other passengers from his murderous attack. In its application to the facts of this case, the instruction we are considering is faulty and misleading, in that it improperly limits the right of a common carrier to refuse to accept an insane person as a passenger, and fails to state clearly what the duty of the carrier would be in case a person known to the company to be insane offers himself as a passenger, unaccompanied by friends or attendants. Having been accepted as a passenger, then the railway company, as soon as it became chargeable with knowledge of *Graeter's* insane condition,—whether that knowledge was acquired before or at the time he became a passenger, or from his

acts subsequent to the beginning of the journey,—was charged with the duty of exercising proper care for the protection of the other persons upon its train.

In defining the measure of care required of the company under these circumstances, the court ruled as follows:

"The defendants in this case were bound to use the utmost care and diligence that prudent and careful men, skilled in the discharge of the duties of their employes were engaged in, should have exercised to protect the plaintiff's intestate from any and all assaults that might be made upon him by any one while he was a passenger upon the train, or on the cars of the defendants, or either of them; and if they, or either of them, failed to exercise such care, and by reason of such failure he was killed, then the jury should find for the plaintiff, in such sum as the testimony in the case warrants, not exceeding the amount sued for."

The degree of care demanded of a common carrier or other person in the performance of a duty to another is defined by the law. What a party should do to fulfill the degree of care the law imposes upon him, under given circumstances, is ordinarily a question of fact, for the determination of the jury. It is therefore the duty of the court to instruct the jury as to the degree of care required of the party to the particular case, in order that the jury may determine whether the obligation which the law imposes has been fairly met. A common carrier of passengers is bound to exercise, for the protection of his passengers, a higher degree of care and foresight than is imposed upon persons not engaged in that business. In the instruction given by the court the statement is that the defendants were bound to use the utmost care and diligence that prudent and careful men should have exercised to protect the plaintiff's intestate from any and all assaults that might be made upon him by any one while he was a passenger on the train. The jury were not instructed that, as a common carrier of passengers, the railway company was bound to the exercise of the highest degree of care. The instruction was that the company was bound to use the utmost care that prudent men should exercise. The care that prudent men should exercise is dependent largely upon the relation they occupy towards the person to whom the exercise of care is due. Degrees of care may be predicated of one who is a common carrier, or of one who is not, but cannot be of prudent men; for the law does not cast upon prudent men any particular degree of care, nor the duty of exercising any greater care than is imposed upon men in general. The degree of care imposed by the law is determined by the relation existing between the parties, as that of carrier and passenger, master and servant, and the like, but not by the character of the individuals occupying the relations named. The instruction, therefore, wholly fails to give to the jury the test to be applied in determining the question of negligence on the part of the railway company. In no part of the charge did the court give any other definition of the degree of care demanded of the company in the performance of its contract of transportation than that contained in the instruction last quoted. Counsel for plaintiff submitted an instruction which correctly defined the degree of care demanded of the railway company as a common carrier of passengers; but the court refused to give it, substituting therefor the charge we are now considering, which, in our

judgment, fails to state with clearness and accuracy the degree of care imposed by the law upon the railway company.

Taking the charge given to the jury in its entirety, it is open to the criticism that it fails to properly inform the jury of the duty and obligation resting upon the railway company. The charge is largely devoted to instructing the jury that the company had not the legal right, or was not called upon, to do this or that; but it fails to state what the company had a right to do, provided certain conditions of fact were found by the jury to exist. Thus the evidence proved that Graeter was violently insane some weeks before February 16th, and that, when he sought passage on the railway train at St. Louis, he had not recovered therefrom. There was also evidence tending to show that knowledge of his insanity, and of the delusions to which he was subject, was brought home to the conductor and other employes on the train, possibly on the evening of February 16th, and certainly before the train reached Bald Knob station, the next day, being the place where Meyer got on the train. The court did not affirmatively instruct the jury that if the company became chargeable, through its employes, with knowledge of Graeter's insane condition, it had the right, and that it might be its duty, to place Graeter under guard or restraint, or to remove him from the cars, if such action was required for the protection of the other passengers from possible harm. On the contrary, every paragraph of the charge contains a limitation, expressed negatively, either upon the right of the company to act, or upon its duty to act. The evidence fails to show that the company took any action for the protection of the other passengers until after Meyer was killed, and the character of the charge, in that it negatived the right and duty of the company in so many particulars, must have impressed the jury with the belief that the facts proven were not sufficient in law to confer upon it the right to take any steps whatever for restraining, guarding, isolating, or removing the insane person previous to the killing of Meyer, and that all the company could lawfully do was to wait and see what might happen. Upon this question of the right of the company after it had knowledge of Graeter's insanity, the court, at the request of the defendants, gave the following instructions:

"(6) The law does not require of a common carrier to provide keepers, or other means of restraint or confinement, in anticipation of one of its passengers becoming suddenly insane while on his journey. If such event occurs after the passenger has begun his journey as an apparently sane person, it would be the duty of the carrier to refuse to carry such passenger any further than was necessary to place him in charge of some county or municipal officer, and to use all reasonable care to prevent his doing injury to other passengers in the meantime.

"(7) Nor even then would the carrier be justified in binding such person, or putting him under physical restraint, or off the train, unless forewarned by such conduct, as would reasonably indicate to prudent persons that such passenger would probably do violence to those around him. If, on the contrary, such passenger was neither violent in word or act, and the only outward expression of a disordered mind was an expression of fear and apprehension of violence from others, which apprehension was apparently removed when assured that his fears were groundless, the carrier would not have been justified, in law, in exercising any physical restraint over such passenger.

"(8) The law does not require of the carrier that it do more than to protect its passengers from dangers and annoyances which are the usual and reasonable results of a given condition of affairs; and if the jury find from the evi-

dence in this case that a person of ordinary prudence would not have anticipated or reasonably apprehended that a failure to eject Graeter from the train, or to physically restrain him, would result in his suddenly killing one of his fellow passengers, then the defendant carrier is not guilty of negligence, and the plaintiff cannot recover.

"(9) And if the jury find from the evidence that the killing of Meyer by Graeter, under the circumstances, was an occurrence of such an unusual, rare, and unexpected character as would not have been looked for or anticipated by a prudent person as the direct consequence of a failure to restrain Graeter beforehand, then it was not a danger of such character as the law requires a carrier to protect its passengers against. Consequently the omission or failure of the carrier to guard against such an occurrence would not be negligence for which the carrier would be liable or answerable."

It cannot be disputed that Graeter's insanity was such that he ought not to have been permitted to travel, unattended and unguarded, upon railway passenger trains. If the defendant railway company became at any time chargeable with knowledge of Graeter's actual condition, then certainly the company would be charged with the duty of doing whatever a high degree of care would demand for the protection of the other passengers upon the train. If the evidence failed to show that the company had become chargeable with knowledge of Graeter's actual condition at any time before the killing of Meyer, then no ground would exist for holding it responsible for the consequences of Graeter's act; but from the time the company had become chargeable with knowledge of his condition, then the obligation rested upon the company to do whatever was reasonably within its power for the protection of the others upon the train. Under such circumstances the company owes a duty to the insane passenger, as well as to the others; and what action should be taken is, of course, dependent largely upon the circumstances of the particular case. If the safety and reasonable comfort of the other passengers will not be imperiled thereby, the company may carry the insane person to the end of his journey, or he may be removed from the train at the first station where he may be properly cared for; but whether he be carried on the train a longer or a shorter distance, the company is bound, so long as he is on the train, to do whatever, in the way of restraint or isolation, is reasonably demanded for the safety and comfort of the other passengers.

The sixth and seventh instructions given by the court are open to a construction which would place too narrow a limit upon the power and right of the carrier in dealing with an insane person upon its trains. In the seventh charge the right of the carrier to exercise physical restraint over or to put an insane person off the train is limited to cases wherein the conduct of the insane man indicates that he will probably do violence to those about him. In the performance of its contract of transportation with the other passengers, the carrier is under obligation to use a high degree of care, and a reasonable possibility as well as a probability of danger may call for action on part of the carrier. Furthermore, in the seventh charge it is said that the carrier would not have been justified, in law, in restraining the insane person, if he was neither violent in word or act, and the only outward expression of a disordered mind was an expression of fear and apprehension of

violence. The jury might well infer from this statement that the law forbade the carrier from exercising any physical restraint over an insane person, so long as he remained quiet, whereas, if the carrier knows that in fact the person is violently insane, and may at any moment do violence to others, it is justified, and in fact it may be its imperative duty, to exercise proper restraint, although at the time the person may be quiet, and apparently harmless; and it is for the jury to decide, under the evidence, what the situation demands of the carrier, in the performance of its legal duty to the other passengers.

In the eighth charge it is said that if a person of ordinary prudence would not have anticipated that a failure to eject Graeter from the train, or to restrain him, would result in his suddenly killing one of his fellow passengers, then the company could not be charged with negligence. The better statement would have been that if the employes of the defendant company, in the exercise of the high degree of care demanded of them, could not have reasonably anticipated that the failure to eject or restrain Graeter might result in his doing injury to his fellow passengers, then the non-accident of the company could not be held to be negligence.

In the ninth charge it is stated that, if the killing of Meyer by Graeter was an occurrence of such unusual character as would not have been anticipated as a direct consequence of a failure to restrain Graeter beforehand, then the company was not required to guard against the same. In order to charge the company with the duty of restraining Graeter, it was not necessary that it should foresee that if Graeter was not restrained he would kill Meyer. If the situation was such that the company should have foreseen a reasonable possibility of injury being caused to any of the passengers by the presence of Graeter on the train, then the obligation to take proper action for the protection of the passengers arose, although the company could not possibly anticipate which one of the passengers might be injured by Graeter in case he was not restrained, nor whether his violence would cause death or not.

It is not necessary to examine each one of the instructions that were excepted to, and the giving of which is assigned as error. What has been already said is sufficient to show in what particulars we deem the instructions given to the jury to be insufficient, and in some degree misleading. So far we have considered the case as though the railway company was the sole defendant.

In defining the duty and obligation resting upon the Pullman's Palace-Car Company, the court, at the request of that company, gave the following instruction:

"The court instructs the jury that Pullman's Palace-Car Company, one of the defendants herein, is not a common carrier, and is not burdened with the heavy and exceptional obligations of a common carrier, for the protection of its passengers from injury; that the extent of its obligation for the protection of its passengers from injury is to maintain a reasonable watch to protect those passengers from any known danger reasonably probable to arise under the circumstances."

It has been repeatedly held that sleeping-car companies are not ordinarily either common carriers of passengers nor innkeepers.

The character and extent of the obligations resting upon them have not yet been defined with exactness, and may in some particulars be dependent upon the relation existing between them and the railway company upon whose line their cars are used. As the record now is in this case, we do not deem it advisable to enter upon the consideration of the relation existing between Meyer and the Pullman Company, it being sufficient to say that assuming, without so deciding, that the instruction last quoted correctly states the extent of the obligation resting upon the sleeping-car company, nevertheless the court did not instruct the jury that the company had the right, if need arose, to restrain or eject from the car an insane person, and the jury would naturally infer from the entire charge that the rights of the sleeping-car company were in this particular even more limited than those of the railway company. For these reasons the judgment must be reversed as to both defendants.

During the introduction of the evidence on the trial of the case the plaintiff offered the deposition of Orpheus Evarts, the medical superintendent of the Cincinnati Sanitarium, a private hospital for the care of insane persons, to which hospital Graeter was taken on the 4th of March next after the killing of Meyer, which was excluded on objection made by the defendants. The testimony of the witness tended to show Graeter's condition while he was at the hospital, but, in reply to the question whether he could state whether Graeter's insanity preceded the occurrence on the train, he answered that he could not. If the testimony would throw any light upon the question of Graeter's mental condition prior to February 16, 1891, then it would be admissible, because the defendants, in their answers, denied that his insanity antedated that time. The mere fact that the witness did not see Graeter for some two weeks after the time Meyer was killed would not necessarily render his testimony inadmissible. If by reason of his knowledge he was an expert in mental diseases, and could give an intelligent opinion as to the probable length of time that Graeter's insanity had existed, his testimony would have been competent; and therefore the objection taken, that the knowledge of the witness was not acquired until after the date of Meyer's death, was not well taken. We are not, however, prepared to say that the objection of immateriality was not well founded. The trial court was in a position to better judge, in view of the whole evidence adduced, which is not before us, whether the testimony would throw any light upon the matters in dispute or not. So far as we can now see, the court might have admitted the testimony without impropriety, but we are not prepared to say that it was clearly error to reject it.

For the errors pointed out in the instructions given the jury, the judgment is reversed, at cost of defendants in error, and the case is remanded to the circuit court, with instructions to grant a new trial.

UNITED STATES v. SHAPLEIGH.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 121.

1. FALSE CLAIMS AGAINST THE UNITED STATES—PRESENTATION—SUIT FOR PENALTIES—DEGREE OF PROOF REQUIRED.

In a suit under Rev. St. § 3490, to recover the double damages and forfeiture prescribed against any one presenting a false or fraudulent claim against the United States to one of its officers for payment or approval, the government must prove its case beyond a reasonable doubt, and defendant may introduce evidence of good character, for the proceeding, while civil in form, is criminal in its nature and effect.

2. SAME—EVIDENCE OF INTENT.

In such a suit the government must show that defendant not only presented a false or fraudulent claim, but that he knew it to be such; and the jury are not warranted in inferring such knowledge merely from the fact that he acted negligently and without ordinary business prudence; they must at least be satisfied that he was aware of circumstances such as would induce an ordinarily intelligent and prudent man to believe the vouchers to be false.

3. APPEAL—REVIEW—HARMLESS ERROR.

No judgment should be reversed for an error which could not have prejudiced the rights of the party against whom the ruling was made.

4. SAME—GENERAL OBJECTIONS TO EVIDENCE.

A mere objection, where no grounds for it are assigned at the trial, cannot be considered in an appellate court. *Burton v. Driggs*, 20 Wall. 125, approved and followed.

5. TRIAL—PROVINCE OF COURT AND JURY—DIRECTING VERDICTS.

It is the duty of a federal trial court to direct a verdict for defendant when the evidence is such that, in the exercise of a sound judicial discretion, it would be compelled to set aside a verdict returned in favor of plaintiff. *Railroad Co. v. Davis*, 53 Fed. Rep. 61, and *Monroe v. Insurance Co.*, 52 Fed. Rep. 777, followed.

In Error to the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

Action by the United States against Frank Shapleigh to recover certain penalties prescribed by Rev. St. § 3490. The district court gave judgment on a verdict for defendant. Plaintiff brings error. Affirmed.

Statement by SANBORN, Circuit Judge:

Section 5438 of the Revised Statutes of the United States provides that:

"Sec. 5438. Every person who makes or causes to be made, or who presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

Section 3490 provides that:

"Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the

provisions of section fifty-four hundred and thirty-eight, title 'Crimes,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing of such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

On the 4th day of February, 1891, the plaintiff in error filed a petition in the district court of the United States for the eastern district of Missouri, in which it alleged that the defendant in error, who was not a person in the military or naval forces of the United States, or in the militia, had committed 156 violations of the provisions of section 5438, whereby the plaintiff had sustained damage in the sum of \$56,885.67, and demanded judgment against him for double this amount of damages and \$312,000 in penalties, amounting in the aggregate to \$425,771.34. An amended petition was subsequently filed, which contained 146 counts, each of which set forth a violation by the defendant of the provisions of section 5438. This petition set forth the amount of damages sustained by the plaintiff from each violation, and demanded a recovery of double damages and \$2,000 for each of the 146 violations charged. A demurrer to counts numbered 1 to 45, inclusive, and 86 to 122, inclusive, was sustained on the ground that the causes of action stated in these counts were barred by the statute of limitations. At the close of the plaintiff's case upon the trial the court sustained a demurrer to the evidence in support of, and withdrew from the consideration of the jury, the causes of action set forth in all the remaining counts except those numbered 129, 132, 133, 137, 138, 141, and 142.

Counts numbered 1 to 85, inclusive, were founded on vouchers for merchandise, which the defendant presented for payment to Capt. A. E. Miltmore, assistant quartermaster of the United States army at Jefferson barracks, near St. Louis, Mo. during the years 1883, 1884, 1885, and 1886. These vouchers were receipted by the defendant, and the amounts named in them were paid to him. He was a prominent merchant in St. Louis, and a stockholder in the A. F. Shapleigh Hardware Company, a corporation engaged in mercantile business in that city during these years, and that corporation furnished large quantities of merchandise to the United States, which was paid for upon these vouchers, made in the name of, and receipted by, the defendant. During these years extensive repairs and improvements were made by the United States at the Jefferson barracks, under the direction of Capt. Miltmore. The evidence tended to show that the defendant had great confidence in this captain; that he furnished the United States large quantities of supplies through him, and had been acquainted with him for many years; that at the captain's suggestion he made proposals and signed contracts for performing work and furnishing materials at the barracks, and received payments and receipted vouchers therefor whenever they were presented to him by the captain; that upon his orders he paid over to the captain's clerk the moneys he so received, and left the hiring and discharging of the men, their payment, and the accounts between himself and the government and between himself and the workmen employed, entirely to the captain. He testified that he derived no profit from the contracts for work, or from the work done in his name, but that he signed these contracts and vouchers simply as an accommodation to Capt. Miltmore, and relied upon him to make the proper vouchers, and keep the accounts for this work and material used in the repairs and improvements, and that he did not know that any of the vouchers were not correct. The evidence tended to prove that an account was kept upon the books of the A. F. Shapleigh Hardware Company during these years, in which all the merchandise furnished to the government by that corporation or the defendant, through Capt. Miltmore, and all the cash paid to him or his clerk by either of them was charged to him, and all the moneys received by the defendant on the vouchers was credited to him. The causes of action numbered 86 to 146, inclusive, were founded upon vouchers for this work and these materials there stated to have been done and furnished in making the improvements and repairs at the barracks, and there was evidence tending to show that some of the services specified in the seven vouchers named in the causes of action submitted to the jury were never, in fact, per-

formed. To rebut this evidence the defendant introduced in evidence, over the plaintiff's objection, certified copies of the reports of the assistant quartermaster at Jefferson barracks to the United States for the time covered by the seven vouchers, which contained statements of the services performed that exactly corresponded with those contained in the vouchers.

The defendant introduced evidence of his character for integrity and honesty over the plaintiff's objection. The court charged the jury that "a fictitious claim against the government (for the purposes of this suit) may be defined to be a claim preferred against it for services said to have been rendered to it, or for supplies said to have been furnished to the government, no part of which services or supplies were, in fact, rendered or supplied." That "a claim against the government is a 'false' one, within the meaning of the statute, if it is an untrue claim; for example, if a claim is made for labor or supplies said to have been furnished to the government, and the claim is made for more services than have been actually rendered, or for more supplies than have been furnished, such a claim is a false one within the meaning of the statute." That "a fraudulent claim against the government is a false or fictitious claim, gotten up or contrived by some person or persons with the intent to present it for approval and payment, and thus to defraud the government." That to entitle the plaintiff to recover the jury must find that some of the seven claims referred to in the seven counts were either false, fictitious, or fraudulent, and that the defendant knew it when he presented them. That "whether he had such knowledge or not is a question for you to determine, and you may determine it from all the facts and circumstances in evidence before you. I will say this much: You ought not to infer that he had such knowledge merely from the fact (if it is a fact) that he acted negligently, or without ordinary business prudence, in his dealings with Capt. Miltimore. To warrant you in finding that he knew such claims were either false, fictitious, or fraudulent, you must be satisfied that he was aware of such facts or circumstances as would have created the belief in the mind of an ordinarily intelligent and prudent person that the claims were in some respects false, fictitious, or fraudulent." That "the law presumes the defendant to be innocent of the charge made against him. It is also true, as has been stated, that to entitle the government to a verdict in a case of this sort every fact necessary to a conviction, as heretofore explained, must be proved beyond a reasonable doubt. The doubt here referred to is a doubt arising in your minds from the testimony in the case; and it is such a doubt, also, as reasonable men, having heard all the testimony, may fairly entertain in view of all the testimony." The plaintiff excepted to these portions of the charge inclosed in quotation marks, and assigned these and other less important rulings as error. The jury found that the seven vouchers were false, but that the defendant had no knowledge of it, and returned a verdict in his favor, upon which the judgment was rendered to reverse which this writ of error was sued out.

George D. Reynolds, (E. H. Crowder, on the brief,) for the United States.

Given Campbell and Chester H. Krum, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge, (after stating the facts.) Where a statute authorizes the state to recover, in a civil suit, penalties prescribed for the commission of a felony, must the government prove its case beyond a reasonable doubt, in order to recover the penalties in such a suit? This is the most important question presented by this record. The burden of proof in judicial proceedings is on him who alleges the existence of a fact denied. Where the fact denied is the commission of a crime, the additional burden of overcoming

the presumption of innocence, which the law always interposes as a shield between accuser and accused, is necessarily imposed upon him who alleges it. In controversies of a civil nature the purpose is generally to obtain the determination of some right of person or property, or to recover compensation for some injury. The parties are ordinarily private citizens or corporations, and the character, life, or liberty of neither party is in jeopardy. In controversies of a criminal nature the purpose is to punish the accused for some violation of his duty to the public. The prosecutor is generally the government, and the defendant is a private citizen, whose character, and either his life, liberty, or property, and sometimes all of them, are placed in jeopardy. To this wide difference in the purpose, the character, and situation of the parties, and in the natural effects of findings and judgments against the defendants in controversies, civil and criminal, is it due that the rule became established that, to warrant a verdict or finding against the defendant in the latter, evidence sufficient to satisfy the jury or court beyond a reasonable doubt is required; while in the former, evidence preponderating in his favor, but less convincing, is sufficient to warrant a recovery by the plaintiff. The presumption that every man is innocent until the contrary appears, and a consideration of the irreparable injury to the defendant that must result from an unjust conviction, tended to the establishment of this rule; but doubtless the controlling consideration was the inequality of the parties in power, situation, and advantage in criminal cases where the government, with its unlimited resources, trained detectives, willing officers, and counsel learned in the law stood arrayed against a single defendant, unfamiliar with the practice of the courts, unacquainted with their officers or attorneys, often without means, and frequently too terrified to make a defense if he had one, while his character and his life, liberty, or property rested upon the result of the trial. Proof sufficient to satisfy beyond a reasonable doubt, then, is required in a criminal case, because its purpose is punishment, not compensation for injury; its prosecutor is the state; the result to the defendant of its successful prosecution is irreparable loss of character, and the loss of either life, liberty, or property; and because the presumption is that every man is innocent until the contrary appears; while less convincing evidence will authorize a recovery in a civil suit, because its purpose is generally compensation for injury or the determination of rights, not the punishment of the offender; the litigants are generally private parties, more nearly equal in resources, advantages, and situation, and neither the character, life, nor liberty of either is ordinarily at stake.

Now, if the government enacts a statute which provides that a case in its nature criminal, whose purpose is punishment, whose prosecutor is the state, and whose successful prosecution disgraces the defendant, and forfeits his property to the state as a punishment for crime, may be brought in the form of a civil suit, does that change the rule of evidence that ought to be applied to it? If a state provides that all proceedings for the punishment of crime shall be conducted in the form of civil suits, does that change their

nature, or the amount of evidence that ought to be required to convict the defendants of the crimes? Is a wolf in sheep's clothing a wolf or a sheep? Take the case at bar. The crimes with which the defendant was charged were felonies. The government might have proceeded by indictment to punish him for them under section 5438. If it had done so, its case must have been proved beyond a reasonable doubt. It elected to proceed under section 3490, by a civil suit, to recover over \$300,000 in penalties, to punish the defendant for the same crime. The penalties sought to be inflicted by the latter proceeding are far heavier than any that the court would probably have inflicted under the former. In each proceeding the same government, with its unlimited resources, proceeds against the same citizen to punish him for the same crimes, and in each the single question for the jury to determine is, was this defendant guilty of these felonies? Every consideration which induced the courts to establish the rule that the prosecutor must prove the crime charged beyond a reasonable doubt—the inequality of the parties in power, situation, and advantage; the purpose of the proceeding, which is the punishment of the defendant, not compensation for injury; the irreparable disgrace and injury that must result to the defendant from an unjust recovery, and the presumption of his innocence—demands that this rule be applied to the latter to the same extent as it would be to the former proceeding. It is not the form, but the nature, of this proceeding that must determine the rule to be applied to it. To protect the substantial rights of parties, to wisely administer the law, courts must frequently look beyond the outward form to the real substance and nature of things. Thus in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. Rep. 1370, the state of Wisconsin brought in the supreme court a civil suit to collect a judgment rendered in one of its own courts against the Pelican Insurance Company, a corporation of Louisiana, for penalties imposed by a statute of Wisconsin for doing an insurance business therein without having deposited with the proper officer of the state a full statement of its property and business during the previous years. This was a suit to recover a debt. It was founded on a judgment rendered in a proceeding in the form of a civil suit. The judiciary act provided that "the supreme court shall have exclusive jurisdiction of controversies of a civil nature where a state is a party, except between a state and its citizens, and except, also, between a state and citizens of other states, or aliens, in which latter case it shall have original, and not exclusive, jurisdiction." Section 687. But that court looked through the form of the civil suit before it, and through the form of the suit in which the judgment was rendered, to the real nature of the original controversy, and refused to take jurisdiction, because that was a suit to recover a penalty, and was not of a civil nature. Mr. Justice Gray, in delivering the opinion of the court, said:

"The cause of action was not any private injury, but solely the offense committed against the state by violating her law. The prosecution was in the name of the state, and the whole penalty, when recovered, would accrue

to the state, and be paid, one half into her treasury and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. Laws Wis. 1885, c. 395. The real nature of the case is not affected by the forms provided by the law of the state for the punishment of the offense. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action, or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by *scire facias*, or by a new suit. In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end,—the compelling the offender to pay a pecuniary fine by way of punishment for the offense."

In *U. S. v. The Burdett*, 9 Pet. 682, 690, 691, a proceeding in rem was instituted against the brig Burdett to enforce a forfeiture of the vessel, and all that pertained to it, for the violation of a revenue law. Neither the life nor liberty of the citizen was in jeopardy; nothing but his property; yet the supreme court held that the prosecution was a highly penal one, and the penalty should not be inflicted unless the infractions of the law were established beyond a reasonable doubt. Mr. Justice McLean, in delivering the opinion of the court, said:

"No individual should be punished for a violation of a law which inflicts a forfeiture of property, unless the offense shall be established beyond reasonable doubt."

In *Lilienthal's Tobacco v. U. S.*, 97 U. S. 238, 271, which was a proceeding in rem to enforce the forfeiture of certain tobacco for the violation of a revenue law, this question did not arise, but there is a dictum of Mr. Justice Clifford's to the effect that the rule that should apply to a proceeding in rem for the forfeiture of property is widely different from that applicable to an action against the person to recover a penalty imposed to punish an offender, and upon that ground he suggests a distinction between that case and *Chaffee v. U. S.*, 18 Wall. 516, and says that in a proceeding in rem "it is correct to say that, if the scale of evidence hangs in doubt, the verdict should be in favor of the claimant," and that "jurors in such a case ought to be clearly satisfied that the allegations of the information are true; and when they are so satisfied of the truth of the charge they may render a verdict for the government, even though the proof falls short of what is required in a criminal case prosecuted by indictment." This statement does not commend itself to our judgment, and it is clearly disapproved, and the distinction between such a proceeding in rem for a forfeiture and an action for a penalty there suggested is expressly repudiated, in the latter well-considered and decisive case of *Boyd v. U. S.*, 116 U. S. 616, 637, 638, 6 Sup. Ct. Rep. 524. That was also a proceeding in rem to enforce a forfeiture for the violation of a revenue law. The fifth section of the act of June 22, 1874, (18 St. p. 187,) in terms empowered the courts in all suits and proceedings other than criminal arising under any of the revenue laws of the United States to require the defendant or claimant on motion to produce any of his books or invoices for the purposes of examination and proof under the penalty of having the allegations made in the motion deemed as confessed. The claimant had been required by an order of the

court under this act to produce an invoice tending to show the quantity and value of the goods seized, and had done so, and the invoice had been introduced in evidence over his objections that the law was unconstitutional and the order unauthorized. One question presented to the supreme court was whether the proceeding in rem, which was civil in form, was a "criminal case" within the meaning of the clause of the fifth amendment to the constitution of the United States, which declares that no person "shall be compelled in any criminal case to be a witness against himself." A number of decisions had been rendered in the district and circuit courts to the effect that under such a statute the defendant or claimant could be compelled to produce evidence to support the claim of the government, and thus convict himself. *U. S. v. Mason*, 6 Biss. 350, 355; *U. S. v. Three Tons of Coal*, Id. 379; *U. S. v. Distillery No. 28*, Id. 483; *Stockwell v. U. S.*, 3 Cliff. 284; *U. S. v. Hughes*, 12 Blatchf. 553. But the supreme court unanimously held otherwise, and Mr. Justice Bradley delivered an exhaustive and convincing opinion, in which he said:

"We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. In this very case the ground of forfeiture as declared in the twelfth section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared that the offender shall be fined not exceeding \$5,000 nor less than \$50, or be imprisoned not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by the suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,—that is, civil in form,—can he by this device take from the proceeding its criminal aspect, and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is, in substance and effect, a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey v. U. S.*, 116 U. S. 436, 6 Sup. Ct. Rep. 437, in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods, arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi criminal nature, we think that they were within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself."

In *Chaffee v. U. S.*, 18 Wall. 516, 522, 544, 545, the government brought a civil action of debt to recover a penalty of double damages imposed for the violation of a revenue law; and the court instructed the jury that, if the government had in its opening case made a *prima facie* case against the defendants, requiring explanation from them, but not sufficient to satisfy the minds of the jury beyond all reasonable doubt that the plaintiff was entitled to recover, and they believed that the defendants could by their books or

testimony have made certain material facts left uncertain by the proof on the part of the plaintiff certain, and the defendants had knowingly withheld this proof, the jury was authorized to resolve all doubts against them. The supreme court reversed the judgment, and declared this charge erroneous. Mr. Justice Field, in delivering the opinion of the court, said:

"The purport of all this was to tell the jury that, although the defendants must be proved guilty beyond a reasonable doubt, yet, if the government had made out a *prima facie* case against them,—not one free from all doubt, but one which disclosed circumstances requiring explanation,—and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and, if they did not, they were guilty beyond a reasonable doubt. We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it."

In *U. S. v. McKee*, 4 Dill. 128, Mr. Justice Miller and Judge Dillon held that the indictment, conviction, and punishment of a defendant under section 5440 of the Revised Statutes for conspiracy with certain distillers to defraud the United States by the unlawful removal of distilled spirits from their distilleries without the payment of the taxes was a bar to a civil suit by the government to recover the penalty of double the amount of the taxes for the same offense under section 3296 of the Revised Statutes, on the ground that the defendant could not be twice punished for the same offense. In *Coffey v. U. S.*, 116 U. S. 436, 6 Sup. Ct. Rep. 437, the supreme court held that an acquittal on a criminal information was a bar to a proceeding to enforce a forfeiture of property for the same offense.

There is a decided conflict in the decisions of the other courts of this country upon the question whether or not the government should be required to establish its case to a moral certainty when it brings a civil suit to recover a penalty imposed for the violation of some statute. The decisions in the federal courts were generally rendered before the supreme court decided in *Boyd v. U. S.*, *supra*, that a proceeding in rem to enforce a forfeiture of property and a suit to recover a penalty for a violation of law were criminal cases within the meaning of the constitution. Many of the cases in the state courts were brought to recover penalties for acts or omissions which were not felonies, and some of them were not even misdemeanors. To such cases the reason of the rule obviously applies with less force than to the case at bar. Some of these decisions are *Nichols v. Newell*, 1 Fish. Pat. Cas. 647; *White v. Comstock*, 6 Vt. 405; *Riker v. Hooper*, 35 Vt. 457; *Barton v. Thompson*, 46 Iowa, 30; *Welch v. Jugenheimer*, 56 Iowa, 11, 8 N. W. Rep. 673; *Hawloetz v. Kass*, 25 Fed. Rep. 765; *U. S. v. Brown*, Deady, 566; *Webster v. People*, 14 Ill. 365; *Hitchcock v. Munger*, 15 N. H. 97; *People v. Hoffman*, 3 Mich. 248; *Woodward v. Squires*, 39 Iowa, 435, 437. To review these and other authorities here would serve no good purpose, since the decisions of the supreme court to which we have referred are binding upon us, commend themselves to our judgment, and in our opin-

ion are decisive of this case. They maintain the following propositions: In applying the statutes, constitution, and rules of law to the various suits and proceedings as they arise, courts should look beyond their form, and be governed by their character. A proceeding in rem to enforce a forfeiture for the violation of a law, and an action to recover a penalty imposed for such a violation, while civil in form, are in their nature and character criminal proceedings; they are criminal cases within the meaning of the constitution. *Boyd v. U. S.*, supra. Where provision is made by statute for the punishment of an offense by fine or imprisonment, and also for the recovery of a penalty for the same offense by a civil suit, a trial and judgment of conviction or acquittal in the criminal proceeding is a bar to the civil suit, and a trial and judgment for the plaintiff or defendant in the civil suit is a bar to the criminal proceeding. *Coffey v. U. S.*, supra; *U. S. v. McKee*, supra. It is now settled by the great current of the authorities in this country that where a criminal act is alleged in a civil suit—in a suit that is civil not in form merely, but in its nature and purpose—proof of the criminal act beyond a reasonable doubt is not required to warrant a verdict or decision in favor of the party who makes the allegation. 1 *Greenl. Ev.* § 13a, note; *Kane v. Insurance Co.*, 17 *Amer. Law Reg. (N. S.)* 293, 297; *Insurance Co. v. Wilson*, 7 *Wis.* 169; *Blaeser v. Insurance Co.*, 37 *Wis.* 31; *Knowles v. Scribner*, 57 *Me.* 495; *Hoffman v. Insurance Co.*, 1 *La. Ann.* 216; *Schmidt v. Insurance Co.*, 1 *Gray*, 529; *Young v. Edwards*, 72 *Pa. St.* 257, 267; *Insurance Co. v. Johnson*, 11 *Bush*, 587; *Rothschild v. Insurance Co.*, 62 *Mo.* 356; *Bradish v. Bliss*, 35 *Vt.* 326; *Ellis v. Buzzell*, 60 *Me.* 209; *Folsom v. Brawn*, 5 *Post. (N. H.)* 114; *Matthews v. Huntley*, 9 *N. H.* 146; *Welch v. Jugenheimer*, 56 *Iowa*, 11, 8 *N. W. Rep.* 673.

The United States might have maintained a civil suit for the single damages it sustained, if any, from the wrongful acts of the defendant charged in this complaint without establishing its case beyond a reasonable doubt. Such a suit would have been a civil suit in its nature and purpose as well as in its form. The action at bar is a civil suit in form; but when, under the form of this civil suit, the government sought to punish this defendant for felonies by recovering the penalty of double damages and \$2,000 for each offense, it made this proceeding criminal in its nature and purpose, and invoked the application to it of the rules of evidence applicable to criminal trials. While civil in form, all its other characteristics were those of a criminal case; its prosecutor was the government; its purpose was punishment; the defendant's conviction of a felony was essential to the plaintiff's recovery; the defendant's character and property were in jeopardy, because the government sought to punish him in this suit; and the verdict and judgment here would be a bar to any criminal prosecution for the same offense. The case became a criminal case under the cloak of a civil suit, and the reason of the rule required, and the decisions of the supreme court warranted, the application to it of the rule that the plaintiff must establish its case by proof beyond a reasonable doubt.

For the same reason the evidence of the defendant's character was

properly received. When a man whose character for honesty and integrity has been unquestioned for 40 years in the community in which he lives is charged by his government on circumstantial evidence with knowingly defrauding it, in a direct proceeding to punish him for the crime that character ought to serve him as a shield against unfounded accusations, and the evidence of it ought to be received and to have no light weight in determining the issue. The presumption is strong that a man of such character would not be guilty of such a crime. That presumption accompanies him in every other situation in life, and he is entitled to the benefit of it in the jury room. 1 Whart. Crim. Law, § 636.

The defendant's testimony was that he presented these vouchers for services and received payment of them without examining them, and without any knowledge whether they were correct or incorrect, in reliance upon the assistant quartermaster, who prepared them for him. The counsel for the government requested the court to charge "that it was the duty of the defendant, before presenting the vouchers for payment and allowance and receiving the money thereon, to have exercised such care and prudence as a man of ordinary business capacity and prudence would exercise to determine whether or not the accounts were in fact true; and that if, without such inquiry as an intelligent man would make under similar circumstances to ascertain that the facts presented were in fact true, it should turn out that they were false, then the defendant was responsible in this action for the consequences of presenting false vouchers." The court refused to give this request, and charged that to enable the plaintiff to recover the jury must be satisfied that the defendant knew some of the claims he presented were false, fictitious, or fraudulent; that they might determine whether or not he had such knowledge from all the facts and circumstances in evidence; that they ought not to infer that he had such knowledge merely from the fact that he acted negligently, or without ordinary business prudence, in his dealings with Capt. Miltimore; but that to warrant a finding that he knew such claims were either false, fictitious, or fraudulent they must be satisfied that he was aware of such facts or circumstances as would have created the belief in the mind of an ordinarily intelligent and prudent person that the claims were in some respects false, fictitious, or fraudulent. In other words, the counsel for the government insisted that the defendant was liable to pay the prescribed penalties if he was negligent in examining or presenting the false vouchers, and the court charged that he was not liable in this action for mere negligence, but was liable only in case he was aware, when he presented the vouchers, of such facts and circumstances as would induce an ordinarily intelligent and prudent man to believe them to be false. The statute prescribes these penalties not for negligently presenting false vouchers, but for presenting them "knowing the same to contain any fraudulent or fictitious statement or untruth." It is not negligence, but guilty knowledge, for which punishment is here prescribed, and nothing can make it more evident that the request was wrong and the charge right than this statement.

The court charged that "a fictitious claim against the government (for the purposes of this suit) may be defined to be a claim preferred against it for services said to have been rendered to it, or for supplies said to have been furnished to the government, no part of which services or supplies were in fact rendered or supplied," (by the person making the claim, or by the person in whose favor the account or claim purports to have been made out;) and it is urged that this charge was erroneous, because the court did not add to it the words contained in the parenthesis at the close of the quotation above; that under the charge as given one might present a fictitious claim in his own name for services rendered or supplies furnished by another, and for which the government had once paid the rightful claimant, and this second claim would not, under the court's definition, be fictitious. The vice of this argument is that such was not the case presented to the court below, and its charge was given "for the purposes of this suit," and not for the imaginary case supposed in the brief presented to this court. The evidence was that the defendant signed some of these contracts and vouchers for the accommodation of Capt. Miltimore; that he had no pecuniary interest and derived no pecuniary benefit from them; but that he had paid over to the captain's clerk all the money he collected on the vouchers, as he supposed, to pay the men whom the captain hired to perform these services; that the captain did hire and pay some men, and that a part of the services charged for in the vouchers were actually rendered to the government. For these services that were performed no one but the defendant presented any vouchers or claims, and the question was not whether the defendant had presented claims for services for which the government had paid or become indebted to another, but simply whether he had presented and received payment of claims for any services that had never in fact been rendered by any one. The definitions of fictitious, false, and fraudulent claims given by the court fairly submitted this question to the jury, and there was no error in this portion of the charge. After testimony had been introduced that the defendant admitted that all the transactions between him and Capt. Miltimore were entered in the account with the captain on the books of the A. F. Shapleigh Hardware Company, that account, which opened November 25, 1882, and closed May 8, 1886, was introduced in evidence. With the exception of one item of \$15.50, it consisted of merchandise items and cash items. The government proved by Mr. Kent that the cash credits to Miltimore on this account were \$78,531.38, and that the cash debits were \$55,623.53, and the entire account exactly balanced. The government also proved by Mr. Kent that the net amount of merchandise charged to Miltimore in this account subsequent to February 4, 1885, (prior to which date the claims of the government against the defendant were barred by the statute of limitations,) was only \$6,566.88, while he had presented vouchers for merchandise therein said to have been furnished to the government subsequent to that date to the amount of \$9,761, besides vouchers for services in which some other merchandise was charged. The government then offered to prove the amount and items of the

merchandise charged to Miltimore in this account prior to February 4, 1885, and the court excluded the evidence. It is clear that this ruling could not and did not prejudice the government, because it had already proved that the defendant had presented vouchers, subsequent to February 4, 1885, for merchandise, amounting to \$3,194.12 more than was charged to Miltimore on this account, and proof that merchandise was charged to him prior to that date could not have increased, but might have diminished, this discrepancy, because it might appear from this evidence that some of this earlier merchandise was included in the later vouchers. It is not necessary to determine whether there was technical error in this ruling, for it is well settled that "no judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the rights of the party against whom the ruling was made." *Lancaster v. Collins*, 115 U. S. 222, 227, 6 Sup. Ct. Rep. 33; *Deery v. Cray*, 5 Wall. 795, 803; *Gregg v. Moss*, 14 Wall. 564, 569; *Lucas v. Brooks*, 18 Wall. 436, 454; *Allis v. Insurance Co.*, 97 U. S. 144, 145; *Cannon v. Pratt*, 99 U. S. 619, 623; *Mining Co. v. Taylor*, 100 U. S. 37, 42; *Hornbuckle v. Stafford*, 111 U. S. 389, 394, 4 Sup. Ct. Rep. 515.

For the same reason it is unnecessary to determine whether or not there was technical error in the receipt in evidence of the official reports and certificates of the assistant quartermaster, Miltimore, and the major commanding at Jefferson barracks, made in 1885 and 1886, to the effect that the services charged for in the seven vouchers submitted to the jury had actually been rendered to the government by the defendant. The only purpose and effect these reports could have had was to rebut the evidence that had been introduced by the government to the effect that the claims made in these seven vouchers were false. They did not tend to show whether or not the defendant had knowledge of their falsity, for it did not appear that he had any knowledge of the reports. The jury found specifically that those seven vouchers were false, so that it conclusively appears that the introduction of the reports and certificates of the officers in no way prejudiced the rights of the government.

It is assigned as error that a quartermaster of the army was permitted to testify what sort of an examination is usually made by the commanding officer of a post for the purpose of making reports of this description, but at the trial no ground of objection to this testimony was stated. The only objection consists of the two words, "Objected to." A mere objection, where no grounds for it are assigned at the trial, cannot be considered in an appellate court. *Burton v. Driggs*, 20 Wall. 125, 133; *Camden v. Doremus*, 3 How. 515, 530; *Baldwin v. Blanchard*, 15 Minn. 489, 496, (Gil. 403.)

It was the duty of the court below to withdraw the case from the jury, and to direct them to return a verdict for the defendant on every cause of action in this complaint upon which the evidence was of such a character that the court, in the exercise of a sound judicial discretion, would have been compelled to set aside a verdict returned in favor of the plaintiff. *Railroad Co. v. Davis*, 53

Fed. Rep. 61; Railroad Co. v. Converse, 139 U. S. 469, 472, 477, 11 Sup. Ct. Rep. 569; North Pennsylvania R. Co. v. Commercial Bank, 123 U. S. 727, 733, 8 Sup. Ct. Rep. 266; Monroe v. Insurance Co., 52 Fed. Rep. 777, 778. Tested by this rule, a careful examination of this record has satisfied us that there was no error in the ruling of the court withdrawing from the jury and instructing them to return a verdict for the defendant upon all the causes of action upon which the government went to trial except the seven submitted to the jury.

There are other errors assigned, but they were not discussed in the briefs or arguments, and are deserving of no separate consideration. There was no sufficient ground for their assignment, and no error prejudicial to the government in the trial of this case.

The judgment is affirmed.

UNITED STATES v. DUCOURNAU.¹

(Circuit Court, S. D. Alabama. July 2, 1891.)

1. JUDICIAL KNOWLEDGE—BEER A MALT LIQUOR.

Beer is judicially known to be a fermented liquor, chiefly made of malt, and proof of selling beer not shown to be otherwise made will support an indictment for selling malt liquor.

2. PRACTICE—COURT AND JURY.

The jury in a criminal case are exclusive judges of the weight of what is proved, and the court will not set aside a verdict because differing with them as to the sufficiency of the evidence.

At Law. Indictment of Lotta Ducournau for carrying on the business of a retail dealer in malt liquors without a license. On motion to set aside a verdict of conviction. Denied.

M. D. Wickersham, U. S. Dist. Atty.

Smith & Gaynor, for defendant.

TOULMIN, District Judge. The indictment charges that defendant carried on the business of a retail dealer in malt liquors without a license. The evidence tended to prove that he carried on business and sold beer by the glass. The jury found him guilty. A motion is now made to set aside the verdict and grant a new trial on the grounds: First, that there was no evidence to support the verdict; and, second, that the evidence was not sufficient to establish beyond a reasonable doubt the guilt of the defendant. The contention is that proof that beer was sold does not support the charge that malt liquor was sold, but that there should be evidence that the beer sold was that made of malt. At first impression I was inclined to yield to this contention, and to hold that the evidence did not support the verdict. But from investigation and further consideration I have reached a different conclusion. Malt liquor is defined to be a beverage prepared by infusion of malt, as beer, ale, porter, etc.; and beer is defined as a fermented liquor, chiefly made of malt. If, then, beer is a liquor chiefly made of malt, and

¹Reported by Peter J. Hamilton, Esq., of the Mobile, Ala., bar.

malt liquor is a beverage prepared by infusion of malt, beer is malt liquor, and malt liquor embraces beer. *Allred v. State*, 89 Ala. 112, 8 South. Rep. 56. I believe this is common knowledge, and that when one speaks of beer he must be understood to mean beer made of malt. The ordinary acceptation of the term "malt liquor" imports a fermented liquor, made chiefly of malt; and beer is a fermented liquor made chiefly of malt, as I have said. Now, there are other kinds of beer, made from vegetables, roots, and the like. When these are referred to, I think there is a prefix to the word beer; as, for instance, spruce beer, cain beer, etc. My opinion, therefore, is that the general term "beer," as defined and commonly understood, refers to beer made from malted grain, and that when any other kind of beer is meant a prefix must be added to indicate the kind referred to. The supreme court of this state has in several cases decided that the courts take judicial knowledge of the fact that lager beer is a malt liquor, and that evidence of that fact was not necessary to support an indictment charging the unlawful selling of malt liquor; the evidence in the cases referred to showing that lager beer was the liquor sold. *Tinker v. State*, 90 Ala. 647, 8 South Rep. 855; *Watson v. State*, 55 Ala. 158; *Allred v. State*, *supra*. When we consider the definition of the words "lager" and "beer," and why that beverage is commonly called "lager beer" in this country, we may justly conclude that, had the evidence in the cases referred to been that beer was sold, the court would have made the same ruling. Lager beer is a beer much used in Germany, where it is kept in casks on a frame, ("lager" signifying "bed,") placed in a cellar for that purpose, and it is the name of a similar beverage now largely manufactured in the United States. It is obviously called "lager beer" here to indicate that it is like the German beer. The fact that the word "lager" is prefixed to the term "beer" does not convey the idea that it is a fermented liquor made of malt. This idea is involved in its being called "beer," beer being a fermented liquor, chiefly made of malt. This is, I believe, known wherever it is drank or is an article of commerce.

This disposes of the first ground on which a new trial is claimed. While the court decides whether there is any evidence on the issue in a case, and what evidence is before the jury, the jury are the sole and exclusive judges of the weight and sufficiency of the evidence. They must be convinced, beyond a reasonable doubt, by the evidence, before they can find the defendant guilty; and they alone can say whether they are thus convinced. Even if the court should differ with them in the conclusion reached as to the weight of the evidence, it would be a mere difference of opinion. And where the jury, considering the weight of the evidence, say by their verdict that it is sufficient to convince them beyond a reasonable doubt of the defendant's guilt, the court would not substitute its opinion for that of the jury, especially in a case of this sort. In saying this I do not mean to intimate that I differ with the jury in the conclusion reached by them in this case now that I am satisfied on the technical point of defense raised in the case. The motion is denied.

UNITED STATES ex rel. HAM v. CHAPEL, Sheriff.

(District Court, D. Minnesota. January 31, 1893.)

JURISDICTION OF FEDERAL COURTS — DISCRETION — PRISONER UNDER STATE PROCESS.

The United States district court has jurisdiction to discharge a person held for trial by a state court, where he is restrained of his liberty in violation of the constitution and laws of the United States, but the federal court may in its discretion refuse to exercise such jurisdiction before trial in the state court, in the absence of special circumstances requiring immediate action. *Ex parte Royall*, 6 Sup. Ct. Rep. 734, 117 U. S. 241; *Cook v. Hart*, 13 Sup. Ct. Rep. 40; *Robb v. Connolly*, 4 Sup. Ct. Rep. 544, 111 U. S. 624-627,—followed.

Application by J. W. Ham for Discharge on Habeas Corpus from the custody of Charles E. Chapel, sheriff of Ramsey county, Minn. Writ dismissed, and prisoner remanded.

J. F. Fitzpatrick and Martin H. Albin, for petitioner.
Pierce Butler, for respondent.

NELSON, District Judge. The petitioner seeks a discharge upon the ground of the illegality of his arrest and imprisonment under state authority. The following facts are stipulated:

"That said J. W. Ham was extradited on an indictment mentioned in his petition, and arrived at St. Paul, Minnesota, August 26, 1892. That after said J. W. Ham had been duly arraigned upon said indictment, and had duly entered a plea of not guilty thereto, a nolle prosequi was on the 12th day of December, 1892, duly entered in said case, and said case was dismissed; and that thereafter, and before said J. W. Ham had an opportunity to depart from the district court room of Ramsey county, state of Minnesota, he, said J. W. Ham, was by the sheriff of Ramsey county, Minnesota, arrested, and detained for the offense set out in the indictment, a copy of which is attached to the return to said writ of habeas corpus, and has ever since been so detained."

It is claimed that the district court of Ramsey county is without authority to try said J. W. Ham on the indictment found after his rendition to the state of Minnesota by the territory of Utah for an alleged crime in no wise connected with the crime or charge upon which his surrender was demanded and secured, for the reason that no opportunity, before his arrest upon this charge, was given "to depart or return to his domicile;" and thus, it is urged, he is restrained of his liberty in violation of the constitution and laws of the United States.

The jurisdiction of this court to discharge the prisoner from arrest and imprisonment before his trial in the district court of Ramsey county if he is restrained of his liberty in violation of the constitution and laws of the United States does not admit of doubt; but it is also well settled that the court is not bound to exercise such power, and may, in its discretion, decline to discharge the prisoner alleged to be so held, and may require him to make his defense, and raise the question of the legality of his arrest and imprisonment in the state courts. The supreme court of the United States, in *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 734, and

in many other cases, holds that when a person is in custody under process of a state court of original jurisdiction for an alleged offense against the laws of that state, and it is claimed that he is restrained in violation of the constitution of the United States, the circuit court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted, although, if special circumstances requiring immediate action exist, it will interpose and discharge the accused. The district court of the United States has equal authority with the circuit court to issue a writ of habeas corpus. This doctrine was adhered to in *Cook v. Hart*, 13 Sup. Ct. Rep. 40, (decided in November, 1892.) It was a case of interstate rendition, and in the opinion the court, quoting from *Robb v. Connolly*, 111 U. S. 624-627, 4 Sup. Ct. Rep. 551, said:

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them."

And again, the court said:

"While the power to issue writs of habeas corpus to state courts which are proceeding in disregard of rights secured by the constitution and laws of the United States may exist, the practice of exercising such power before the question has been raised or determined in the state courts is one which ought not to be encouraged; * * * and we think that comity demands that the state courts under whose process he is held, and which are, equally with the federal courts, charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance."

There are no special circumstances in this case requiring immediate action by this court, and no urgency demanding its interference. Following the views announced in the foregoing decisions, the prisoner is remanded to the sheriff of Ramsey county, and the writ of habeas corpus is dismissed.

UNITED STATES v. BATTLE & CO.

(Circuit Court of Appeals, Eighth Circuit. February 6, 1893.)

No. 169.

CUSTOMS DUTIES—CLASSIFICATION—CHLORAL HYDRATE.

Chloral hydrate is dutiable at the rate of 25 per cent. ad valorem, under paragraph 76 of Schedule A of the tariff act of October 1, 1890, "as a chemical compound not especially provided for," and not at 50 cents per pound, under paragraph 74 of said schedule, as "a medicinal preparation of which alcohol is a component part, or in the preparation of which alcohol is used." 50 Fed. Rep. 402, affirmed.

Appeal from the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

Application by Battle & Co., chemists, for a review of the board of general appraisers' decision as to the classification of certain imports of chloral hydrate. The circuit court held that the goods were dutiable under paragraph 76, Schedule A, of the act of October 1, 1890. 50 Fed. Rep. 402. The United States appeals. Affirmed.

Statement by CALDWELL, Circuit Judge:

This is an appeal from the judgment of the circuit court of the United States for the eastern district of Missouri. The character of the case, and the questions of law and fact arising therein, are set forth in the opinion of Judge TRAYER, in the court below, as follows:

"THAYER, District Judge. This is a case that arises under the customs law. The question in the case is whether chloral hydrate is dutiable at fifty cents per pound, under paragraph 74 of Schedule A of the tariff act of October 1, 1890, as 'a medicinal preparation * * * of which alcohol is a component part, or in the preparation of which alcohol is used,' or whether it is dutiable at the rate of twenty-five per cent. ad valorem, under paragraph 76 of the same schedule, as 'a chemical compound * * * not especially provided for.'

"The court is compelled to adopt the latter view, for the following reasons: Chloral hydrate is not mentioned by name in the tariff act, and in that sense it is not 'specially provided for.' Furthermore, all of the experts agree that it is 'a chemical compound.' It answers, therefore, all of the requirements of paragraph 76 of Schedule A. On the other hand, there are some grave objections to classifying it under paragraph 74 of Schedule A. In the first place, it may be said that alcohol is clearly not a component part of 'chloral hydrate,' because in the process of manufacturing the latter drug (when the alcohol process is employed) the alcohol is broken up into its constituent elements, and does not reappear in the drug, and cannot be extracted therefrom, as it may be when used merely as a solvent, or to treat oils or other fatty substances. The case for the government rests on the fact that alcohol is used in one of the most common processes employed for manufacturing chloral hydrate. Hence it is claimed that it is a 'medicinal preparation, * * * in the preparation of which alcohol is used.' A very substantial objection to this view is that chloral hydrate may be, and sometimes is, manufactured by two processes, from substances containing considerable starch, without the use of any alcohol. Chloral hydrate, thus produced, would certainly not be dutiable under paragraph 74; and the result of holding the present importation dutiable under that clause would be to impose a different rate of duty on the same drug, depending upon the process of manufacture.

"Another view of the case is also entitled to much weight. Considering the whole of paragraph 74, which reads as follows: 'All medicinal preparations, including medicinal proprietary preparations, of which alcohol is a component part, or in the preparation of which alcohol is used, not specially provided for in this act, fifty cents per pound,'—it would seem as though congress, in this clause, only had in mind a class of medicinal preparations in which alcohol is used as an ingredient without being broken up, either as a solvent, or to extract and hold in solution the medicinal properties of certain vegetable substances or drugs. The use of alcohol in the manufacture of chloral hydrate bears no analogy to the uses last mentioned. The drug is manufactured in the alcohol process by passing dry chlorine gas through alcohol. By so doing the alcohol is broken up chemically, a part of its hydrogen is liberated, and is replaced by atoms of chlorine. The process results in the formation of a solid substance of crystalline structure, which is then treated with water to form chloral hydrate.

"As before stated, other substances containing starch may be used in lieu of alcohol to supply the elements necessary to form chloral hydrate. In view of the manner in which alcohol is treated in the process above described, the court considers it extremely improbable that chloral hydrate was one of the medicinal preparations which congress intended to make dutiable under paragraph 74 of Schedule A. Under the testimony, it is also doubtful whether chloral hydrate is, in a strictly legal or dictionary sense, 'a medicinal preparation.' In the form in which the present importation was made, it is clear that the article in question is not a complete medicinal preparation, for the reason that it cannot be administered in the form in which it was imported, but must be further prepared by the druggist or apothecary.

"While the case is not entirely free from doubt, I think, for the reasons above stated, that the article in question should be assessed under paragraph 76, as 'a chemical compound not specially provided for,' and at the rate of twenty-five per cent. ad valorem."

George D. Reynolds, U. S. Atty.

Eleneious Smith, (Joseph Dickson, on the brief,) for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge, (after stating the facts.) Having reached the same conclusions as those expressed in the opinion of Judge THAYER in the circuit court, the judgment below is affirmed.

In re GERDAU.

(Circuit Court, S. D. New York. February 6, 1893.)

1. CUSTOMS DUTIES—IVORY.

The provisions of paragraph 618 of the tariff act of October 1, 1890, admitting, free of duty, ivory not sawed, cut, or otherwise manufactured, do not apply to elephants' tusks sawed into pieces of various lengths, when such sawing requires skill and judgment, and is done, not for convenience in transportation, but to separate the ivory into different grades, adapted to different uses. *Hartranft v. Wiegmann*, 7 Sup. Ct. Rep. 1240, 121 U. S. 609, distinguished.

2. SAME—CONSTRUCTION OF LAWS — KNOWLEDGE OF WAYS AND MEANS COMMITTEE.

An importer of ivory called the attention of the ways and means committee to the fact that a certain provision relating to cut ivory in a tariff bill then in preparation would make a tusk once sawed dutiable, but the bill was not changed in this respect. Act Oct. 1, 1890, par. 618. *Held*, that it should be presumed that congress intended to make ivory once sawed subject to duty.

3. SAME—PROTEST—REVERSAL OF APPRAISERS' DECISIONS.

To entitle an importer to a reversal of a decision by the board of general appraisers, as provided in the tariff act of June 10, 1890, it must be proved that the classification contended for by him is right, and not merely that the collector's classification is wrong.

Appeal by the importer from decision of the board of general appraisers affirming the decision of the collector of the port of New York. Affirmed.

Stephen G. Clarke, for importer.

James T. Van Rensselaer, Asst. U. S. Atty., for collector.

COXE, District Judge. The merchandise in question consists of parts of elephants' tusks, sawed into pieces of various lengths. The collector classified it under paragraph 462 of the new tariff as "manufactures of ivory * * * not specially provided for in this act, forty per centum ad valorem." The importer protested, insisting that it was entitled to free entry under the provisions of paragraph 618, as "ivory and vegetable ivory, not sawed, cut, or otherwise manufactured." The board overruled the protest and sustained the collector. The importer appeals.

The following facts are found by the board: That the different parts, into which the tusks are sawed, are especially adapted to different uses, the sawing being done with reference to this selec-

tion; that certain parts of the tusk, which are worth from 50 to 100 per cent. more than certain other parts, are separated from the parts of less value by sawing; that the grades of ivory, having been thus selected, are designed for different uses and are marketed in different countries; that sawing or cutting ivory requires expert skill and judgment, the operation being performed not for convenience in transportation, but for the purpose of selection. Samples of the importation were presented at the argument, consisting of tusks sawed into pieces of different lengths. Some pieces were short, others long. One large tusk had been sawed but twice, once near the middle and once near the end. No distinction was made, however, either at the argument or in the briefs between the various samples. They will, therefore, be considered together, it being assumed that they present the same characteristics so far as the present controversy is concerned. If the merchandise in question is "ivory, not sawed or cut," the importer is entitled to a reversal; if it is "ivory, sawed or cut," the decision of the board should be affirmed. It is wholly immaterial whether or not the collector has classified it for duty under the right section.

Does the paragraph quoted from the free list apply? This is the only question. The language of the law is very plain. It says, as explicitly as possible, that only ivory which is not sawed or cut can enter duty free. That this ivory is sawed is admitted. Here, then, would seem to be an end of the controversy. But it is argued that the language does not mean what it says, and that a sawing which is the equivalent of a manufacture, is implied. In other words, that a longitudinal sawing or cutting of the ivory into rudimentary piano keys, knife and pistol handles, was meant. If the language were ambiguous there might be room for judicial interpretation, but it is not. It says ivory which is sawed is dutiable, ivory which is cut is dutiable, and ivory which, by some process different from sawing or cutting, is manufactured, is dutiable. It would seem that, on the face of the statute, congress, so far as ivory is concerned, considered sawing and cutting as two species of manufacture. These two, being known, were mentioned *ex nomine*, but there might be other processes by which ivory could be manufactured, and hence the general clause, "or otherwise manufactured." But whether this be so or not, it seems too clear for debate that the importations are subject to duty whether they are manufactured or not. If the language of the free list simply had been "ivory, not sawed," there would be little room for argument that ivory which was sawed could enter free. The addition of the words "cut, or otherwise manufactured" if it does not add to, certainly does not diminish the strength of the collector's position. Certainly there is little force in the suggestion that the sawing or cutting must in every case amount to a manufacture. If that had been the intention of congress the language would have been the same as in paragraph 726 of the act of 1883, "ivory, unmanufactured." There would have been no difficulty, under the various decisions of the courts, in arriving at the true meaning of the word "unmanufactured," appearing in such a connection. *Hartranft v. Wieg-*

mann, 121 U. S. 609, 7 Sup. Ct. Rep. 1240; U. S. v. Semmer, 41 Fed. Rep. 324.

The words "not sawed or cut" cannot be read out of the statute; they are there and must receive some construction. What other meaning they can have than the one contended for by the collector I am at a loss to conjecture. Were it necessary to resort to extrinsic circumstances to arrive at the legislative intent, a persuasive piece of evidence is found in the record. It appears that the importer, Mr. Gerdau, called the attention of the ways and means committee of the fifty-first congress to the fact that if the language of paragraph 618 became law, a tusk of ivory which was once sawed transversely would be subject to duty. There was no misunderstanding at that time as to the true meaning of the paragraph; all understood it alike. With the attention of congress thus sharply drawn to the inevitable result of the proposed enactment it must be presumed that they legislated in the light of this knowledge. If they had intended to permit the free entry of sawed ivory they would have modified the paragraph; not having done so, the presumption is clear that they did not so intend. The case of *Hartman v. Wiegmann*, supra, is not in point. The court was there dealing with a provision of the law which placed on the free list "shells * * * not manufactured." If the statute had read "shells, not cleaned, ground, or otherwise manufactured" it is manifest that the decision would have been different. The reasoning of the board in the able opinions returned with the record is, to my mind, unanswerable, and their decision should be affirmed.

In re SCHMID.

(Circuit Court, S. D. New York. February 10, 1893.)

CUSTOMS DUTIES—GOODS IN BOND—ADDITIONAL DUTY.

Rev. St. § 2970, providing for an extra duty of 10 per cent. on goods remaining in a bonded warehouse longer than a year, is repealed by Act Oct. 1, 1890, § 50, and under the latter act such additional duty cannot be levied upon goods which had been in bond more than a year before October 6, 1890, (when the act of 1890 went into effect,) and were withdrawn in January, 1891. U. S. v. McGrath, 50 Fed. Rep. 404, approved.

Appeal by importer from the decision of the board of general appraisers affirming the action of the collector of the port of New York. Reversed.

Stephen G. Clarke, for importer.

Henry C. Platt, Asst. U. S. Atty., for collector.

COXE, District Judge. The merchandise in question—whiskey, wine, tobacco, etc.—was imported and entered for warehouse January 10 and March 9, 1889, and remained there until January, 1891, when it was withdrawn and the duties paid. The collector assessed an additional duty of 10 per cent. under the provisions of section 2970 of the Revised Statutes. The importer protested against the exaction of this duty upon the ground that the law permitting it had

v.54f.no.1—10

been repealed. Section 2970 provides in substance that merchandise deposited in a bonded warehouse may be withdrawn for consumption within one year from the date of importation, on payment of the duties and charges due at the time of such withdrawal, but if it remains in such warehouse after the expiration of one year it may be withdrawn on payment of the assessed duties and an additional duty of 10 per cent. of the amount of such duties and charges.

Section 20 of the customs administrative act of June 10, 1890, as amended by section 54 of the act of October 1, 1890, provides:

"That any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal."

Section 29 of the said act of June 10, 1890, after repealing and renominating various sections of the Revised Statutes, and after reciting various sections of subsequent statutes, continues as follows:

"And all other acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made."

Section 30 of the said act provides that the act, with exception of section 12, shall take effect August 1, 1890.

On the 1st of August, 1890, the merchandise in question had remained in bonded warehouse at least four months over one year. When the year expired, section 2970 of the Revised Statutes was in force and continued in force for several months thereafter. The saving clause of the repealing act expressly provides that it shall not affect "any right accruing or accrued." If the withdrawal had taken place subsequent to August 1st, and prior to the passage of the new tariff act, there would have been an interesting question whether or not the right of the government to the additional duty had not accrued, or, at least, was not accruing. It is argued with plausibility that the interest of the government in the additional duty attached after the expiration of the year, and although that interest was in a sense inchoate and contingent it was nevertheless an accruing right preserved by the saving clause of the repealing act referred to. But the merchandise was not withdrawn until January, 1891, after the passage of the act of October 1, 1890.

Section 50 of that act provides that on and after October 6, 1890,—

"All goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered, without payment of duty and under bond for warehousing, transportation or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to no other duty, upon the entry or the withdrawal thereof, than if the same were imported, respectively, after that day: provided, that any imported merchandise deposited in bond in any public or private bonded warehouse, having been so deposited prior to the first day of October, eighteen hundred and ninety, may be withdrawn for consumption at any time prior to February first, eighteen hundred and ninety-one, upon the payment of duties at the rates in force prior to the passage of

this act: provided, further, that, when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its withdrawal."

Section 55 repeals "all laws and parts of laws inconsistent with this act," and contains a proviso similar to that of the repealing clause quoted from the act of June 10, 1890.

I have no doubt at all, after considering all of the acts referred to, that it was the intention of congress to repeal section 2970 of the Revised Statutes, and abolish the additional duty therein provided for. The language of section 50 is too plain to admit of doubt that after October 6, 1890, no duty can be levied on merchandise in warehouse that could not be levied were the merchandise imported after October 6, 1890. In other words, merchandise in warehouse prior to October 6th is placed, as to duties, on an exact equality with similar merchandise imported after that date. *U. S. v. McGrath*, 50 Fed. Rep. 404.

The decision of the board is reversed.

UNITED STATES v. DAVIS.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 160.

1. CUSTOMS DUTIES—CLASSIFICATION—MARBLE MOSAICS.

Pieces of marble less than an inch in length and breadth, and pasted on paper in the form of blocks, or loose in bags, and intended to be imbedded in cement, so as to form a mosaic pavement, are dutiable at \$1.10 per cubic foot, as marble paving tiles, under paragraph 124 of the tariff act of October 1, 1890, (26 St. at Large, p. 567,) and not at 50 per cent. ad valorem, as manufactures of marble not specially provided for, under paragraph 125. *Davis v. Seeberger*, 44 Fed. Rep. 260, approved.

2. SAME—CONSTRUCTION OF STATUTE.

In cases of doubt as to the classification of an imported article, the construction most favorable to the importer should be adopted. *Hartranft v. Wiegmann*, 7 Sup. Ct. Rep. 1240, 121 U. S. 609, followed.

3. SAME.

Where a duty is imposed upon an article by a specific name, this will determine its classification, although the article may be included in other words of general description in another part of the same act. *Twine Co. v. Worthington*, 12 Sup. Ct. Rep. 55, 141 U. S. 468, followed.

4. SAME—REVIEW OF APPRAISERS' DECISION—FORM OF JUDGMENT AGAINST THE UNITED STATES.

In a proceeding under Act June 10, 1890, § 15, to review the decision of the board of general appraisers, the award of the circuit court is not limited to giving a mere certificate showing the amount due the claimant, but its duty is to hear, decide, and adjudge, under Act March 3, 1887, (24 St. at Large, p. 505,) and a judgment "that the petitioner recover" is not erroneous.

5. SAME—COSTS AGAINST THE UNITED STATES.

In a proceeding to review a decision of the board of general appraisers, under Act June 10, 1890, § 15, costs are recoverable against the United States, since the purpose of the act was merely to "simplify the laws" and change the procedure, not to take away the previously existing right of the importer to costs, (in his action against the collector;) and, where the

United States are appellants, and decision is against them, the costs should be paid out of the proper fund according to Rev. St. § 1001. U. S. v. Barker, 2 Wheat. 395, distinguished.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Proceeding by Frank L. Davis to review a decision by the board of general appraisers affirming the decision of the surveyor of customs at St. Louis in assessing duties on marble mosaics for pavements. The circuit court reversed the decision. The United States appeal. Affirmed.

Statement by SHIRAS, District Judge:

On the 13th of December, 1890, Frank L. Davis, the appellee, entered at the port of St. Louis 10 cases containing pieces of marble from three eighths to seven eighths of an inch in length and breadth, and pasted on paper, forming blocks about 12 by 24 inches, and 1 case containing the same kind of pieces of marble, not attached to paper, but loose in bags; and on the 18th of December, 1890, the appellee entered a further importation of 22 cases, containing like pieces of marble, all of which were attached to paper. The surveyor of customs at St. Louis assessed these importations as manufactures of marble, and therefore dutiable, under the act of congress approved October 1, 1890, at the rate of 50 per cent. ad valorem. The duty thus assessed was paid by the importer under protest, it being claimed that the articles were marble paving tiles, and therefore subject to the duty of \$1.10 per cubic foot, and appeals from the ruling of the surveyor of customs were duly prosecuted to the board of general appraisers at the city of New York under the provisions of section 14 of the act of congress approved June 10, 1890, (26 St. at Large, p. 131.) The board of appraisers affirmed the decision of the surveyor of the port of entry, holding that the imported articles were manufactures of marble, and thereupon the importer applied to the circuit court of the United States for the eastern district of Missouri for a review of the questions of law and fact involved in the matter in controversy according to the provisions of section 15 of said act of June 10, 1890, and upon the hearing thus had before the circuit court it was adjudged that the articles imported were dutiable as marble paving tiles, and that the importer was entitled to judgment for the excessive duties collected of him, amounting to the sum of \$521.33. From this decision and judgment the United States appealed to this court, and thus the question is presented whether the imported articles should be deemed to be manufactures of marble or marble paving tiles in classifying the same for assessment under the provisions of the act of congress of October 1, 1890.

George D. Reynolds, U. S. Atty.

Clinton Rowell and Franklin Ferriss, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge, (after stating the facts.) The act of congress approved October 1, 1890, (26 St. at Large, pp. 567-573,) assesses duties on marble under three heads, to wit: Paragraph 123: "Marble of all kinds, in blocks, rough or squared, sixty-five cents per cubic foot." Paragraph 124: "Veined marble, sawed, dressed, or otherwise, including marble slabs and marble paving tiles, one dollar and ten cents per cubic foot, (but in measurement no slab shall be computed at less than 1 inch in thickness.)" Paragraph 125: "Manufactures of marble, not specially provided for in this act, fifty per cent. ad valorem."

On behalf of the United States it is contended (1) that the importations in question are shown not to come under the specific designation of "marble paving tiles;" (2) that they come under the designation of "manufactures of marble," and therefore the classification made by the surveyor of customs was correct.

In construing the various provisions of the acts of congress imposing duties upon importations, in cases of doubt the construction most favorable to the importer must be adopted. *U. S. v. Isham*, 17 Wall. 496; *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. Rep. 1240.

When a duty is imposed upon an article by a specific name, such designation will determine its classification, although there may be in the same act of congress other words of general description which would include the article in question. *Homer v. The Collector*, 1 Wall. 486; *Arthur v. Lahey*, 96 U. S. 112; *Twine Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. Rep. 55.

Under these rules of construction, as well as under the express language of the paragraph itself, nothing can be included under the terms of paragraph 125, to wit, "Manufactures of marble, not specially provided for in this act," which come fairly within any one of the several classifications contained in paragraphs 123 and 124. In the latter are found the words "marble paving tiles," which are clearly intended to create or define a class which includes tiles of marble to be used for paving purposes; and therefore all articles, whether manufactured or not, which come within this particular description by reason of the material of which they are composed and the use for which they are designed, must be so classed, regardless of the minor differences which may serve to distinguish one kind of marble paving tile from another.

In the testimony of some of the witnesses on behalf of the government the meaning of the word "tile" is sought to be restricted to the one kind of tile that is made from burned earth or clay, but such limited use of the word is not admissible in the present case. Derivatively, the word means a covering, and hence is applied to such articles as are used for covering roofs, pavements, walls, and the like. The original meaning of the word refers, therefore, to the use made of the article, and not to the material of which it may be composed. In the *Encyclopedia Britannica*, under the article "Roofing Tiles," it is said, "In the most important temples of ancient Greece the roof was covered with tiles of white marble, fitted together in the most perfect way, so as to exclude rain;" and in a note to this article it is further stated that "marble tiles are said to have been first made by Byzes, of Naxos, about 620 B. C." In *Jules Adeline's Art Dictionary*, a work of recognized merit, it is stated that "Roman temples were sometimes covered with bronze tiles, laid side by side, while the roofs of Chinese temples generally consist of tiles of crane porcelain, painted green or yellow. The term 'tile' is also applied to plaques of marble, stone, or earthenware, sometimes decorated, sometimes with a uniform surface, which are used to cover walls or pavements. As a rule, they are either square or rectangular. Sometimes, however,

they are triangular, or in shape of a lozenge, hexagon, or octagon. They are then capable of very varied combinations." Among the definitions of the word "tile" in the Century Dictionary is the following: "Also a slab of stone or marble, used with others like it in a pavement or revetment. In the middle ages such tiles of stone were frequently incised with elaborate designs, the incisions being filled with lead or a colored composition, or occasionally incrustated in mosaic."

In *Rossman v. Hedden*, 145 U. S. 561,--568, 12 Sup. Ct. Rep. 925, it is said by the supreme court that "the covering of roofs, floors, and walls with tiles made of many different materials is of very ancient origin, and there is much interesting information in respect of their manufacture and that of pottery to be found in works on those subjects." It thus appears that the word "tile," etymologically considered, is not limited to an article of one material only. On the other hand, we well know that by the usages of trade and commerce words may come to have a significance or meaning much less comprehensive than that originally pertaining to them and it is entirely possible that the word "tile," unaccompanied with qualifying words, might be limited to articles made of baked earth or clay. Thus in *Rossman v. Hedden*, supra, it is said: "So far as this case is concerned, we see no reason to question the sufficiency of the ordinary definition of tiles as plates or pieces of baked clay, used for covering roofs, floors, and walls, and for ornamental work of various kinds, as well as for drains," etc.

In the case just cited the supreme court was called upon to construe the provisions of the tariff act of March 3, 1883, (22 St. at Large, p. 488,) it being therein held that plain glazed and plain enameled tiles were properly classified under the fourth paragraph of Schedule B as earthenware not otherwise specially enumerated, for the reason that it appeared from the evidence that when the act of March 3, 1883, was enacted, in commercial usage paving tiles did not include glazed or enameled ware, but only hard, unglazed tiles, fitted to endure the wear to which a pavement is ordinarily subjected. It was doubtless in view of this limited meaning that had become attached in commercial usage to these words that congress in the act of October 1, 1890, in framing Schedule B, included therein paragraph 94, which reads as follows: "Tiles and brick, other than firebrick, not glazed, ornamented, painted, enameled, vitrified, or decorated, twenty-five per centum ad valorem; ornamented, glazed, painted, enameled, vitrified, or decorated, and all encaustic, forty-five per centum ad valorem."

Many articles which, under the act of 1883, would have been classed as earthenware, would, under the act of 1890, be classed as tiles; the rate of duty being determined by the question whether they were glazed, enameled, painted, decorated, or not. To guard against the limitation of the word "tile" when applied to an article intended to be used for paving purposes to that kind of tile made from burnt earth or clay, the words "marble paving tile" were inserted in paragraph 124. Tiles intended for paving purposes, made from burnt earth or clay, are covered by the provisions of paragraph

94, and tiles intended for paving purposes, made out of marble, are included within the provisions of paragraph 124. Articles of importation which, by reason of the material of which they are composed and the use to which they are to be put, are fairly described by the phrase "marble paving tiles," must be so classed, even though there may be other general classifications in the act of congress which might include them. As we have seen from the authorities already cited, a paving tile, within the meaning of the act of congress of 1890, is a piece of burned earth or clay or of marble, suitable for and intended to be used as a covering for a floor, a pavement, or the like.

It is not questioned in this case that the articles imported were intended to be, and were in fact, used in covering floors and pavements, the manner of imbedding the same in cement not being substantially different from that used where the pieces of marble are of larger size; but it is claimed that the pieces of marble constituting the covering of the pavement should not be deemed to be paving tiles of marble, because they are smaller than the pieces which in former years were used for paving purposes, and because, by reason of their smaller size, they can be laid so as to form artistic designs or patterns, thus making a mosaic pavement. From the evidence in the case it appears that formerly marble floors or pavements were made of pieces of marble of several inches in length and width, but latterly they are largely constructed of pieces less than an inch in size. It is said that experience has shown that floors made of the larger pieces are more liable to crack, and are not as durable, as those made of the smaller pieces; but, whatever may be the cause or causes for the change in the size of the pieces used, the lessening of the size does not change the character of the floor or pavement made therefrom; whether composed of pieces of marble six inches or an inch square, in either case, it is a floor or pavement made of marble paving tile, for in defining paving tile, whether of earth, clay, or marble, the act of congress does not make the size thereof an element in the definition of the article. Some of the witnesses for the government state that pieces of marble of the size of those now under consideration are known in the trade as "mosaics" or "marble mosaics." It is entirely possible that, for the purpose of distinguishing the different sizes of the article, the word "mosaic" is used to define the sizes which are readily adapted to be laid in the form of designs, thus giving an artistic appearance and finish to the floor or pavement; but no matter how variegated in color or intricate in pattern or artistic in effect may be the pavement constructed, as compared with one made from larger pieces of a single color, it is equally true of both pavements that they are made of pieces of marble suitable for paving purposes, and are therefore both constructed of marble paving tile.

In the case of *Davis v. Seeberger*, 44 Fed. Rep. 260, the question was presented of the proper classification of similar pieces of marble under the provisions of the tariff act of March 3, 1883, (22 St. at Large, p. 488.) The collector claimed, as in this case, that they were dutiable as a manufacture of marble, not otherwise enumer-

ated, but Judge Blodgett held that they were not a manufacture of marble, but came under the designation of marble paving tiles. The reasoning in that case is entirely applicable to the question now before this court, and fully sustains the conclusion we have reached, that the articles composing the importations made by the appellee are included in the words "marble paving tile," as the same are used in the act of 1890.

Much stress is laid in the argument of counsel for the government upon the difficulty of ascertaining the cubic contents of small pieces of marble such as form the importations in question, so as to ascertain the amount of duty at the rate of \$1.10 per cubic foot. It is not made to appear that there was any difficulty in ascertaining the difference between the amount of the duty at 50 per cent. *ad valorem*, and at \$1.10 per cubic foot, as it is not questioned in the record that the difference between the two amounts is \$521.33, for which judgment was rendered in the trial court; and the evidence does not conclusively show that methods for ascertaining the number of cubic feet contained in importations of this kind cannot be devised which will be sufficiently accurate for all practical purposes. Even if there was difficulty in this particular, it would not justify the court in taking the imported articles out of the class to which they clearly belong and assigning them to another, upon which a higher duty is imposed, for the citizen cannot be thus subjected to a heavier burden, which is not clearly within the intent of the statute. The conclusion reached by the trial court that the articles in question were subject to duty as marble paving tiles was correct, and is therefore affirmed.

Exception is also taken to the form of the judgment entered by the circuit court, which is as follows, omitting the formal and preliminary recitals: "It is therefore considered by the court that the petitioner, Frank L. Davis, have and recover of the United States the sum of five hundred and twenty-one dollars and thirty-three cents damages, aforesaid, by the court assessed, and also costs in this behalf expended, and that a copy of this judgment be certified to the attorney general of the United States, according to law." On behalf of the United States it is claimed that the entry should have been merely in the form of a certificate showing the amount found due the claimant.

Before the enactment of the statutes conferring on the court of claims and the circuit and district courts jurisdiction over certain classes of cases against the United States, it was doubtless true that no judgment for the recovery of money could be rendered against the government. The right to enter judgment did not exist, because the courts did not have jurisdiction to hear and decide cases against the United States. When, however, by statutory enactment the United States conferred upon the courts jurisdiction to hear and decide, it included the power to render judgment, for by that is meant the final decision of the court in the application of the law to the facts established by the evidence. Thus, in section 7 of the act of congress of March 3, 1887, (24 St. at Large, p. 505,) which confers jurisdiction upon the court of claims and the cir-

cuit and district courts over certain claims against the government, it is made the duty of the court to file a written opinion setting forth the findings of fact and conclusions of law, "and to render judgment thereon," and in section 15 of the act of June 10, 1890, (26 St. at Large, p. 131,) under which this proceeding was carried for review into the circuit court, it is enacted that "all final judgments, when in favor of the importer, shall be satisfied and paid by the secretary of the treasury from the permanent indefinite appropriation provided for in section twenty-three of this act." In view of these enactments, it is clear that the circuit court, in reviewing cases of this character, is not limited to giving a mere certificate, but its duty is to hear, decide, and adjudge.

A further exception is taken to the judgment of the circuit court in that it awards costs against the United States, the contention of the district attorney being that the United States cannot be subjected to a liability for costs, and in support of this position are cited the cases of *U. S. v. Hooe*, 3 Cranch, 73; *U. S. v. Barker*, 2 Wheat. 395; *U. S. v. Boyd*, 5 How. 29; *In re Chase*, 50 Fed. Rep. 695.

At common law, costs, strictly speaking, are not recoverable as an incident to the judgment on the issues litigated. They are recoverable only when authorized by statute. General statutes providing for the recovery of costs by the prevailing party have been held not applicable to the state or national governments, the principal ground for this ruling being the fact that the government, in the absence of direct statutory authority, is not liable to be sued by its citizens. In England it was considered the prerogative of the king not to pay costs, and beneath his dignity to receive them. 3 Cooley, Bl. 400. In the decisions of the supreme court cited by the counsel for the government, it is held that costs are not recoverable against the United States, and this must be accepted as the rule, unless congressional legislation, since the date of these decisions, has subjected the government to a liability for costs in cases of this character.

It will not be questioned that generally costs may now be awarded to the United States when it is the prevailing party, and by the provisions of section 962, Rev. St., it is provided that in all suits by the United States for the recovery of duties on imports—that is to say, in suits involving the same question as that now before us—"the judgment shall recite that it is rendered for duties, and such judgment, with interest thereon and costs, shall be payable in the coin receivable by law for duties." On the other hand, there are a number of statutes in which the liability of the United States to respond for costs is recognized, and methods of procuring payment thereof are provided. Thus, in section 976, Rev. St., it is enacted that in case of suits brought by an informer on a penal statute, wherein the suit is dismissed or judgment is rendered for the defendant, the informer alone shall be liable to the officers of the court for their fees, unless the informer is an officer of the United States, and had probable cause for instituting the suit, "in which case the United States shall be responsible for such fees."

In proceedings for the condemnation of vessels seized as prizes it is provided in section 4640, Rev. St., that when restitution of the vessel is awarded, or in case the court has not funds to cover costs and charges allowed and remaining unpaid, the same "shall be a charge upon and be paid out of the fund for defraying the expenses of suits in which the United States is a party or interested."

In section 1001, Rev. St., is found the general declaration that "whenever a writ of error, appeal, or other process in law, admiralty, or equity issues from or is brought up to the supreme court or a circuit court, either by the United States or by direction of any department of the government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted."

On March 3, 1887, was approved the act of congress (24 St. at Large, p. 505) giving to the court of claims and to the circuit and district courts jurisdiction over suits against the United States brought to enforce claims arising under the constitution or any law of congress, and in the fifteenth section of the act it is declared that, "if the government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, for summoning them, and fees paid to the clerk of the court."

June 10, 1890, the act of congress (26 St. at Large, p. 131) was adopted, which, in the fifteenth section thereof, provides for bringing this class of cases for review before the circuit court, and also for an appeal to the supreme court from the judgment of the circuit court, it being therein provided that "on such application, and on any such appeal, security for damages and costs shall be given as in the case of other appeals in cases in which the United States is a party."

By the act of March 3, 1891, (26 St. at Large, p. 826,) the jurisdiction on appeal over cases of this character arising under the revenue laws was conferred upon the circuit courts of appeals, created by that act.

In reaching a correct solution of the question under consideration it is necessary to read together the several sections we have quoted, for, as is said by the supreme court in *U. S. v. Freeman*, 3 How. 556-564: "The correct rule of interpretation is that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them; and it is an established rule of law that all acts in *pari materia* are to be taken together, as if they were one law." Not only does it appear that the ancient doctrine of the common law, that it was beneath the dignity of the sovereign to receive costs, has been wholly departed from, but also that in many instances the sovereign has parted with the pre-

rogative of not paying costs, and has consented to be sued in the court of claims and the courts of the United States for claims founded on the constitution or any law of congress. The act of March 3, 1887, confers upon the courts of the United States, in cases wherein the United States puts in issue the claim sued, the discretionary right to award certain costs against the government. In case an appeal is taken from the judgment of the trial court by the government, then the provisions of section 1001 of the Revised Statutes become applicable, in which it is enacted that when the appeal is taken either to the supreme court or a circuit court by the United States security for costs shall not be required, but that in case of a decision adverse to the government in the appellate court such costs as are taxable against the United States shall be paid out of the contingent fund of the department under whose direction the proceedings were instituted. In other words, it is no longer the universal rule that "the United States never pays costs," as was said to be the fact by Chief Justice Marshall, speaking for the supreme court in *U. S. v. Barker*, 2 Wheat. 395. Whether the prevailing party to a suit against the United States to recover for illegal duties exacted under the provisions of the tariff laws of the United States can recover costs depends upon the provisions of these laws, considered as an entirety. Originally the remedy of a person who, under compulsion, had paid illegal or excessive duties, was to sue the collector in an action at law, counting upon the implied promise of the collector to return that which had been wrongfully demanded. *Elliott v. Swartout*, 10 Pet. 137. Upon the rendition of the opinion in this case, the collectors, for their own protection, retained in their own hands the duties paid them under protest, and thereupon congress passed the act of March 3, 1839, (5 St. at Large, p. 339,) the second section of which made it the duty of the collectors to pay into the treasury duties paid under protest, and authorizing the secretary of the treasury, when it was shown to his satisfaction that duties had been wrongfully collected and had been paid under protest, to draw his warrant on the treasury in favor of the person entitled to the overpayment.

In *Cary v. Curtis*, 3 How. 236, it was held by the supreme court that the effect of this act was to deprive the importer of his common-law right of action against the collector, because the latter could not retain the money for his own protection, and was, by the express terms of the statute, compelled to pay the money into the treasury; and hence there was no ground for raising an implied promise on his part to repay it to the importer. This decision was followed by the act of congress of February 26, 1845, (5 St. at Large, p. 727,) which restored the right to maintain an action at law against the collector for duties illegally exacted in whole or in part and paid under written protest, and further deprived the secretary of the treasury of the right to refund overpayments which had been conferred upon him by the act of 1839.

The act of 1845 was in turn repealed by that of June 30, 1864, (13 St. at Large, p. 214,) which provided that the decision of the collector as to the rate and amount of duties should be final, unless

within 10 days the importer should give notice in writing, pointing out specifically the objections relied on, and should appeal to the secretary of the treasury within 30 days; the decision of the secretary being made final unless suit was brought within 90 days. In case the decision of the secretary was favorable to the claimant, he was authorized to draw a warrant upon the treasury for the repayment of the overpayment. The various provisions of the statutes remaining in force were carried into the Revised Statutes, but have now been repealed by the statute of June 10, 1890, (26 St. at Large, p. 131.) The title of the act declares its purpose to be "to simplify the laws in relation to the collection of the revenue," and under its provisions the decision of the collector as to the rate and amount of duties is made final, unless the owner, importer, or person paying the duties charged, shall, within 10 days after the ascertainment and liquidation thereof, give notice in writing of his specific objections to the duty charged, in which case the collector is required to transmit the papers to the proper board of general appraisers provided for in the act, whose decisions in the premises may be reviewed by the proper circuit court of the United States upon application of either the importer or the secretary of the treasury. It thus appears that originally the remedy of the importer for the recovery of illegal charges paid under compulsion was an action at law against the collector. As this was based upon the common law, the general provisions of the statutes of the United States awarding costs to the prevailing party would be applicable, and the importer would be entitled thereto if he prevailed in his suit. This common-law right of action, however, being taken away by the act of March 3, 1839, was not restored by the act of February 26, 1845. That act provided for the bringing of an action at law, but the supreme court, in *Arnson v. Murphy*, 109 U. S. 238-243, 3 Sup. Ct. Rep. 184, held that the effect of this act was not to restore the common-law action existing previous to March 3, 1839, but that it created a statutory right of action at law, exclusively governed by the provisions of the statutes of the United States. As these statutes then gave costs to the prevailing party, the natural conclusion would be that in actions at law against the collector the right to costs existed; and hence, as we understand it, the practice was, in cases of this character, to award costs against the collector when judgment went in favor of the importer. The judgments thus rendered, including costs, were paid out of the general appropriation applicable thereto, aided by special appropriations, made from time to time. Thus, in section 3689 of the Revised Statutes, it is provided that "there are appropriated out of any moneys in the treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same, respectively; and such appropriations shall be deemed permanent annual appropriations: * * * To refund and pay back duties erroneously or illegally assessed or collected under the internal revenue laws; * * * to repay to importers the excess of deposits for unascertained duties, or duties or other moneys paid under protest."

In aid of this general permanent appropriation thus provided for,

special appropriations have also been made from time to time. Thus in the bill passed June 14, 1878, (20 St. at Large, p. 128,) section 3 is as follows: "For repayment to importers the excess of deposits for unascertained duties, or duties or other moneys paid under protest, including interest and costs in judgment cases, \$250,000." In appropriation bills passed in 1879, 1880, 1881, and in the succeeding years, are to be found similar provisions for paying interest and costs in judgment cases. It certainly cannot be true that the right of the importer, obtaining judgment for the repayment of duties illegally exacted, to be paid costs, was dependent upon the fact whether he was repaid out of the permanent appropriation or out of a special appropriation made to supply the deficiency in the former. When giving judgment the court cannot possibly foresee whether the particular judgment will be paid out of the permanent or out of a special appropriation, and that unknown and unknowable factor cannot be the measure of the power and duty of the court. If the prevailing party is entitled to costs, judgment therefor should be awarded him. Whether payment thereof can be secured is another question, over which the court has no control. In the passage of these special appropriations congress clearly recognized the right of the importer prevailing in the action to be repaid costs, and thus we find legislative recognition and sanction of the proposition that in the statutory actions at law against the collectors for the recovery of duties paid under compulsion and protest the prevailing party was entitled to costs, and that when rendered against the collector the United States would provide for the payment thereof.

In the enforcement of the collection of the internal revenue taxes the repayment of costs was specifically provided for. Thus, in section 3220 of the Revised Statutes, it is made the duty of the commissioner of the internal revenue "to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court for any internal taxes collected by him, with the costs and expenses of the suit."

From these several provisions of the acts of congress the inference necessarily to be drawn is that, so long as the remedy of the importer for the recovery of taxes illegally assessed against him and paid under compulsion consisted in the right to bring an action at law against the collector, then the usual statutory rule that the prevailing party was entitled to costs was applicable thereto. Is there anything in the subsequent legislation which changes this rule? The statute of June 10, 1890, provides a different method for bringing the question of the right to recover taxes paid by the importer before the circuit court, but the change is merely as to the method of procedure, and not as to matter of substance. The purpose of the act is to simplify the laws pertaining to the subject-matter, and there is no provision to be found therein which declares that the previously existing right to recover costs shall no longer exist. On the contrary, in section 15 it is declared that "on such original application, and on any such appeal, security for damages and costs shall be given as in the case of other appeals in cases in which the

United States is a party." The fair inference from this declaration is that proceedings under this act of June 10, 1890, in so far as the matter of costs and security therefor on appeal is concerned, are to be governed by the provisions of the statutes on that subject already enacted. Therefore, when the United States is the appellant, no bond or security for costs can be required, but, in case of an adverse decision,—that is, a decision against the United States,—the costs taxable by law against the latter are to be paid out of the proper fund, according to the express provisions of section 1001 of the Revised Statutes.

We find nothing in the act of June 10, 1890, which changes the rule previously existing on this subject, and our conclusion is that in cases of this character the circuit court may award costs against the United States when the decision is adverse to the government. The judgment of the circuit court is therefore affirmed.

In re BISTER et al.

(Circuit Court, S. D. New York. February 6, 1893.)

CUSTOMS DUTIES—GLORIA CLOTH.

Gloria cloth, composed of silk and worsted, and weighing less than 4 ounces to the square yard, and used for women's and children's dresses, is dutiable at 12 cents per square yard and 50 per cent. ad valorem, as "women's and children's dress goods," or "goods of similar description and character, composed wholly or in part of wool, worsted," etc., under paragraph 395 of the tariff act of October 1, 1890, and not at 50 per cent. ad valorem, as a "manufacture of silk, or of which silk is the component material of chief value," under paragraph 414. *Hartman v. Meyer*, 10 Sup. Ct. Rep. 751, 135 U. S. 237, distinguished.

Appeal by the importers from a decision of the board of general appraisers affirming a decision of the collector of the port of New York. Affirmed.

W. Wickham Smith, for importers.

James T. Van Rensselaer, Asst. U. S. Atty., for collector.

COXE, District Judge. The merchandise in question is known as "Gloria Cloth." It is composed of silk and worsted, silk being the component material of chief value. It is used for women's and children's dresses, and weighs less than four ounces to the square yard. The collector classified it under paragraph 395 of the act of October 1, 1890, which is as follows:

"On women's and children's dress goods, coat linings, Italian cloth, bunting, and goods of similar description and character, composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca, or other animals, and not specially provided for in this act, the duty shall be twelve cents per square yard; and in addition thereto fifty per centum ad valorem."

The importers protested, insisting that it should have been classified under paragraph 414 of the new tariff law, which is as follows:

"All manufactures of silk, or of which silk is the component material of chief value, not specially provided for in this act, fifty per centum ad valorem: provided, that all such manufactures of which wool, or the hair of the camel,

goat, or other like animals is a component material, shall be classified as manufactures of wool."

The board sustained the collector and the importer appeals to this court.

The question is whether the merchandise is more specifically provided for in paragraph 414 than in paragraph 395 of the new tariff act. The question is a perplexing one, but I am inclined to think that the collector was right in his classification. "Women's and children's dress goods" is a term of commercial designation. Paragraph 395 does not deal broadly with woollen cloths or manufactures of wool or worsted, but is confined to certain designated varieties of woollen or worsted cloths and to goods of similar description to these varieties. Strictly speaking "Gloria cloth" may not be known commercially as "women's and children's dress goods," but there is no question that it is used in making women's and children's dresses and is similar in description to such goods. A paragraph which provides for "goods of similar description and character to women's and children's dress goods composed wholly or in part of worsted" describes with greater accuracy the imported merchandise than a paragraph which provides for "all manufactures of silk." To borrow an analogy from the patent law, cloth which would infringe paragraph 414, were its broad language embodied in the claim of a patent, would not be touched by the narrower provisions of paragraph 395. The latter is more limited in scope and, therefore, more specific. It is this element of specialization which distinguishes the case from *Hartranft v. Meyer*, 135 U. S. 237, 10 Sup. Ct. Rep. 751, where two broad paragraphs, one relating to manufactures of wool and the other to manufactures of silk, were under consideration. The contention that in no event is paragraph 414 applicable for the reason that "Gloria cloth" is within the proviso when construed in the light of the provisions of the act of May 9, 1890, (26 St. at Large, p. 105,) entitled "An act for the classification of worsted cloths as woolens," presents an interesting question which it is unnecessary to decide.

The decision of the board is affirmed.

IN RE KURSHEEDT MANUF'G CO.

(Circuit Court of Appeals, Second Circuit. February 7, 1893.)

CUSTOMS DUTIES—VELVETEEN DRESS FACINGS.

"Velveteen dress facings" are dutiable at 40 per cent. ad valorem as "manufactures of cotton not specially provided for," under paragraph 355 of the tariff act of October 1, 1890, and not at 14 cents per square yard and 20 per cent. ad valorem, as "velveteens," nor as "cotton-pile fabrics," under paragraph 350. 49 Fed. Rep. 633, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Proceeding by the Kursheedt Manufacturing Company to review the decision of the board of general appraisers assessing a duty of 40 per cent. ad valorem on "velveteen dress facings." The circuit

court affirmed the decision. 49 Fed. Rep. 633. The United States appeals. Affirmed.

Edward Mitchell, U. S. Atty., and Thos. Greenwood, Asst. U. S. Atty., for appellant.

M. A. Kursheedt, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. The court below, affirming the decision of the board of general appraisers, adjudged that the importations in controversy were manufactures of cotton, under paragraph 355 of the tariff act of October 1, 1890, which subjects to duty at 40 per cent. ad valorem "all manufactures of cotton not specially provided for." It is contended for the appellant that they should have been classified and assessed for duty under paragraph 350 of the same tariff act, which imposes a duty of 14 cents per square yard and 20 per cent. ad valorem upon "plushes, velvets, velveteens, corduroys, and all pile fabrics composed of cotton, * * * if dyed, colored, stained, painted, or printed." Paragraph 355 is the omnibus clause of "Schedule I, Cotton Manufactures." The importations consist of velveteen which has been cut bias into narrow strips of short length, the ends lapped over, formed into a seam, sewed together, and pressed with a hot iron. They are commercially known as velveteen dress facings. They are intended for facing the skirts of dresses, and are used for that purpose in the form in which they are imported.

The real question in the case is whether the articles are the velveteens of paragraph 350 or a manufactured article. Concededly, if they are a manufactured article, they are a manufacture of cotton, because they are made out of velveteen, which, itself, is a manufacture of cotton. If they are specially provided for, and excluded from the manufactures of cotton of paragraph 355 for that reason, it is because they are velveteens. Velveteens are a particular variety of cotton-pile fabric, and, having been enumerated, like plushes, velvets, and corduroy, are taken out of the more general descriptive term. They are not the pile fabrics of paragraph 350, because that term is intended to cover and subject to duty only such other varieties as have not already been described. We regard the term "pile fabric" as a trade term, used to designate all the other cotton fabrics which are ejusdem generis with the varieties previously named. We think the evidence clearly shows that the articles in controversy have lost their commercial identity as velveteen, and are a manufactured article. Not only have they been advanced to a form in which they have acquired a new commercial name, and are adapted for a distinctively new use, but they have been subjected to a process consisting of several steps, which requires a considerable amount of skill and labor, and which has very materially enhanced their value beyond that of velveteen. It appears in the record that two letters patent for inventions in the process of making the articles have been granted by the United States.

The judgment is affirmed.

In re DIECKERHOFF et al.

(Circuit Court, S. D. New York. January 12, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—"FEATHER-STITCHED BRAIDS."

So-called "feather-stitched braids," being an article from one quarter to one third of an inch in breadth, woven on a loom, and ornamented with certain patterns, "herring bone" and others, are dutiable as cotton braids, under Schedule I, par. 354, of the tariff act of October 1, 1890, and not as cotton trimmings under Schedule J, par. 373, of said act, as classified by the collector of customs of New York.

At Law.

This was an appeal by the collector of customs at the port of New York for a review of the decision of the board of United States general appraisers, reversing the decision of the said collector in the classification for duty of certain merchandise imported in the early part of the year 1891, and which was classified for duty by the collector as "cotton trimmings," and duty thereon assessed at 60 per cent. ad valorem, under the provisions of paragraph 373 of the tariff act of October 1, 1890, which contains an enumeration of "trimmings * * * composed of flax, jute, cotton, or other vegetable fiber, or of which these substances, or either of them, or a mixture of any of them, is the component material of chief value, not specially provided for in this act, sixty per centum. ad valorem." The importers protested in the case of each of the entries, claiming that the merchandise was dutiable at only 35 cents per pound, as cotton braids, under Schedule I of said tariff act, (paragraph 354,) or, second, at only 40 per cent. ad valorem, as cotton galloons, under the same schedule and paragraph, which provision, so far as it is material, is as follows: "(354) Cotton cords, braids, boot, shoe, and corset lacings, thirty-five cents per pound." The importers abandoned their contention that the merchandise was galloons, and stood upon their claim that it was braids; and, having appealed to the board of United States general appraisers, pursuant to the provisions of the so-called "Administrative Act of June 10, 1890," produced the testimony of a number of trade witnesses before said board, from whose evidence it appeared that the merchandise was known in trade and commerce on and immediately prior to October 1, 1890, as "feather-stitched braids," and that the articles were not known as "trimmings," or included within the line of goods of that character. It also appeared that braids were sometimes made on looms and sometimes on braiding machines, but that by far the greater proportion was made on looms; and that, whether woven on looms or made on braiding machines, the use was the same,—for covering and binding goods, etc.—and that these braids were not used as trimming articles.

The board of appraisers decided that the merchandise was cotton braids, that it was not commercially known as "trimmings," and sustained the protests of the importers. The collector thereupon by petition procured the return of the board of general appraisers to be filed in the circuit court pursuant to the provisions of the above-mentioned administrative act, and obtained from the court an order to take further testimony before one of the general appraisers as an officer of the court. A number of witnesses were produced before the referee on behalf of the collector and the government, from whose testimony it appeared that the articles in question in this suit were woven with a shuttle on a loom, and that braids were frequently manufactured on braiding machines by an entirely different process from weaving. The witnesses for the government, with the exception of one manufacturer, were persons who bought the merchandise in question for the purpose of using it in the manufacture of ladies' and children's underwear, in which it was used, according to their testimony, to cover up and give a certain finish or ornament to seams in those garments; and that the articles were bought by them as "herring-bone," or "herring-bone trimming." There was some difference in the testimony of these witnesses as to whether these articles were applied to seams merely for the purpose of covering such seams or for giving to them an ornamental effect. This evidence was returned to the circuit

court, and on the trial it was argued on behalf of the collector and the government that a commercial designation, in order to govern the classification, must be widespread and general, and that the testimony offered by the government before the referee in the circuit court had shown that there was no such general designation of these goods as "feather-stitched braids" as would take them out of the collector's classification as "cotton trimmings;" but that, even if they were in reality braids, there was some testimony to show that they were trimmings, and used as such, and that the designation "trimmings," as used in the tariff act, was more specific than "cotton braids," unless the trade meaning of "trimmings" excluded the articles in suit. At the close of the argument the circuit court decided against the contentions of the government, and affirmed the decision of the board of appraisers, delivering the following opinion.

Curie, Smith & Mackie, (D. Ives Mackie, of counsel,) for importers.
Edward Mitchell, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for collector and the United States.

COXE, District Judge, (orally.) The question in this case was fairly stated by the district attorney, to be whether or not, the importations are "braids" or "trimmings;" whether or not they were commercially known in this market as "braids," at the time of the passage of the tariff act of 1890. I do not understand that it is seriously contended on the part of the district attorney that upon the proof before the board of appraisers, a mistake was made in the finding, that they were commercially known as "braids." If, however, it is so contended, it seems to me that the contention can have no foundation, for the reason that four witnesses, concededly representative importers and large dealers in this city, so testified, and their testimony was not contradicted. So the question before this court is, whether or not the additional evidence now presented is sufficient to warrant the court in overturning the finding of the board. I do not know that any rule of this court has been laid down applicable to such a situation, but it would seem to me that the finding of the board should stand, unless the appellant presents evidence before this court of greater weight, or at least of equal value. I do not think that the appellant has done either; because it is practically conceded that the witnesses produced by him, assuming that their evidence is competent, were not as representative men, under the well-known rule that requires such witnesses to be importers or large dealers, as the four witnesses presented on the part of the importer. In other words, I think that if the evidence now before the court had all been presented to the board of appraisers, their finding would have been justifiable upon the facts. The additional evidence is not sufficient, therefore, to warrant the court in overturning that finding.

The decision of the board of appraisers is affirmed.

AMERICAN GAS CONTROLLER & FIXTURE CO. v. SIEMENS-LUNGREN CO.

(Circuit Court of Appeals, Third Circuit. February 14, 1893.)

Appeal from the Circuit Court of the United States for the District of New Jersey.

In Equity. Bill by the Siemens-Lungren Company against the American Gas Controller & Fixture Company for infringement of letters patent No. 299,660, and of claims 1, 2, and 4 of No. 282,337, issued to Andrew B. Lipsey, respectively, June 3, 1884, and July 31, 1883, for improvements in gas lamps. The infringement alleged consisted in the manufacture and sale of the so-called "Arc Gas Lamp." A motion for a preliminary injunction having been heard, the court made an order that defendant within 15 days file a bond in the clerk's office in the sum of \$15,000, in default whereof a preliminary injunction should issue pursuant to the prayer of the bill. Defendant having failed to file the bond an injunction was issued, and from this interlocutory order defendant appeals. Appeal dismissed.

The injunction was asked for on the following grounds: (1) Clear infringement; (2) undisturbed possession and acquiescence; (3) total irresponsibility of the defendants. The defenses were: (1) Noninfringement; (2) anticipation by certain patents to Westphal and others, all of which were subsequent to 1881; (3) anticipation by or insufficiency of invention in view of the patent to Siemens, No. 211,077, of May 3, 1881, based upon the prior French and German patents to Siemens. In order to avoid the effect of these alleged anticipations, plaintiff offered evidence to carry back the Lipsey invention to March, 1881, as adjudged by the patent office in certain interference proceedings in the case of Lipsey v. Sanderson.

John L. S. Roberts, for appellant.

John R. Bennett, for appellee.

Before DALLAS, Circuit Judge, and WALES and BUFFINGTON, District Judges.

BUFFINGTON, District Judge. A careful examination satisfies this court that under all the facts before it there was no error in the court below awarding a preliminary injunction. As the case may hereafter come before us on final hearing, we abstain from discussing it.

The appeal is dismissed, at the cost of the appellant.

FELIX v. LEDOS et al.

(Circuit Court, D. New Jersey. January 31, 1893.)

1. PATENTS FOR INVENTIONS—INVENTION—COMBINATION—WATCH-CASE SPRINGS.

The first claim of letters patent No. 290,761, issued December 25, 1883, for an improvement in watch-case springs, consisting of the combination of a main spring piece and an auxiliary spring piece, whereby a slot is formed for the reception of the retaining pin, which, without adjustment, will always register with the hole in the watch case, are valid as producing a new and useful result.

2. SAME—LIMITATION OF CLAIM—INFRINGEMENT.

This claim is not limited to any particular means of connecting the auxiliary piece to the main spring, but covers any method of connecting the two so as to form the required slot, and, when this result is obtained, infringement is not avoided by varying the details of construction.

In Equity. Bill by Numa J. Felix against Eugene P. Ledos and Robert L. Matches, trading under the firm name of E. P. Ledos & Co., for infringement of a patent. Decree for complainant.

George Cook, for complainant.
Philemon Woodruff, for defendants.

DALLAS, Circuit Judge. This is a suit brought to restrain infringement of the first claim of letters patent granted to the complainant, numbered 290,761, and dated December 25, 1883, for an improvement in watch-case springs. The case, upon pleadings and proofs, was, on December 28, 1892, submitted, by agreement of counsel, upon their respective briefs. It has since been held under advisement, and is now for decision. The only claim involved is:

"(1) A watch-case spring, composed of a main piece, A, and of an auxiliary spring piece, B, attached to the body of the main piece so as to form an arc-shaped slot for the retaining pin, substantially as set forth."

The "main piece" referred to does not materially differ, as a spring, from those which had been generally in prior use to open the face cover of a hunting-case watch when released from the bolt or catch which holds the lid in place when closed. These springs were (as they still are) made separately from the case. They were commonly secured thereto by means of a small pin, which was passed through a hole in the rim of the case, and into a similar hole in the spring. This mode of attachment required that there should be a hole in the spring at a point precisely corresponding with that in the watch case; but watch cases are not all of the same size, and the hole in them is not always placed in exactly the same position. To make the cases with more than one such hole is not desirable, and they are not so made. Therefore, it had been customary to make the springs with several holes in them, so that some one or other of them might, with some degree of probability, be expected to properly engage the pin when passed through the single hole in any particular watch case. Sometimes, however, none of the holes in a spring would thus receive the pin, and in all cases the rejected holes were certainly of no use, and possibly of some disadvantage. The patentee's object was to overcome this defect, and the means which he claims that he had invented to accomplish the desired result is the combination of a main piece, or principal spring, with an auxiliary spring piece, attached to the body of the main piece, so as to form an arc-shaped slot for the retaining pin.

The claim is for a combination, and for one which is manifestly efficient and useful. The attachment of the auxiliary spring piece to the main piece, irrespective of details, but in such manner as to form an arc-shaped slot for the retaining pin, is the gist of the alleged invention. By this contrivance the spring may be quickly set in place in any case, and without adjustment. The slot takes the place of all holes formerly made in watch-case springs, and it is formed, not only without weakening or otherwise impairing the spring, but by the addition of a part having (if it at all affects the strength of the spring) the incidental advantage of enhancing its durability.

It is admitted that the defendants have manufactured springs like those in evidence, marked "Complainant's Ex. Defendants' Springs;" and examination of these springs discloses that without

doubt they embody every element of the first claim, and are what any skilled mechanic, having that claim for his guidance, might readily have constructed in pursuance of its terms. It is, however, insisted that, "the complainant must be confined, in the construction of the claims, to the auxiliary spring pieces described in his patent, and that they cannot be extended so as to include the defendants' springs," which differ in details from those described in the second claim, because, as contended, unless so restricted, the invention claimed was anticipated, as shown by the evidence of the prior state of the art. The answer to this is that the first claim cannot be made other than it is by construction. The plain and ordinary meaning of its language precludes its limitation to any particular method of connecting the auxiliary piece to the main piece, provided they are so connected as to form the required slot. The substitution of "washers" for "cheeks," or the omission of "stays," is not material, if the first claim is a valid one. In that claim neither cheeks nor stays are even mentioned, but, on the other hand, both are distinctly and specifically included in the second claim; and, as has been repeatedly held, each claim must, if possible, be so construed that both may be given effect. The first claim, if not valid as for a combination, is invalid; and the only substantial question is as to whether, as a combination claim, it should be sustained. If it should be, the defendants admittedly infringe. If it should not be, the right asserted by the complainant does not exist. The evidence does not disclose any prior knowledge, publication, or patent of the combination of a main spring piece and an auxiliary spring, whereby a slot is formed for the reception of the retaining pin, which, without adjustment of any kind, will always register with the hole in the watch case. This is what the complainant invented. It is what he claimed. It was entirely new with him. The complainant's invention was of a true combination. He did not simply contrive a mere aggregation of parts. In *National Cash Register Co. v. American Cash Register Co.*, (decided December 23, 1892,) 53 Fed. Rep. 367, the circuit court of appeals for this circuit stated the law as to this point as follows:

"A combination, to be patentable, must produce a new and useful result, as the product of the combination, and not a mere aggregate of several results, each the complete result of one of the combined elements; there must be a new result produced by their union."

The present case is plainly one of a new result produced by the union of the combined elements.

The remaining points urged on behalf of the defendants must also be disallowed. It is not exact to say that the complainant's first claim "is for nothing more than a hole." It involves, it is true, the arc-shaped slot; but what is claimed is the combination by which it is formed, and which gives it its especial utility, by peculiarly fitting it for the purpose for which it is intended. Neither is it true that the patentee did nothing but take two old and well-known springs, "and attach the two by rivets to one another." He did more: He combined the two pieces so as to produce a new

and useful result, as the product of the combination; and this was invention. The complainant is entitled to a decree in the usual form, which may be prepared and submitted.

FULLER & WARREN CO. v. TOWN OF ARLINGTON.

(Circuit Court, D. Massachusetts. September 15, 1892.)

No. 2,765.

PATENTS FOR INVENTIONS—INVENTION—MECHANICAL SKILL—PRIVY FURNACES.

Letters patent No. 264,568, issued September 19, 1882, to William S. Ross, for a furnace for privies, consisting of a metallic vault having a fire chamber at one end and a flue at the other, with a perforated platform for separating the solid from the fluid matter, are void, as the alleged invention is the result of mere mechanical skill.

In Equity. Suit by the Fuller & Warren Company against the town of Arlington for infringement of letters patent No. 264,568, issued September 19, 1882, to William S. Ross, for furnaces for privies. Bill dismissed.

The first claim of the patent reads as follows:

(1) AS an attachment for a privy, a horizontal, metallic casing, constituting the depository for the fecal matter, and provided with the hinged lids and fire chamber, substantially as set forth."

Esek Cowen, for complainant.

William H. H. Tuttle, John W. Munday, and Lysander Hill, for defendant.

PUTNAM, Circuit Judge. The contest in this case is narrowed down to the first claim in the patent. The court calls special attention to the fact that this claim relates strictly to a combination, and in no manner touches a method or process. The pith of the complainant's alleged invention is stated by its expert. It is also stated in the complainant's brief in substantially the same terms used by the expert, as follows:

"The precise improvement made by Ross was as follows: The ordinary country privy has for a receptacle simply a pit dug in the ground, which retains the solid matter, while the liquid soaks away through the soil. For this pit Ross substituted what he calls a 'metallic casing,'—that is, an incombustible (for that is the only object of making it metallic) vault, tube, or duct, for the reception of the fecal matter, over which the privy seats are placed, and which is open at both ends. At one end is placed an air shaft or flue, which takes the air from the interior of the vault or casing into the atmosphere above the building. At the opposite end of the vault is a fire chamber, containing a grate, for the purpose of highly heating air that enters the vault, which heated air is drawn through the vault by the flue or shaft. The fecal matter, as it falls from the seats above, is received upon a perforated platform which separates the solid portion from the liquid. There is, therefore, a pile of solid matter beneath each seat. When the grate is not in use, the doors at the end of the vault opposite the flue admit enough air to carry away the odors. Page 169, line 50. When the closet is so full that it is desirable to remove its contents, a fire is built in the grate. The heated air, mingling with the products of combustion, is drawn over and around the piles of matter resting on the platform. They are rapidly dried, and, when thoroughly dried, are usually mixed with some combustible matter and burned."

Striking out the superfluous words, this reads as follows:

"For this pit, Ross substituted a metallic vault, open at both ends; at one end, a flue; at the opposite end, a fire chamber. The fecal matter falls from the seats upon a perforated platform, which separates the solid portion. When desirable to remove the contents, a fire is built. The piles of matter are rapidly dried, mixed with some combustible matter, and burned."

The specifications and claim fail to point out the advantages of the perforated platform, and it may be that all relating to it could be omitted without changing the essence of the complainant's description of the pith of its own invention; but, independently of this, when the case comes down to the concise form above given, it seems to suggest at once to any intelligent mind the common process of heating, drying, baking, or burning, with such common changes of details as the daily occurrences of life constantly require, and nothing more. The court need not repeat the brief and ordinary terms in which all this could easily be put, as they are apparent to every one on slight consideration. If the complainant had any claim to any part of the suggestion or idea of first drying, and then consuming, fecal matter, as a sanitary measure, this might show an inventive mind, within the meaning of the law. But its success in marketing a fireproof vault, with a grate and flue attached, for drying and consuming fecal matter, even though the vault is traversed by a perforated platform in order to make two currents of heated air, or to separate the solid portions from the liquid, is not the result of inventive genius, but of the mechanical skill of complainant in meeting the ordinary emergencies of heating, drying, baking, or consuming by fire, for either domestic or public uses.

Bill dismissed, with costs.

GEO. A. MACBETH CO. v. LIPPENCOTT GLASS CO.

(Circuit Court, S. D. Ohio, W. D. January 25, 1893.)

No. 4,572.

1. PATENTS FOR INVENTIONS—MOTION FOR PRELIMINARY INJUNCTION—EFFECT OF PRIOR DECISIONS.

Letters patent No. 14,373, issued October 30, 1883, to George A. Macbeth, as assignee of Henry Dietrich, for a design for lamp chimneys, having been sustained on final hearing in two suits, and preliminary injunctions having been granted in two other suits, in another circuit court, its validity must be taken as established for the purposes of a motion for preliminary injunction, although defendant files affidavits alleged to contain new evidence of certain prior uses.

2. SAME—INFRINGEMENT.

On a motion for preliminary injunction against the infringement of a patent, the court will not go into the questions of infringement and validity as on final hearing, although numerous affidavits are filed by both parties, covering about all the ground of a record on final hearing, but, it appearing that defendant is upon debatable ground, will refuse an injunction, and require him to give a bond covering probable profits and damages, and to keep an account of his manufactures and sales, to be produced when called for by the court.

In Equity. Bill by the Geo. A. Macbeth Company against the Lippencott Glass Company for infringement of a design patent. On motion for a preliminary injunction. Overruled.

James I. Kay and George H. Christy, for complainants.

Frank O. Loveland and Parkinson & Parkinson, for respondents.

SAGE, District Judge. This is a motion for a preliminary injunction in a suit for the infringement of design patent No. 14,373, for a lamp chimney having at its top a beading, or similar ornamentation, raised above the circular edge. The patent was sustained in *Geo. A. Macbeth et al. v. David Evans et al.*,¹ (in the western district of Pennsylvania,) and in *Macbeth v. Gillinder*, 54 Fed. Rep. 169, (in the eastern district of Pennsylvania;) and preliminary injunctions have been granted in *Macbeth v. Glass Co.*, 54 Fed. Rep. 173, (in the western district of Pennsylvania,) and in *Macbeth v. Globe Chimney Co.*,¹ (in the northern district of Ohio;) so that, upon the question of the validity of the complainants' patent, the case is, for the purposes of the motion, clear. But the defendants, while they contest the validity of the patent, and insist that certain prior uses (evidence of which they produce by affidavits) were not before any of the courts in the former adjudications, rely also upon the defense of noninfringement, contending that the chimney which they manufacture is formed in precisely the way represented in the specification of the complainants' patent as old.

In the case of *Macbeth v. Gillinder*, upon the hearing of a motion for an attachment against the respondents for having disregarded the injunction, the court called attention to the fact that the decree limited the patent to chimney tops with circular or flared mouths,—each having a “beading or similar ornamentation raised above” so as to present a pearl-like appearance, which the complainants called a “pearl top,”—and held that the ornamentation must be such as to present the beaded pearl-like top described in the specification. The case was referred to a master, to take proof and report to the court upon the facts, and the opinion suggests that, in making the inquiry, care should be taken to avoid the danger of extending the respondents' liability beyond the limit stated, the court stating that the line between what is and is not an infringement is necessarily dim, and that the complainants' rights must be confined to what was clearly within the scope of the patent.

The complainants have offered, in support of their motion, 75 affidavits, the defendants 40 affidavits, and the complainants 30 in rebuttal. In addition there are exhibits and patents. Altogether, the evidence upon this preliminary proceeding covers about all the ground of a full record on final hearing, and calls for a decision upon the validity of the patent, and upon the question of infringement, which I do not feel inclined, at this stage of the case and upon ex parte evidence, to undertake to make. How closely the complainants' patent may be bounded by prior patents and prior

¹ No opinion was filed.

uses, and whether the defendants are within or without the boundaries, will have to be decided upon the hearing. It is sufficient now to say that, in my opinion, the defendants are upon debatable ground.

My conclusion is that this is a case for an order requiring the defendants to give bond in the sum of \$10,000 to the complainants for the payment of any profits or damages that may be decreed against them; and an order will be made also requiring them to keep an account of their manufactures and sales, to be produced when called for by the court.

The motion for a preliminary injunction is overruled, with leave to renew it if the bond above provided for be not furnished within 20 days from the date of the entry.

MACBETH et al. v. GILLINDER et al.

(Circuit Court, E. D. Pennsylvania. May 10, 1889.)

No. 6.

1. PATENTS FOR INVENTIONS—COMITY BETWEEN CIRCUIT COURTS.

A circuit court will not disregard a decision by another circuit court sustaining a patent, and declaring infringement, unless fully convinced that such decision is erroneous, and the existence of a grave doubt as to the soundness thereof is not sufficient warrant for refusing to follow it.

2. SAME—VALIDITY—DESIGNS FOR LAMP CHIMNEYS.

Letters patent No. 14,373, issued October 30, 1883, to George A. Macbeth, as assignee of Henry Dietrich, for a design for lamp chimneys, consisting in what is called the "pearl top," are valid.

3. SAME—ABANDONMENT—INFRINGEMENT.

It is not an infringement of this patent to make or sell a lamp chimney with a so-called "prism top," as the original application included such a top, which was stricken out at the suggestion of the patent office, and the patentee, by accepting his patent, with this amendment, waived his claim to such design as effectually as if he had filed a disclaimer thereof, upon the suggestion of the patent office.

4. SAME.

The fact that the patentee subsequently applied for and received another patent for what is claimed to be virtually the same design would not affect the force of the estoppel against him under the former patent; for, if it was the same design, the new patent merely added force to the implication that it was not included in the old one, and, if it was not the same design, the taking of the new patent was a renewal of the assertion that this design was open to the public.

In Equity. Bill by Macbeth and others against Gillinder and others for infringement of a design patent. Decree for complainants.

James I. Kay, Francis T. Chambers, and George H. Christy, for plaintiffs.

George Harding and George J. Harding, for defendants.

BUTLER, District Judge. The suit is for infringing letters patent No. 14,373—"Designs for Lamp Chimneys"—granted to George A. Macbeth, assignee of Henry Dietrich, October 30, 1883. This patent was involved in a suit by the same plaintiffs against Evans & Co.,¹

¹ No opinion rendered.

in the circuit court at Pittsburgh, No. 19, November term, 1884. It was there held to be valid; and a crimp-top chimney, such as that manufactured by the defendants, and here involved, was held to be an infringement. Unless, therefore, we disregard that decision the bill must be sustained, and the defendants held responsible to this extent. We cannot disregard it, unless fully convinced that it is erroneous. The importance of uniformity of decisions in courts of co-ordinate jurisdiction and authority, is such that even grave doubt respecting the soundness of a particular decision is not a sufficient warrant for disregarding it. The proper remedy, where such doubt exists, is by appeal. To courts of last resort this rule does not apply with equal force. The controlling effect of their decisions on all inferior tribunals within their jurisdiction, secures uniformity. We listened to an earnest and very able argument, intended to convince us that the decision at Pittsburgh is erroneous. We have patiently and fully considered what was urged; but we are not convinced. We must therefore follow *Macbeth v. Evans*.

Nothing remains but to determine whether the defendants' "prism-top" chimney, is an infringement. When the case was before us on motion for preliminary injunction, we were not satisfied it was an infringement, and we therefore refused to include it in the writ issued. When application for the patent was originally made the patentee claimed not only the "pearl top," but also two other designs, one of which was substantially, if not absolutely, identical with the defendants' "prism top"—as appears by the drawings filed. He was informed by the office that these several designs could not be embraced in the letters applied for; whereupon he amended the application, withdrawing therefrom everything except the pearl top,—illustrated by the figures accompanying the patent. In view of these facts he cannot now be permitted to claim that the letters cover the top in question. If it were proved, as he asserts, that the patent might, in the absence of these facts, be construed to embrace it—that the office was mistaken, and he was misled—the result would be the same. He cannot be permitted to turn round after obtaining a patent on the only terms upon which the office would grant it, and after declaring by his conduct, and language as emphatic as he could employ, that this top is not embraced, hold those who have engaged in its manufacture, guilty of infringement. He is estopped by the circumstances under which the patent was obtained. The case cannot be distinguished in principle, from those in which a patentee at the instance of the office, or to avoid some obstacle in his way, disclaims a part of his original demand. Here, as there, the part yielded and abandoned, cannot subsequently be set up as protected by the patent. The argument based on the fact that the language of the claim was not changed, has little force. The patentee having agreed to omit this top, and obtaining his patent by this means, the claim must be read accordingly, even though this may limit the scope to which it otherwise would be entitled.

We attach little importance to his subsequent conduct in applying for and taking the "Macbeth patent." If it is virtually for the same top as that withdrawn from the former patent, his conduct in taking

it was a repetition of his declaration that this top was not embraced in the former patent; but this could add nothing to the force and effect of what preceded it. The record of the office was a continuing declaration to the public that this design was not embraced in the patent under consideration. If the "Macbeth patent" is not, as the plaintiff asserts, for the prism top, the effect of his former conduct is not weakened, but rather strengthened by taking this patent; for in such case it not only was at the time, but continues to be an assertion that the manufacture of this top is open to all who may choose to engage in it. A decree will be entered in accordance with this opinion.

MACBETH et al. v. GILLINDER et al.

(Circuit Court, E. D. Pennsylvania. November 17, 1891.)

No. 6.

1. **DESIGNED PATENTS—INFRINGEMENT.**

In determining whether a design patent is infringed, the test is whether the alleged infringing article presents to the eye of an ordinary purchaser the same appearance as the patented article.

2. **SAME—DESIGNS FOR LAMP CHIMNEYS.**

Letters patent No. 14,373, issued October 30, 1883, to George A. Macbeth, for a design for lamp chimneys, consisting of a so-called "pearl top," are infringed by one who manufactures or sells a lamp chimney presenting the same appearance to the eye of an ordinary purchaser; and it is immaterial whether such appearance was caused intentionally, or by the worn condition of the tools by which they are made, as claimed by defendants.

In Equity. Bill by Macbeth and others against Gillinder and others, constituting the firm of Gillinder & Sons, for infringement of letters patent No. 14,373, granted October 30, 1883, to George A. Macbeth, as assignee of Henry Dietrichs, for designs for lamp chimneys. The patent was heretofore sustained, and an injunction granted. 54 Fed. Rep. 169. The cause is now heard on motion for an attachment for violating the injunction. Referred to a master to ascertain the facts.

James I. Kay, Francis T. Chambers, and George H. Christy, for plaintiffs.

George Harding and George J. Harding, for defendants.

BUTLER, District Judge. Have the respondents disregarded the injunction? The decree of the court limited the patent to chimney tops with circular or flared mouth, "having a beading, or similar ornamentation, raised above," so as to present a pearl-like appearance—which the complainants call a "pearl top." The reasons for this limitation are stated in the opinion filed. The only feature of the case, as then presented, which called for extended remark, was that arising from the complainants' effort to extend the patent so as to cover the respondents' "prism top." The validity of the patent, and its infringement by the manufacture or sale of the "small pearl top," before the court, had been settled in a former suit. We had no occasion, therefore, to remark upon

the distinguishing features of the "pearl top." They are however plainly stated in the specification and claims of the patent, from which the following is quoted:

"The object of my design is to form an ornamentation for the top of the chimney; and it consists, essentially, in a lamp chimney having a circular edge and a beading or similar ornamentation raised above the said edge. The chimney, a, is blown to shape and finished by suitable tools, and has the mouth, b, which is flared, and the circular edge, c, to give it a neat appearance. Raised above the circular edge, c, is the beading ornamentation, d. This beading consists of a series of globular beads around the edge of the chimney, this globular beading giving a fine finish to the top of the chimney to be substantially the same height around its entire edge. The beading is raised or extends up above the edge of the chimney, leaving the edge solid below the bead. The top of the chimney thus presents to the eye the regular flared circular top of the ordinary plain chimney and a finish of beading or like ornamentation around this top, thus combining the effect of the circular plain finished chimney with the fancifully finished top. What I claim, and desire to secure by letters patent is: (1) The design for lamp-chimney tops herein shown and described, consisting in a circular top or edge and a beading or similar ornamentation raised above said edge. (2) The design for lamp-chimney tops herein shown and described, consisting in a flared mouth having a circular top or edge and a beading or similar ornamentation raised above said edge."

The figures accompanying the patent illustrate the meaning of this language; and show the "raised beaded edge," and pearl-like appearance, very clearly. The question may now be repeated: Has the injunction been disregarded? Among the tops purchased by the complainants directly from Gillinder & Sons, as well as among those purchased from others, bearing the firm's trademark, are several which seem, virtually, indistinguishable from the complainants' "pearl top." To the eye of an ordinary purchaser they would present the same appearance; and this is the recognized test in such cases. Whether the resemblance arises from design, or from the worn condition of the respondents' tools,—as they allege,—can make no difference as respects liability for the injury resulting to complainants therefrom. If it arises from the latter cause it must be ascribed to negligence. In view of the respondents' affidavits it would be unsafe to ascribe it to design, and hold them liable for intentional disregard of the writ. But a small percentage of the chimneys exhibited infringe. Many of them show prisms extending more or less above the edge, showing an uneven surface. This unevenness, alone, is not, however, important. The crimping must be such as to present the beaded, pearl-like top, before described.

The case will be referred to Joseph C. Fraley, Esq., as master, to take proof and report the extent of infringement since decree, and the injury sustained therefrom; and also to ascertain and report the costs to which complainants have been, and will yet be, subjected by this proceeding. In making the inquiry care must be observed to avoid the danger of extending the respondents' liability beyond the limit before stated. The line between what is, and is not, an infringement is, necessarily, dim, and the complainants' rights must be confined to what is clearly within the scope of their patent.

Frederick R. Gillinder makes affidavit that he severed his connection with the firm in 1888, before final decree, and that he has not been connected with the manufacture or sale of chimneys since that date. The master will inquire and report upon this, and will ascertain whether Frederick R. Gillinder is responsible for the manufacture or sale of the infringing chimneys here involved.

The objection to the motion founded on the failure to serve an injunction subsequently to the decree is, under the circumstances, without substance.

MACBETH et al. v. BRADDOCK GLASS CO., Limited, et al.

(Circuit Court, W. D. Pennsylvania. July 5, 1890.)

PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTION—EFFECT OF PRIOR DECISIONS.

On a motion for a preliminary injunction against the infringement of letters patent No. 14,373, issued October 30, 1883, to George A. Macbeth, for a design for lamp chimneys, the court will not disregard prior decisions sustaining the patent, upon new evidence, consisting of the affidavits of five persons, resting entirely in personal recollection after the expiration of eight or ten years as to the date of certain alleged prior uses, when there are other affidavits fixing a later date, and the latter are strongly corroborated by circumstances.

In Equity. Bill by Macbeth & Co. against the Braddock Glass Company, Limited, and others, for infringement of letters patent No. 14,373, granted October 30, 1883, to George A. Macbeth, as assignee of Henry Dietrich, for designs for lamp chimneys. Heard on motion for preliminary injunction. Granted.

James I. Kay and George H. Christy, for the motion.

W. L. Pierce, contra.

ACHESON, Circuit Judge, (orally.) The patent in suit has already been sustained at final hearing in two hotly-contested cases—First, by this court in *Macbeth & Co. v. Evans & Co.*,¹ and then by the circuit court of the eastern district of Pennsylvania, in *Macbeth v. Gillinder*, 54 Fed. Rep. 169; in which cases it was held also that the patent was infringed by ornamentation similar to that appearing on the top edge of the lamp chimneys manufactured by the defendant company, of which Exhibits Nos. 1 and 2 are samples. Upon this state of facts, then, under the general rule of law applicable here, the complainants are entitled to a preliminary injunction against the present defendants. But, notwithstanding the prior adjudications, it is now asserted by the defendants that as early as the year 1882, before the patent in suit was applied for, or the patented design was produced by Dietrich, the fine crimping of the top edge of lamp chimneys, producing the bead-like ornamentation complained of as an infringement, was openly and extensively practiced at the Independent Company's glassworks, in the city of Pittsburgh, and the affidavits of five persons have been offered

¹ No opinion rendered.

in evidence to establish the truth of the allegation. Now, if such were indeed the fact, it is very remarkable that it was not shown at the hearing before this court, in the fall of 1884, upon the motion for a preliminary injunction in the Evans suit. That case was one of notoriety, and excited great interest in the trade, and the application for a preliminary injunction was most earnestly resisted. But, if this alleged prior use was by any means overlooked at the preliminary hearing, how is it to be accounted for that it was not set up as a defense at the final hearing, if the defendants' witnesses are correct in what they state? After a careful consideration of all the affidavits, my conclusion is that these witnesses are mistaken in respect to time. Evidently they testify from mere recollection, for the particular facts of which they speak as fixing dates have no necessary or natural relation to the main fact here in question. On the other hand, the statement of Michael Ward, Sr., the manager of the Independent Company's glassworks, that the fine crimping with the bead-like effect was first introduced there in the winter of 1884, and after he had been shown a specimen of the complainants' pearl-top chimneys, is entitled to great weight. Moreover, Mr. Ward's testimony is very strongly corroborated by that of the other rebutting witnesses, and also by an entry in Charles Fischer's books, so that, upon the whole, I am entirely convinced that the defendants' witnesses are at fault as to their recollection as to the year when the design similar to the patented design first came into use at the Independent Glass Company's works, and that in fact it was in the year 1884, instead of 1882, as they now think.

I have only to add that, in my opinion, the specimen of the defendant company's manufacture, Exhibit No. 3, is an infringement equally with Exhibits No. 1 and No. 2, and that the injunction should embrace all three. Let a preliminary injunction issue against the defendants, in accordance with these views.

Sur Rule for Attachment for Contempt of Court.

(July 5, 1892.)

PER CURIAM. The above rule rests on two points—First, whether the 20-crimp chimneys, such as Exhibits Braddock No. 4 and Felix & Marston No. 4, made by defendants, are an infringement of the Dietrich patent in suit; and, second, whether the defendants are guilty of violation of the injunction by the disposal of the enjoined stock. The court has no doubt whatever but that the 20-crimp chimney is as much an infringement as the chimneys Braddock Nos 1, 2, and 3 enjoined, but it has decided to look upon this rather in the light of an inconsiderate, than of a willful, act.

As to the second point, there is a possibility that the chimneys bought in Chicago might have come into the hands of Felix & Marston otherwise than through the Braddock Glass Company, and the court has decided to give the defendants the benefit of every doubt, so that we will not hold them guilty of contempt. We will therefore make an order discharging the rule, and ordering that the defendants pay the costs of the investigation.

IMPROVED FIG SYRUP CO. et al. v. CALIFORNIA FIG SYRUP CO.

(Circuit Court of Appeals, Ninth Circuit. January 30, 1893.)

No. 70.

1. TRADE-MARK—EQUITY—DECEIVING THE PUBLIC.

While a court of equity will not protect a trade-mark based on misrepresentation and deceit, and intended to deceive and defraud the public, yet where the testimony in an action to enjoin an infringement fails to show that plaintiff has attempted to practice any fraud, or impose upon and damage the public, the court will not refuse to extend its aid.

2. SAME—WHAT WILL BE PROTECTED—"SYRUP OF FIGS."

The phrase "Syrup of Figs" adopted by the manufacturer to designate a medical preparation, composed in part of fig syrup, and which, during a course of trade, has become known to the public by such name, indicates the origin of the preparation, rather than its quality or nature, and constitutes a valid trade-mark.

3. SAME—INFRINGEMENT.

The use, to designate a medical preparation, of the phrase "Improved Fig Syrup" upon bottles, wrappers, and devices, resembling in appearance a similar preparation manufactured and sold under the name of "Syrup of Figs," and calculated to deceive and mislead the public, will be enjoined as an infringement of trade-mark.

Appeal from the Circuit Court of the United States for the Northern District of California.

In Equity. Suit by the California Fig Syrup Company against the Improved Fig Syrup Company and others to enjoin the infringement of a trade-mark. A demurrer to the bill was overruled, (51 Fed. Rep. 296,) and the circuit court subsequently made an order continuing a temporary restraining order against defendants. Defendants appeal. Affirmed.

John L. Boone, for appellants.

Warren Olney, (Paul Bakewell, of counsel,) for appellee.

Before GILBERT, Circuit Judge, and MORROW and BEATTY, District Judges.

BEATTY, District Judge. This is an appeal from an order of the circuit court of the northern district of California, continuing a temporary restraining order against appellants *pendente lite*. It appears from the complaint that the appellee for a number of years last past has been engaged in the manufacture and sale of a liquid medical preparation, designated by it as "Syrup of Figs;" that such designation has been pressed upon the bottles containing the preparation, and printed upon the paper boxes containing the bottles, and that, through such and other means during a long course of trade, the medicine has become known to the public as "Syrup of Figs," also as "Fig Syrup," and appellee's name as "California Fig Syrup Co.," "Fig Syrup Co.," and "Syrup of Fig Co.," to such an extent that business letters concerning the same refer to it and appellee by such names and terms; that appellee was the first to manufacture such preparation, and to adopt and use the name so given to it; that, subsequently, the appellants

commenced the manufacture of a medicine claimed by them to be a like remedy for a similar purpose, which they styled "Improved Fig Syrup," put up in bottles and paper boxes resembling in size, shape, and appearance those used by appellee; and the complaint further alleges that the preparation of appellants is such, and offered under name and appearance so closely resembling that used by appellee, that the public are most likely to be deceived into the purchase of one for the other. A demurrer to the complaint was overruled, and upon a showing by affidavits, under an order to show cause why the temporary restraining order granted upon the filing of the complaint should not be continued pending the action such restraining order was continued.

The appellants now say that "the only question that arises under this appeal is whether, on the facts set out in the complaint and affidavits, the complainant is entitled to an injunction. Respondents demurred to the complaint on several grounds, but the demurrer was overruled by the court. The grounds of demurrer are, however, the grounds upon which we maintain that an injunction should not be granted," but the argument which follows is based upon other questions than those appearing alone from the complaint and demurrer.

The first point raised by appellants—that courts will not protect the trade-marks of manufacturers of patent or quack medicines—need not be discussed, for the reason that it does not satisfactorily appear from the record that appellee's preparation is such a medicine.

It is next urged that the appellee has no standing in a court of equity, because in the representations it has made concerning its medicine it has practiced deceit and fraud upon the public. If this were clearly established by the evidence, it would be ground for reversal. Trade-marks which are based upon misrepresentations and deceit, and especially such as are intended to deceive and defraud the public into the purchase of articles for what they are not,—into the belief they are valuable, when deleterious,—will not be protected by the courts. There is too much reason for the assertion that "there is not a thing that we eat or drink or wear which is pure or genuine." To protect a dishonest manufacturer in a fraudulent and deceptive trade-mark would be simply to aid him in fraud; to add to his unlawful gain by assisting him in palming off upon the public his worthless wares as valuable, and thus discourage, injure, and bankrupt the honest dealer, as well as to impose upon the public. Upon a proposition so plain, discussion or the citation of authorities would seem unnecessary, but we may, in this connection, refer to *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. Rep. 436, and the cases therein cited. While we agree with appellants as to the doctrine, we are not satisfied from the evidence that the appellee has attempted to practice any fraud or impose upon and damage the public.

The appellants contend that the phrase "Syrup of Figs" is merely descriptive of the preparation, and therefore cannot be adopted as a trade-mark. It is not always clear when this doctrine invoked

by appellants is applicable, but the facts and the manner of the use of the words, symbols, or signs adopted in a particular case will aid us in reaching a conclusion. Generally, any words, marks, or symbols may be adopted as a trade-mark which are indicative of the origin or ownership of the manufactured article; but those used simply to describe the quality, kind, or nature of the article cannot be so appropriated. The law, as stated in *Canal Co. v. Clark*, 13 Wall. 322, has been quoted with approbation in *Manufacturing Co. v. Trainer*, 101 U. S. 51; *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, 138 U. S. 546, 11 Sup. Ct. Rep. 396,—and other supreme court cases,—and is that “words in common use, with some exceptions, may be adopted, if at the time of their adoption they were not employed to designate the same or like articles of production. The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may in many cases be done by a name, a mark, or a device well known, but not previously applied to the same article. But, though it is not necessary that the word adopted as a trade-mark should be a new creation, never before known or used, there are some limits to the right of selection. This will be manifest when it is considered that in all cases where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities. Hence the trade-mark must either by itself or by association point distinctively to the origin or ownership of the article to which it is applied. The reason of this is that, unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived. The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator or manufacturer of the article, is injured whenever another adopts the same name or device for similar articles, because such adoption is, in effect, representing falsely that the production of the latter are those of the former. Thus the custom and advantage to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another's use, and this is done by deceiving the public,—by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another. The trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association. And there are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a

generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it entitled to legal protection."

The phrase "Syrup of Figs" is in no sense a generic one. It is not a name of a natural product, or of a class of natural products. If such an article exists, it must be the result of a manufacturing process. So far as we are advised, the name never existed, nor was it applied to any natural or artificial product, until formulated by appellee of words of no prior association, and by it used to designate its preparation. Even if such medicine were made entirely of figs, it is still a new name, applied to a manufactured, and not a natural product; hence indicates rather its origin, than its quality, or even its nature. It is not, however, claimed by appellee that its preparation is a product of figs alone, but that it is produced from a combination of the juice of figs with other plants. In this light, the phrase is not "merely descriptive of an article of trade, of its qualities, ingredients, or characteristics." Appellants claim the preparation is not made of figs, nor do they claim, nor has it been shown, that their production is pure syrup of figs; but, as theirs also appears to be a combination of different articles, neither are they entitled to the name as a generic or descriptive one. Why, then, should they use it, or any words or phrases in similitude thereof, unless it be thereby to induce the public to believe that the goods sold by them are those manufactured or produced by the appellee; thus palming off the former as those of the latter, which the law says shall not be done. That such has been appellants' design we are constrained to believe when we consider the character and size of their bottles, their paper boxes, the printing on each, and other matters connected therewith; for, it appearing that the terms used are not merely descriptive of the preparation in either case, it cannot be conceived that it was purely by accident that appellants adopted the terms and appliances they have to make known to the public, and dispose of, their goods. While there is a difference between the two, there is still such similarity as we think would lead many purchasers—the consumer, though not likely the general trade dealer—to purchase one for the other. It is against the probability of such impositions upon the consuming class of the public that courts will extend their protection. "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, as applied to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resembling that of another trader as that ordinary purchasers, buying with ordinary caution, are likely to be misled." *McLean v. Fleming*, 96 U. S. 251.

As we construe the restraining order of the court below, it simply excludes the use by appellants of trade-marks, bottles, wrappers, and devices used in offering their preparation to the public similar to those applied by appellee to its preparation for a similar use and purpose. Appellants are not restrained from making their medicine, but from offering for sale or selling it under such or any circumstances, declarations, or representations that it

may be taken as the preparation made and offered to the public by the appellee. We have not deemed it necessary to enter into any lengthy discussion of the law on the points raised on this hearing, as they are fully settled by other courts, and moreover, the cause is still pending for final trial; but we think the facts before the lower court clearly justified the conclusion it reached, and its order and judgment, so far made, are affirmed.

HEFEL v. WHITELY LAND CO.

(Circuit Court, D. Indiana. February 2, 1893.)

No. 8,808.

1. COPYRIGHT—FORM OF NOTICE.

Act June 18, 1874, (18 St. at Large, p. 78,) prescribes the following alternative form of notice of claim of copyright: "Copyright, 18—, by A. B." *Held*, that the following notice on a map: "Copyright entered according to act of congress 1889, by T. C. Hefel, civil engineer,"—is sufficient, since it differs from the prescribed formula only by including words which are mere surplusage.

2. SAME—STATUTES—CONFLICTING PROVISIONS.

Act June 18, 1874, relating to copyright, (18 St. at Large, p. 78,) prevails over Rev. St. 1878, § 4962, with which it is in conflict, by virtue of Rev. St. § 5601, which provides that acts passed after December 1, 1873, are to be taken as passed subsequent to the revision.

At Law. Action by Toney C. Hefel against the Whitely Land Company to recover penalties for infringement of copyright. Heard on demurrer to the declaration. Overruled.

J. N. Templer & Son and Morris, Newberger & Curtis, for plaintiff.
Ryan & Thompson, for defendant.

BAKER, District Judge. Action to recover penalty for infringement of a copyright of a map. The declaration, which is in two counts, alleges in each that the plaintiff is the author and proprietor of a certain map entitled "Hefel's Natural Gas and City Map, Muncie, Indiana;" and that the same has been duly copyrighted by compliance with the acts of congress; and charges that the defendant, in violation of his rights as such author and proprietor, has infringed his copyright by the publication of 10,000 copies of the map in and on a paper called "The Whitely Bulletin," for which infringement the plaintiff seeks to recover as damages the penalty provided by statute. The defendant demurs to each count of the declaration, upon the ground that it fails to show that the plaintiff has obtained a valid copyright upon his map. The map in question is referred to in each count of the declaration, from which it appears that the only notice of the copyright given on the map itself is by printing upon each copy and issue thereof the following words: "Hefel's Natural Gas and City Map, Muncie, Indiana, made by T. C. Hefel, civil engineer. Copyright entered according to act of congress 1889, by T. C. Hefel, civil engineer,"—and the only question raised by the demurrer and argued by counsel is whether this shows a sufficient notice to entitle the plaintiff to maintain an action to recover the penalty

provided by statute for the infringement of a copyright. Counsel for defendant cite and rely on section 4962, p. 959, Rev. St. U. S. 1878, (2d Ed.,) as the one which governs in this case. This section, so far as material, is as follows:

"No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof, * * * if a map, * * * by inscribing upon some portion of the face or front thereof * * * the following words: 'Entered according to act of congress in the year —, by A. B., in the office of the librarian of congress, at Washington.'"

If this section were the one applicable to the case, the demurrer would be well taken. The plaintiff has not adopted the formula for his notice prescribed in the above-quoted section. He has used a portion of the formula, but has omitted the words "in the office of the librarian of congress, at Washington." It is not necessary to discuss the natural rights of authors in their literary productions, nor to determine whether in this country, aside from the rights secured by statutes, they can maintain an action to recover damages for the unauthorized appropriation of their writings. This action is brought to recover the penalty denounced by the statute against the infringer of a copyright. The statute is highly penal in its character, and must be strictly construed. Giving it such a construction, the omission of the above-quoted words would be fatal, if there was no other statute applicable to the case. *Jackson v. Walkie*, 29 Fed. Rep. 15.

Section 5601, Rev. St. U. S. 1878, provides that "the enactment of said revision is not to affect or repeal any act of congress passed since the 1st day of December, one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision; and, so far as such acts vary from or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith." Consequently the act of June 18, 1874, (18 St. at Large, p. 78,) is the one which must be looked to in determining the sufficiency of the declaration. Section 1 of that statute, so far as material to this case, provides "that no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof, * * * if a map, * * * by inscribing upon some visible portion thereof * * * the following words, viz.: 'Entered according to act of congress, in the year —, by A. B., in the office of the librarian of congress, at Washington;' or, at his option, the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out; thus, 'Copyright, 18—, by A. B.'" The notice alleged to have been inscribed on each copy of the map is in the following words: "Copyright entered according to act of congress 1889, by T. C. Hefel, civil engineer." The notice embodies the exact words required by the last formula prescribed in the statute, with the additional words "entered according to act of congress," and the words "civil engineer" following the author's name. These additional words simply amplify the formula prescribed by the statute, without in any manner affecting its mean-

ing. They are to be regarded as surplusage. The maxim, "utile per inutile non vitiatur," is decisive. *Patterson v. U. S.*, 2 Wheat. 221.

The declaration is sufficient, and the demurrer is overruled.

THE CITY OF NEW YORK.

STEVENS et al. v. THE CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. February 7, 1893.)

1. ADMIRALTY—APPEAL.

Although the opinion of the trial judge in an admiralty case will not be disturbed on appeal as to questions of fact depending upon the credibility of witnesses examined in his presence unless there is a decided preponderance of evidence the other way, his decision rendered without an opinion cannot be reviewed conformably with that rule, and, on appeal therefrom, the appellate court will decide such questions of fact as best it may on reading the record.

2. COLLISION—TUG AND STEAMER AT PIER.

A tug had instructions from the officers of a steamship company to assist one of its steamers in getting into her slip, and, in so doing, take a position under her starboard quarter. After the steamer got part way into the slip, using her propellers from time to time for that purpose, the tug came alongside, signaled with her whistle, stopped her engines, and lay alongside, waiting for a line to be passed, with her stern close to the steamer's propeller, her approach not having been noticed by the steamer's crew. While in this position the tug was sucked under and sunk by the starting of the steamer's starboard propeller. *Held*, that the tug was negligent in assuming such a position, and that the steamer was not liable.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Libel by Stevens and others against the steamship City of New York for collision. Decree for libelants. Respondent appeals. Reversed.

H. G. Ward, for appellant.

Jos. F. Mosher, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The learned district judge who heard this cause in the court below did not express any opinion in deciding it upon the facts or law of the cause, and we are wholly uninformed of the reasons which led him to conclude that the libelants were entitled to recover. In controversies involving questions of negligence there is usually less difficulty in applying the rules of law to the facts than in ascertaining what the facts really are. In the present case the findings of the trial judge, in whose presence the important witnesses for the parties were examined, would have been most persuasive with this court in determining the facts, and probably would have been controlling, because the testimony is conflicting, and its weight and force depends upon the credit to be given the witnesses. The demeanor of the witnesses is a material and important part of the evidence, which cannot be sent up with the record; and, because this is so, the rule prevails in appeals in

admiralty that the opinion of the trial judge will not be disturbed upon questions of fact, depending upon the credibility of witnesses who were examined in his presence, unless there is a decided preponderance of evidence the other way. Under the present circumstances, we must decide all questions of fact depending upon the credibility of witnesses as best we may upon reading the record.

It has been urged for the appellees that the decision of the district judge, without an opinion, is equivalent to the general verdict of a jury upon the issues of fact, and is necessarily a decision in favor of the libelants upon all litigated questions of fact necessary to a full recovery. We cannot for a moment assent to this proposition. How can a reviewing court know what questions of fact entered into the decision until it is informed what the judge decided as matter of law? We can hardly suppose in this case that the learned judge regarded the steamship as an insurer of the safety of the injured tug; but if he did, in the view which we take of the law, his decision could not involve any finding upon the most essential facts of the case.

The facts, as upon the record we deem them to be, are these: On the 8th day of October, 1890, the steamship City of New York arrived at the port of New York from Liverpool, and the master of the steam tug Viking, expecting that the steamship would require assistance in getting into her berth, which was the slip between piers 42 and 43, North river, applied for employment to the superintendent of the Inman & International Steamship Company, the owners of the steamship. He was told by the superintendent that he might assist with his tug, and, according to his testimony, he was told by the superintendent to use the tug on the starboard quarter of the steamship. At that time the steamship was on her way coming up the river from the Battery. The tug proceeded a short distance down the river, and laid off, awaiting the arrival of the steamship, until after the steamship had passed by on the starboard hand. When the steamship came opposite her berth, she stopped her headway, and got her bow into her own slip, at the end of pier 43. Her stern projected further out into the river, and was about abreast of midway between piers 40 and 41. She fastened a headline, and also a breastline, to pier 43, leading from her port side, and commenced using her propellers for the purpose of swinging her stern up the river against the tide, and straightening into her berth. The tide at this time was ebb. She lay in this situation some little time, working a little into her slip, using her starboard propeller to back, and her port propeller to go ahead, and being assisted on her port side by the tug Pulver. Two other tugs were lying on her port side waiting to assist her. While the steamship was in this situation, and was thus maneuvering, and during a momentary interval in which her propellers were not in motion, the Viking came up, and went under the stern, and towards the starboard quarter of the steamship. The Viking was 90 feet long, and 20 feet in width. There was a schooner lying at the end of pier 41, and a steamer lying on the northerly side of the pier, and in the position of the steamship there was not sufficient room between her and pier 41 to

enable the tug to push her at right angles, or to assist her with any advantage without being made fast to her by a line. Beyond pier 41, the slip between that pier and pier 42 was clear. When the tug passed under the stern of the steamship she entered the triangular space between the steamship and the end of pier 41, and tooted her whistle to indicate her presence, and attract the attention of those in charge of the steamship. She then ran her bow up to the steamship's side and stopped, intending to pass a line to the steamship, and waited for some of the steamship's crew to appear and make it fast. At this time her stern was opposite and about 20 feet away from the starboard propeller of the steamship. Those in charge of the steamship were at the time busy looking after the lines and tugs on her port side, and did not hear the whistle or know of the presence of the Viking. About this time, and while the Viking was lying, with her engine stopped, in the position stated, the steamship had occasion to use her starboard propeller, and it began to move, and the Viking was drawn against it by suction, and so badly cut by the blades that within a few minutes she sank. The master of the Viking testifies:

"We laid there a moment, and nobody came for the line, and the first thing I knew the ship started her starboard propeller ahead. I immediately rang to go back with the jingle bell, full speed; but the suction being so great, before we could get back far enough to clear the propeller, it had sucked us under sideways."

The master had frequently assisted ocean steamers to make their berths, knew how they maneuvered on such occasions, and knew that in the situation of the steamship she would have occasion to use her propellers at short intervals from time to time. While his tug had been lying astern of the steamship the latter had stopped her propellers momentarily several times, and then put them again in motion. The evidence does not indicate that there was any arrangement or understanding between the two vessels by which the Viking was expected to take her position at any particular place on the starboard quarter, or begin her active services at any particular time. Her master testifies that, according to the customary way of performing such services, he was to determine for himself when and where he should place his tug in position, without waiting for orders from the steamship.

Upon these facts we are unable to see how any negligence can be imputed to the steamship, and think that the tug received her injuries by reason of her own want of proper care. There is no rule of law which compels a steam vessel to forego the use of her motive power, or its appliances, in executing her ordinary movements and maneuvers. Her propellers, though dangerous to other vessels or objects coming in contact with them, are not outlaws. They are necessary instrumentalities for the purposes of commerce and navigation. The law merely imposes upon those who use them the obligation to do so without causing unnecessary harm to others, and, in this behalf, to exercise all reasonable care and circumspection in order to avoid doing injury. *The Nevada*, 106 U. S. 154, 159, 1 Sup. Ct. Rep. 234. The measure of care to be exercised by a steamship in the use of her propellers differs under different circum-

stances; and the same rule of law which would exonerate an employer from the consequences of an injury to a servant caused by a risk inherent in the service which the latter was hired to perform will exonerate a steamship from responsibility for an injury caused by a similar risk received by a tug while in its employ. It is the duty of the employer to use due care to avoid exposing the servant to extraordinary risks which the latter cannot reasonably anticipate; but he is not bound to provide against the risks which are necessarily incident to the service to be rendered. These are implied conditions of the contract of hiring, and there is no reason why they are not as applicable to the relation of steamship and tug as to that of ordinary master and servant.

In the present case the tug engaged to assist the steamship for an occasion in which all who were to participate knew that it was usual, and to a greater or less degree indispensable, for the steamship to use her engines and propellers, and in which she would be required to use them intermittently, but more or less constantly, throughout the operation of getting into her berth. None of them supposed, or had any right to suppose, that the steamship would remit the use of her propellers awaiting the arrival or any of the subsequent movements of the tug. In engaging for the service the tug held herself out as experienced and competent to facilitate the operations of the steamship, without embarrassing her unnecessarily, and at the same time as competent to exercise due care for her own safety during the work. The steamship on her part undertook not to expose the tug to any extraordinary risk while engaged in the service. Those being the implied conditions of the contract, the steamship had a right to assume that the tug would exercise reasonable care for her own safety, and would not expose herself to peril by going unnecessarily into too close proximity to the propeller while it was in motion, or when it was likely to be put in motion. Consequently there was no breach of obligation upon her part in putting her propeller in motion when and as she did. We do not say that it would not have been her duty to stop the movement of her propeller if she had been aware that the tug had gone dangerously near it, and was lying there with her engine stopped. Whether it would have been or not, it suffices that this is not such a case. The steamship did not know of the tug's presence dangerously near the propeller. If she ought to have known from the tooting of the tug's whistle that the tug was ready to begin work, she was not bound to know, and did not have any reason to suppose, that the tug had placed herself in a critical and perilous location.

The master of the tug, acting on his own judgment, chose a place to wait for the steamship to take the line where the tug would be exposed to just such an accident as happened in case the steamship should use her starboard propeller. He not only put her dangerously near the propeller, but he stopped her engine, so that she was not under full control. He did this when he knew, or was bound to know, that the steamship would shortly have occasion to use her propeller. He did this also when he knew that the steamship was not aware that his tug was ready to begin work, because no one from the steamship had responded to the signal

given by the tug—the tooting of her whistle—as she was approaching the steamship. The accident to the tug was caused by his negligence in going to and remaining in an unsafe place, when he should have stopped her at a safe distance from the steamship's propeller. He could have done so either before she got so near on her way to the steamship's starboard quarter, or in the slip beyond pier 41, where she would have been perfectly safe; and he should have kept her there until some one appeared on the steamship to take the line. The case is one where a vessel, having agreed to do a particular duty, and familiar with all its ordinary incidents, thrust herself unnecessarily into a position where she was injured by just such a risk as she should have anticipated.

The decree is reversed, and the cause remitted to the district court, with instructions to dismiss the libel, with costs of that court and of this appeal.

THE J. E. OWEN. THE E. H. NICHOLSON. OWEN v. 65,000 BUSHELS OF CORN. SAME v. 49,774 BUSHELS OF RYE.

(District Court, N. D. New York. February 1, 1893.)

DEMURRAGE—LIABILITY OF CONSIGNEE—GRAIN BLOCKADE.

Two vessels laden with grain from Chicago arrived at Buffalo on Friday at 6 P. M., consigned to elevators with New York Central Railroad connections. There were 28 boats ahead of them. The amount of grain in Buffalo awaiting transshipment east was unprecedented, and navigation was about to close. There was no demand that the consignees or their agents should furnish another elevator, and no claim for damages was made until after the grain was unloaded. The consignees were not negligent in failing to procure an elevator before Monday, and it did not clearly appear that during the following week any other elevator could have released the vessels sooner than that to which they were consigned, and certainly none with New York Central connections could have done so. There was no stipulation as to lay days. *Held*, that the consignees were not liable for the damage resulting to the ship owner from a delay of 10 days in unloading.

In Admiralty. Libel for freight and damages, in the nature of demurrage, for the detention of libellant's vessels at the port of Buffalo for 10 days, from November 27 to December 7, 1891. Decree for libellant for freight and interest thereon, but disallowing demurrage.

George Clinton, for libellant.

Charles A. Pooley, for respondents.

COXE, District Judge. The steamer J. E. Owen left Chicago with the schooner E. A. Nicholson in tow November 20, 1891, and arrived at Buffalo Friday, November 27, 1891, at 6 P. M. The Owen carried a cargo of corn, consigned to the order of the shippers under a bill of lading containing the following provisions: "Order of Boyden and Co. Notify McIntyre and Wardwell, New York. Care of G. J. Ross, Agt. N. Y. C. R. R., Buffalo, N. Y." The Nicholson carried a cargo of rye consigned to the order of the shippers under a bill of lading containing the following provisions: "Order Irwin Green & Co. Notify Power, Son and Co., New York. Care S. D. Caldwell at City

elevator, Buffalo, N. Y." Neither bill of lading had any provision for lay days or demurrage. There were 28 boats ahead of the Owen and the Nicholson at the City elevator waiting to be unloaded, and, although nine of these were sent to other elevators, the libellant's boats were not unloaded until December 7th, and 8th—about ten days after their arrival. There was no demand that the consignees or their agents should furnish another elevator, and no claim for damages was made until after the grain was unloaded. The vessels arrived nearly at the close of navigation. There was at the time an unprecedented amount of grain in the harbor of Buffalo waiting for transshipment to the east. The City elevator was working night and day. All the other elevators having railroad connections, were being taxed to their utmost capacity. There was no delay to the boats at the City elevator other than that occasioned by waiting for their turn. There are over 30 elevators at the port of Buffalo, but the evidence is not at all conclusive that the cargoes in question could have been unloaded at any of these after November 29th, which was Sunday. The agent of the vessel owners, whose duty it was to attend to the unloading of the vessels, testifies that during the week beginning with the 30th "there was still a little room," but whether there was room to receive cargoes aggregating nearly 115,000 bushels does not appear. There is evidence tending to show that on the 28th the cargoes might have been received at the Wells and Wilkinson elevators, but it does not appear that the offer was communicated to the consignees. The Wells and Wilkinson elevators were controlled by a competing railroad, and the cars of the New York Central Railroad were not permitted to load there. The vessels arrived late Friday afternoon, Sunday was a dies non, and it would seem that all the witnesses agree that no negligence can be imputed to the consignees in failing to procure an elevator before Monday. After that day a fair statement of the situation would seem to be that no elevator having connection with the New York Central Railroad could have been obtained, and it is at least doubtful on the proof whether an elevator having any railroad connections could have been had. The grain might, perhaps, have been received at the Watson, Black Diamond and Cyclone elevators, but these were only used for storage purposes and for transferring grain to canal boats. Their use by the consignees would have occasioned great inconvenience and expense. They were wholly unsuited to answer the required needs.

What is the law applicable to this situation?

Demurrage is an extended freight or reward to the vessel in compensation of the earnings she is caused to lose improperly. Strictly speaking, demurrage can only be recovered where it is reserved by the charter party or bill of lading. Where no such express reservation exists the remedy is by an action, in the nature of demurrage, for damages for the wrongful detention. *Gage v. Morse*, 12 Allen, 410. Every wrongful detention may be considered a demurrage, but in the absence of an express agreement damages can only be recovered upon proof that the delay complained of was due to some fault or negligence on the part of the respondent. The burden of proving this

is upon the libellant. *Riley v. Cargo of Iron Pipes*, 40 Fed. Rep. 605. If the consignee has a right to demand that the cargo shall be delivered at a particular dock he is not guilty of fault in requiring the libellant's vessel to take her turn with other waiting vessels. Where no lay days are provided for he is not liable for delays accruing without his fault. *Cross v. Beard*, 26 N. Y. 85; *Wordin v. Bemis*, 32 Conn. 268; *The Glover*, 1 Brown, Adm. 166; *Clendaniel v. Tuckerman*, 17 Barb. 184; *Towle v. Kettell*, 5 Cush. 18; *Weaver v. Walton*, 5 Chi. Leg. N. 125; *Abb. Shipp.* 311-313. Where by reason of any unusual or unexpected occurrence several vessels arrive together at the dock to which they are consigned, the consignee is not obliged to procure other docks, but the vessels must respectively await their turns. *Fulton v. Blake*, 5 Biss. 371. The consignee under a bill of lading in which no time is stipulated for unloading is not liable for the detention of the ship in the London docks, if she is there unloaded in her turn. He is not responsible for delay occasioned by the crowded state of the docks. *Rodgers v. Forresters*, 2 Camp. 483; *Burmester v. Hodgson*, Id. 488. Damages are not recoverable where the vessel was detained near the close of navigation while waiting in accordance with custom to be unloaded in its turn at an elevator, where there was nothing to show that the delay was unreasonable. The only obligation resting on the respondent was to take the grain in the usual and customary way, with reasonable diligence. *The M. S. Bacon*, 3 Fed. Rep. 344; *Coombs v. Nolan*, 7 Ben. 301. The consignee is not liable for damages for delay because 17 days elapsed before the cargo was unloaded, where the delay was caused by the vessel awaiting her turn according to the usage of the port. *Bel-latty v. Curtis*, 41 Fed. Rep. 479; *The Elida*, 31 Fed. Rep. 420; *The Mary Riley v. 3,000 Railroad Ties*, 38 Fed. Rep. 254.

Applying the law to the facts in hand it is clear that the libellant is not entitled to damages for the detention of her boats. The onus was upon her to prove negligence and she has only succeeded in raising a doubt. The interpretation of the testimony most favorable to the libellant only establishes the proposition that if the consignees had been informed of the exact capacity of the other elevators during the time in question they might possibly have secured the necessary room. This, in no circumstances, is sufficient to establish negligence. The grain was consigned to elevators having New York Central Railroad connections; this was part of the contract; was well known to the libellant's agent and, I am inclined to think, exonerated the consignees from providing another elevator; but assuming that they were required to look elsewhere the proof falls far short of showing that they were guilty of laches in this respect. They certainly were not required to take a floating elevator or receive the grain for storage on an island or in canal boats. They were at least entitled to have their grain go on to its destination, and it could not go otherwise than by rail. I am not satisfied that they could have provided, during the week beginning November 30th, another elevator which could have released the vessels sooner than the City elevator. It is possible that they might have done so, but this possibility is not enough. Certainly the court would be un-

warranted in finding that the libelant has established by a preponderance of evidence that other elevators having railroad connections could have unloaded the vessels sooner than the City elevator. All the witnesses agree that the situation was unprecedented. An immense amount of grain had reached the harbor of Buffalo. Navigation was about to close. Every effort was being made to accommodate this extraordinary congestion. The elevators having railroad connections were being worked night and day. Everywhere there was a blockade of greater or smaller proportions. The energies of those engaged in the work of transferring these cargoes were taxed to the utmost, their time was occupied with the daily routine of this busy period. To hold men so situated responsible for the greatest care and diligence, to charge them with every item of information and knowledge which was only elicited by a protracted judicial investigation, would be to establish a new rule of law for the guidance of consignees. Indeed, after an examination, which was intended to be thorough, I have failed to find a single authority allowing damages in circumstances like those developed in the case at bar. Vessel owners can stipulate for lay days, if they so desire, but if they prefer not to do so they must take the risk of delays occasioned by such phenomenal circumstances as these which occurred at Buffalo in November and December, 1891.

It follows that the libelant is not entitled to damages, but is entitled to recover freight in each action and interest from December 9, 1891, besides costs.

THE SIRIUS.

OLIVER v. THE SIRIUS.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1893.)

No. 71.

1. SHIPPING—BOTTOMRY BOND—AMOUNT—ESTOPPEL.

Recitals in a bottomry bond of the amount of advances secured thereby are evidence of the true amount, but do not estop the obligor from showing that the amount was in fact less.

2. SAME—ADVANCES ON OBLIGEE'S CREDIT.

A ship about to depart on a voyage to a foreign country was subject to liens for necessities furnished by her agent, and for advances made by others on his credit. The agent rendered to the owner's attorney in fact an account which included such advances, and thereupon the attorney, without questioning them, gave a bottomry bond for an amount sufficient to cover the whole account. The bond was expressed to cover certain specified contingent liabilities of the agent, and "moneys paid." *Held*, that it would be construed to include the agent's liability for such advances.

3. SAME—COMMISSIONS.

The bond should also be construed to cover commissions earned by the agent upon money collected by him, and credited in the account which was rendered to the attorney in fact.

4. SAME.

The obligee had a right to use money received for freight after the date of the bond in payment of wages and other expenses incident to the projected voyage, and to meet other debts contracted for by him for the benefit of the vessel, and not secured by the bond.

5. SAME—AGENCY.

A promise by an agent for a vessel, to her owners, that she should not be sent on a voyage unless her freight outward bound amounted to a certain sum, is revoked by a bottomry bond subsequently given by the owner's attorney in fact to secure advances by such agent, in which it is recited that the ship is bound on a certain voyage; and all responsibility for such voyage rests upon the owner of the ship, who cannot sustain a counterclaim to an action on the bond on the ground that the agreed amount of the freight was not secured.

6. ADMIRALTY—APPEAL.

An admiralty case on appeal should not be remanded for a new trial because of the erroneous rejection of evidence, since the appeal is itself a new trial, and such evidence, if offered, would be received and considered by the appellate court. *The Portland and The State of California*, 49 Fed. Rep. 172, 1 C. C. A. 224, distinguished.

7. SAME—EVIDENCE.

An appellate court should not receive as new evidence in an admiralty case a deposition by a witness who testified in the trial below concerning the very matters referred to in the deposition, when no ground for introducing additional proof is shown.

Appeal from the District Court of the United States for the Northern District of California.

In Admiralty. Libel in rem upon a bottomry bond filed by Francis B. Oliver against the British steamer *Sirius*; John Meek, claimant. The district court entered a decree for libellant. The claimant appeals. Affirmed.

E. W. McGraw, (Walter J. Bartnett, of counsel,) for appellant.
Andros & Frank, for appellee.

Argued before GILBERT, Circuit Judge, and HANFORD and HAWLEY, District Judges.

HANFORD, District Judge. This is a suit in rem against the British steamer *Sirius* upon a bottomry bond given by the owner, through his attorney in fact, to the libellant, as security for advances made on account of the ship, and to indemnify him against liabilities which he had assumed by giving certain bonds to release the ship from custody under process in suits pending against her. The bond in suit was executed at San Francisco April 28, 1892. The recitals and conditions thereof are as follows:

"Whereas, the said steamship is now lying in the port of San Francisco, and bound on a voyage from said port of San Francisco to a port or ports on the west coast of Central America, and back to the port of San Francisco, California; and whereas, said Francis B. Oliver has advanced to said steamer, for the purpose of furnishing her with necessary supplies, and discharging claims against her, the sum of sixteen thousand eight hundred and fifty-seven 94-100 (\$16,857.94) dollars; and whereas, said Francis B. Oliver has further become liable in the sum of two thousand (\$2,000.00) dollars as a surety upon a bond given to the United States marshal for the release of said steamer *Sirius* from the custody of said marshal under process issued out of the district court of the United States in and for the northern district of California, in the case of *La Compagnie du Boleo* against the steamer *Scandinavia*; and whereas, the said John Meek has promised and agreed to secure the said Francis B. Oliver against any and all liability incurred by him by reason of said suretyship upon the bond aforesaid; and whereas, the said steamship is now again in the custody of the United States marshal, under process issued from

the said district court of the United States in and for the northern district of California, in the case of the Cedros Island Mining and Milling Company against the steamer Sirius; and whereas, the said owner is unable to obtain funds to pay the said claim, and is further unable to furnish the necessary bond to said United States marshal to release said vessel from such custody, by reason of which said vessel is unable to proceed upon her said voyage; and whereas, the said Francis B. Oliver has this day become liable in the sum of five thousand five hundred (\$5,500.00) dollars as surety upon the bond required by law for the release of said vessel from the custody of said marshal; and whereas, the said owner has been unable to obtain said advances, and said release of said steamer from the custody of the marshal, from any other person or persons on more advantageous terms, and has accepted the same from said Francis B. Oliver, and agreed, so far as he lawfully can or may, that the said security shall have priority over all claims against the said steamship, whether by himself or by any other person. Now, in consideration of the said advances, and in consideration of the liability incurred by said Francis B. Oliver upon the bonds for the release of said steamer as aforesaid, the said owner hereby agrees to pay to said Francis B. Oliver the sum of sixteen thousand eight hundred and fifty-seven 94-100 (\$16,857.94) dollars within ten days after the arrival of said steamer in the port of San Francisco, on the completion of her said voyage, with maritime interest at the rate of eight per cent. per annum from the date of this bond, and he further agrees to pay at said time such further sum or sums as the said Francis B. Oliver may at said time have paid upon the said bonds to the United States marshal, with like maritime interest at the rate of eight per cent. per annum from the date of such payment; and upon like consideration, the said owner further hereby hypothecates the whole of said steamship, her tackle, apparel, and furniture, in bottomry, and agrees that the said steamship is to be employed upon the said voyage to a port or ports on the west coast of Central America, and return to the port of San Francisco, the said risk to commence from the date hereof, and to continue until ten days after the completion of said voyage, and the safe arrival of said steamer in the port of San Francisco. Should, however, the said cases of the Cedros Island Mining and Milling Company against the said steamer Sirius, and La Compagnie du Boleo against the said steamer Scandinavia, not have been determined and settled within ten days after the arrival of said steamer in the port of San Francisco from her said voyage, then this bond shall nevertheless be due as to said sum of sixteen thousand eight hundred and fifty-seven 94-100 (\$16,857.94) dollars, and the said risk shall continue as to the sum of seven thousand five hundred (\$7,500.00) dollars until the final determination, adjudication, and settlement of the said cases against said steamer, or until said Meek shall substitute for said bottomry in such regard other security satisfactory to said Francis B. Oliver. And it is further agreed that if the said cases be not finally adjudicated and settled as aforesaid at the time of the arrival of said steamship at the port of San Francisco from her said voyage aforesaid, then the said steamship is to be laid up and remain at some proper and convenient anchorage in the harbor of San Francisco until the final discharge of her obligations under this contract. In consideration whereof, the casualties of the seas are to be on account of said Francis B. Oliver, and the said John Meek doth by these presents hypothecate and assign over to the said Francis B. Oliver the whole of said steamship; and it is hereby declared that the whole of said steamship is thus assigned over for the security of the bottomry taken by said Francis B. Oliver, and she shall be delivered to no other use or purpose whatever until payment of this bond is first made, and the premium and interest that may become due thereon, and the said Francis B. Oliver is to be entitled, in case of loss, to the whole of the salvage of said vessel, which the said obligors promise to pay to said Francis B. Oliver: provided, however, that the said Francis B. Oliver shall not be liable to contribute to or make good any general or particular average, loss, or expenditure, or other charges of a like nature, which may happen to, or be sustained by, or incurred in respect to, said steamship, or her cargo or freight, upon said voyage, in consequence of the perils of the seas or otherwise. Now, the condition of this obli-

gation is such that if the above-bounden John Meek, his administrators or assigns, shall and do well and truly pay, or cause to be paid, to the said Francis B. Oliver, his executors, administrators, or assigns, the full and just sum of twenty-four thousand three hundred and fifty-seven 94-100 (\$24,357.94) dollars, being the principal of this bond, together with the premium and interest that shall become due thereon at the time of the safe arrival of said steamship at her port of destination in manner aforesaid, and shall further relieve the said Francis B. Oliver of all liability upon said bonds in the cases of the Cedros Island Mining and Milling Company against the steamship Sirius, and La Compagnie du Boleo against the steamship Scandinavia, and in case of the loss of said steamship shall pay the whole of the salvage to the said Francis B. Oliver, then this obligation to be void; otherwise to remain in full force and virtue."

The owner of the Sirius, by his letter dated at San Francisco September 26, 1891, constituted the firm or mercantile house of Oliver & Co., agents for the ship, with authority to collect her freight money and disburse her accounts. The record fails to disclose whether the libelant was associated with others in business under said name, or whether he alone constituted the house of Oliver & Co.; but from the accounts introduced in evidence, and the transactions shown by the testimony, we must necessarily infer that all the advances which the bond was intended to secure were made by Oliver & Co. pursuant to the agency created by the letter above referred to. The object of this suit is to recover only the amount of \$16,857.94, with maritime interest at the stipulated rate, on account of advances; and no claim is now made on account of the libelant's contingent liability as a surety upon the bonds given to the United States marshal. The owner appears as claimant, and defends on the ground that the amount sued for is greater than the amount actually due for advances made prior to the date of the bond, after deducting proper credits; and on the further ground that the amount due on the bond should be reduced by allowance of a counterclaim for damages which he makes against the libelant, based upon alleged losses sustained by reason of the libelant's disobedience of instructions given to him as agent and manager of the ship, and wrongful mismanagement on his part, in sending her on a profitless voyage from San Francisco to Central America. The amended answer thus admits the execution and validity of the bond, and that the libelant is entitled to a decree, but puts in issue certain items charged against the ship in the account of Oliver & Co. as her agents, and raises other issues, as to her credits alleged to have been improperly omitted from said account, and as to said counterclaim. The district court rendered a decree for the full amount sued for, and the claimant has brought the case to this court by an appeal.

After reading the record, we find it unnecessary to consider many of the intricate legal propositions discussed upon the argument of the case, for the reason that, when the undisputed facts are given due consideration, the case may be resolved into one of simplicity, and we rest our decision upon elementary and familiar rules. We hold, in opposition to the contention of libelant's counsel, that the claimant is not estopped by the recitals of the bond from questioning the amount due for advances. We regard the recitals as evidence of the true amount, and as an admission on the part of the

claimant contrary to the averments of his answer, as a receipt signed by him would be evidence and an admission, but of no greater force or binding effect than a receipt or other written declaration made voluntarily and deliberately. This suit is brought by the person named in the bond as the obligee thereof, in a forum which proceeds according to the principles of equity. Now, if in fact the amount stipulated exceeded the amount of the indebtedness for which the bond was given, and was understood by the parties at the time to be a mere penalty, certainly a court of conscience would not, in a suit between the original parties, refuse to receive the light shed by the real facts of the transaction, or decree contrary to truth and the justice of the case. Therefore, in affirming the decree of the district court, we are not willing to say that the libelant should recover \$16,857.94 and interest because it is so nominated in the bond. We find, however, that the balance to his credit, upon a fair account of his transactions, as agent of the ship, previous to the date of the bond, is equal to that sum, and that the bond was intended to secure payment of that balance.

For the purpose of restating the account, we adopt as a basis the statement designated as "Exhibit 3," dated April 19, 1892, showing a total on the debit side of \$18,046.12, credits to the amount of \$1,563.18, and a balance of \$16,482.94. This statement was introduced as evidence upon the part of the claimant, and his proctor, upon the argument before this court, while not admitting that it was agreed to as an account stated, insisted that it was in contemplation of the parties at the time the bond was executed, and was the basis for the sum of \$16,857.94, recited in the bond as the amount of the libelant's advances, and by the testimony of the libelant this is proven. So there can be no unfairness to either side in taking this statement, and making such corrections as the evidence justifies.

We will now consider in detail the several disputed items in said statement. We reduce the first item for balance, as per account rendered January 19, 1891, from \$3,765.71 to \$3,724.24, which is by the amended answer stated to be correct, the difference being \$41.47. We disallow items of \$46 paid on draft of D. Payne, paid on March 10, 1892, and \$5 for certified copy of power of attorney, paid April 15, and deduct \$10 from item of \$28 charged under date of March 31, 1892, which are admitted errors. Disallow item of \$25 advanced to Olson March 22, 1892, on the ground that by a preponderance of the evidence it appears that said advance was paid by Alfred Meek, and that the same has not been repaid to him by the libelant. An item of \$421.86, premium for insurance on the vessel for the benefit of her owner, has not been fully paid in money. Part of said amount is a mere liability incurred by the libelant; his personal notes, bearing interest, having been accepted by the insurance agents in lieu of cash. An item of \$94.87 due the Tubbs Cordage Company for stores, and \$3,081.82 due to the Fulton Iron Works for repairs, are also objected to on the ground that the libelant has not paid the same. The evidence in regard to these several items shows that the libelant obtained said stores, and caused the repairs to be made, upon his personal credit, but up to the time of

the trial in the court below he had not paid the bills therefor. In behalf of the claimant it is asserted that the vessel is subject to maritime liens for said stores and repairs, and the injustice of a double liability for the same indebtedness is urged as one of the reasons for the objections to said items. It is also insisted that the terms of the bond preclude a recovery of said amounts in this suit, for the reason that, in plain language, it expresses the two objects for which it was given as being—First, security for money paid; second, indemnity against specified liabilities; and therefore it must be construed so as to limit the right of the obligee to claim under it only the amount due for actual cash payments made prior to its date, and indemnity against his contingent liabilities upon the two bonds given to the marshal. Thus, while refusing to be bound himself by the letter of the bond, as to the amount of his liability under it, he invokes an extremely rigorous rule of interpretation to be applied to the same contract with respect to other provisions, to the prejudice of the obligee. It is the duty of the court, however, to be fair, and to give effect to the contract according to the manifest intent of all its provisions. While no claim of rights under it antagonistic to its express declarations can be upheld, still, to measure accurately the breadth and extent of the rights of the parties, it is necessary to take into account the circumstances existing, and which were operating upon their minds, at the time of the execution of the contract. At that time this foreign vessel was about to depart on a voyage to a foreign country. Necessaries had been procured by the libelant, and furnished to her, for which she was in debt, and without available means to free herself from liens which he was in a position to claim. The very items which we are now considering, were included in his account, and were shown in the statement then before the owner's attorney in fact; and, without raising a question as to these items, the bond was written for an amount sufficient to cover them, as well as other items of indebtedness of the owner which the libelant had not paid, but had assumed, in order to prevent the detention of the vessel by attachments against her. After this bond had been given, the vessel was suffered to make her voyage without any new proceedings being commenced against her. In the light of these admitted facts, we think that it appears very clearly that these several items for insurance premiums, stores, and repairs were regarded as part of the advances made by the libelant as per the recital in the bond, and that the bond was intended to secure the whole of the libelant's account, including these identical charges. We deny that the claimant can rightfully withhold the money due to the libelant upon this bond, or stay the enforcement of the decree herein, until the libelant shall have paid his creditors. We regard the fact that they have so far relied upon his responsibility, and refrained from asserting any claim against the ship, as sufficient assurance that after paying him no second payment will ever be exacted. Nevertheless, for the satisfaction of all parties interested in the vessel, this court will, in its mandate to be sent down, direct the district court to enter an order

requiring the libelant to file vouchers showing the payment by him of said bills at the time of receiving any money that may be collected by process of the court under the decree.

The next objection is to items amounting in the aggregate to \$1,004.85, payments to the officers and crew of port wages for time during which the ship was undergoing repairs, which amount the claimant insists was an unreasonably excessive expense, which the libelant, as his agent, should have prevented; and in this connection he complains of error committed by the district court in excluding evidence relating to said items of expense, and on this ground he asks to have the case remanded for a new trial in the district court. We consider that the several rulings of the district court sustaining objections to questions to witnesses called by the claimant, and intended to elicit testimony concerning the conduct of the libelant, as agent for the ship, in retaining the officers and crew under pay while the ship was laid up for repairs, were erroneous. But the claimant has secured a new trial by his appeal to this court. Here the rejected evidence would have been received and considered, if it had been offered; but we are unable to perceive any good reason for remanding the case to the district court to be again tried, with the right of a second appeal and a fourth trial in this court, with additional expenses, which may exceed the amount of any just reduction of the account. In this respect this case differs from the cases of the barkentine Portland and the steamship State of California, (49 Fed. Rep. 172, 1 C. C. A. 224,) which were by this court remanded for the purpose of ascertaining the damages to each vessel caused by a collision. In those cases the amounts in controversy were sufficient to justify the expense, and by the decisions of the lower courts the cases had proceeded to final judgments without affording an opportunity for offering any proof as to the damages sustained by the Portland. They were the first admiralty cases decided by this court, and in the opinion delivered by Judge Deady it was distinctly announced that in an admiralty cause, upon an appeal, the parties are entitled to a trial de novo in this court. That declaration may be inconsistent with the decree awarding a new trial, but some allowance must be made for peculiar features of the cases, and the circumstances which environed the parties and the court at that time. Whether the order made for a new trial was right or not, it should not be regarded as a precedent for future cases, not affected by similar circumstances. The evidence in this case, as it has been submitted in this court, shows that the sums charged in the account as port wages were in fact paid, that said payments were necessary to clear the ship of liens, and does not show misconduct or breach of duty on the part of the libelant in causing said expenses.

The item of \$77.45 charged for commissions is objected to on the ground that it cannot be regarded as a sum advanced, and it is said that in this suit money earned cannot be recovered, because the bond was not given for such indebtedness. But this charge is for commissions upon money collected by the libelant as agent for the ship, and credited in this account. A commission merchant has a

right to deduct from funds coming into his hands commissions earned by transacting the business producing such receipts. There being no objection to the item on other grounds, and the money received for freight being credited in full, we allow this item to remain in the account. The other item of \$212.50, for commissions on money not credited in this statement, will be stricken out. We deduct \$7.66 from the item of \$147.66 charged for interest, to correspond approximately with the account as now reduced, making the total reductions amount to \$347.63. The account, as now restated, shows the following totals and balance:

Debit	\$17,698 49
Credit	1,563 18
Balance due libellant.....	\$16,135 31

The evidence shows that at the time of executing the bond the parties understood that the libellant was responsible for other supplies furnished to the ship, for which bills had not been rendered, and, in fixing the amount of the bond, allowance was made therefor. The bills so contracted, and not included in Exhibit 3, together with the libellant's disbursements for expenses of the voyage referred to in the bond, and his lawful commissions, without including the disputed charges for insurance premiums, or interest, or the items admitted to be erroneous, amount to a sum at least equal to the \$8,298.86, and other freight bills collected by the libellant subsequent to the date of the bond, plus the excess of the amount sued for over the balance to the libellant's credit per Exhibit 3 as corrected. Further reference to the disputed items in the account charged subsequent to the date of Exhibit 3 is therefore unnecessary. The right of the libellant to use the money received for freight subsequent to the date of the bond in payment of wages and other expenses of the vessel incident to said voyage, and to meet other debts contracted by him for the benefit of the vessel, and not secured by the bond, instead of applying the same as a credit, is beyond question; and in exercising it, in this instance, he acted with fairness. If he had not taken care of said bills, and disbursed the ship, she would certainly be in no better situation; and she might be at this time in custody, to answer the demands of many creditors, for her owner appears to lack either ability or a disposition to provide her with necessary funds.

The counterclaim is founded upon the following facts: In the month of February, 1892, the owner, by telegraph, instructed Oliver & Co. not to dispatch the *Sirius* on another voyage to Central America unless they would guaranty freight for the round trip to amount to at least £2,500. To this a reply was sent from the office of Oliver & Co. to the effect that, unless £2,000 could be secured for freight outward from San Francisco, the vessel would not be sent; and to this the owner answered, "Accept terms proposed." At the time of this correspondence the vessel was at sea. She subsequently came into San Francisco in a disabled condition, necessitating not only delay, but expenses for repairs, which the libellant provided for. She was also taken into custody by the marshal to an-

swer the demands against her recited in the bond; and an attachment suit against her owner for a debt due to Bell Bros. & Thompson, of England, was threatened. This debt was paid in part, and the balance of it assumed and secured by the libelant, and carried into the above account, for which the bond was given. After this had been done, in April, 1892, the vessel was dispatched on a voyage to Central America, but only secured freight outward from San Francisco to the amount of \$8,298.86; and the difference between this amount and £2,000 is what the claimant demands by way of recoupment. As we view this matter, it is of no consequence whether the libelant was or was not cognizant of the telegram sent from his office saying that the vessel would not be dispatched unless freight outward from San Francisco amounted to £2,000. That telegram was not a guaranty that freight to any amount would be secured. It can only be regarded as a promise on the part of the agents for the vessel that they would not, on their own responsibility send the vessel on another voyage without securing the amount specified. Notwithstanding said promise, with the owner's consent the vessel could be sent anywhere, whether she earned freight or not; and, when all the facts as to the events intervening between the dates of said telegrams and the voyage are considered, it appears plain to us that the voyage was undertaken with the knowledge and consent of the owner, and that he must be considered as having assumed the risk of failure to make it profitable. That identical voyage is the one expressly referred to in the bottomry bond now in suit. The bond itself is therefore an express agreement that the voyage should be made, and it necessarily places all the responsibility for it upon the owner himself, and fully answers and contradicts the pretense that the libelant wrongfully employed the vessel for his own purposes, to the injury of the owner.

Having fully considered everything material appearing in the pleadings, evidence, and arguments, we conclude that the decree of the district court must be affirmed, with costs, and it is so ordered; and it is further ordered that the cause be remanded to the district court for the northern district of California for further proceedings in accordance with this opinion.

A deposition of the libelant taken subsequent to the appeal to this court was offered in evidence upon this hearing as new evidence; but we have given it no consideration and we now order that it be suppressed, for the reason that the same witness testified upon the trial in the district court concerning the very matters referred to in said deposition, and no grounds are shown for introducing additional proof at this time. We hold that new evidence, if material and competent, may be introduced upon the trial of an admiralty case in this court, if, for any cause other than a fault of the party offering the same, such evidence cannot be introduced upon the original trial. But, without a showing of a sufficient reason for doing so, this court will not admit new evidence.

**THE AKABA. THE CITY OF BIRMINGHAM. WOOD v. BURG et al.
BOSTON TOWBOAT CO. v. WOOD.**

(Circuit Court of Appeals, Fourth Circuit. February 7, 1893.)

No. 36.

1. SALVAGE—COMPENSATION.

A towboat with a disabled steamship worth \$130,000 in tow, under a contract of towage from Turk's island to New York, which provided that there should be no claim for assistance, salvage, or other services, broke a propeller blade, parted her hawser, and abandoned the tow off the Hatteras Shoals in a hurricane. The vessel so abandoned was with much difficulty and danger taken in tow by a passing freight and passenger steamship worth \$350,000, plying on a regular schedule between New York and Savannah, and taken into Hampton Roads, the hawsers being twice parted on the way, and the towing vessel's bits being torn out. The rescuing vessel lost her regular return trip, and her cargo of vegetables and fruit perished from the delay. *Held*, that an award of \$30,000 salvage was not so excessive as to be disturbed on appeal.

2. SAME—CONTRACT—ABANDONMENT OF TOW.

After the abandonment two other towboats, dispatched by the towing company, met the rescuing steamship with the disabled vessel in tow, and, although their services were refused, passed a hawser to the disabled steamship, and joined in the towage, until near Cape Henry, when they cast off. *Held*, that the towing company could not recover on the contract, nor for salvage.

8. SAME.

The fact that, for a portion of the voyage, the rescuing steamship towed with the steel hawser of the towboat, which, after parting at the time of abandonment, had been hauled aboard the disabled boat, gave the towing company no right to salvage.

Appeals from the District Court of the United States for the Eastern District of Virginia.

In Admiralty. Libels against the steamship Akaba, (James Marke Wood, owner and claimant,) brought, respectively, by Charles S. Burg, master of the steamship City of Birmingham, for salvage, and by the Boston Towboat Company, for salvage and breach of contract. In the district court a decree was entered allowing \$30,000 for the services of the City of Birmingham, and disallowing entirely the claims of the Boston Towboat Company. The claimant of the Akaba and the Boston Towboat Company separately appeal. Modified and affirmed.

Statement by SIMONTON, District Judge:

The British steamship Akaba was in the month of February, 1892, at Turk's island. She had then her shaft broken and her machinery disabled. Her agents entered into a contract with the Boston Towboat Company to tow her from Turk's island to New York, and to this end the towboat company sent the tug Saturn, one of their tugs, to Turk's island. These were the terms of the contract: If the Akaba was successfully towed to New York, and on this condition only, the towboat company would be paid \$6,000. No claim could be made by the Saturn or her owners for assistance, salvage, or other services rendered on the trip from Turk's island to New York. The Akaba must be ready to be towed within 24 hours after the arrival of the Saturn at Turk's island; if not, the Saturn was to be allowed demurrage at the rate of \$250 per day for every day's delay after the expiration of that interval. The Akaba, although disabled, must be in condition to be towed. The Saturn reached

Turk's Island, reported, was detained one day after the 24 hours had elapsed, took the Akaba in tow, and proceeded towards New York. On 27th February of the same year the Saturn, with the Akaba in tow, arrived off the coast of North Carolina, and there encountered a very heavy gale. The Saturn was towing the Akaba with a five-inch steel-wire hawser. During the gale a blade of the Saturn's propeller broke off, and soon after that the hawser parted close to the tug. The latter could not come up to the steamship, but lay off and on near her during the day. Towards nightfall the gale increased into a hurricane, with a heavy sea. The Saturn then left her tow, and made all speed she could to Hampton Roads. The Akaba at this time was off Hatteras Shoals, which were to leeward some 10 miles, without the use of her engines, with small use of her sails, drifting. The only recourse she had was a small steamer, the Ben Lodi, in sight, but unable to tow her, whose master lay near her to be on hand in case of disaster, so as to save life. On the morning of the 29th February she sighted the steamship City of Birmingham, and hoisted signals of distress. The City of Birmingham is a freight and passenger steamship plying on schedule time between Savannah and New York. She was about four years old, 3,000 tons burden, and was worth about \$350,000. She was on her regular voyage to New York, with a crew of 50 men, with 25 or 30 passengers, and an assorted cargo of value, much of it being of a perishable nature, and which in fact did perish. Seeing the signals of distress, she went at once to the assistance of the Akaba. Being prevented by the heavy gale and high sea from communicating with her in any other way, she floated by buoy a line to the Akaba to which a hawser was bent. This effort consumed over two hours, but was finally successful. With two hawsers,—one of her own and the other of the vessel in distress,—the City of Birmingham began to tow her from her dangerous position. During these two hours the water had shoaled from 17 to 13 fathoms. After towing about three hours the hawser of the City of Birmingham parted. The tow was continued by her with the other hawser, when her bits broke out, and the other hawser also got loose. After great effort she again got her own hawser to the Akaba, and towed her nearly all night, when that hawser again parted. The sea having moderated, she waited until daylight, put out a small boat, and took the hawser of the Akaba, with which the towage was again resumed, and continued until the 2d March, when, with the Akaba in tow, she cast anchor in Hampton Roads. The hawser used by the Akaba was the steel-wire hawser of the Saturn, which, after it parted, was hauled aboard of the steamship. The Saturn, when she reached Hampton Roads, dispatched, in search of the Akaba, the towboats Taurus and Underwriter, belonging to the Boston Towboat Company. They are each worth about \$50,000. They went to sea, and on 1st March found the Akaba in tow of the City of Birmingham, proceeding towards Hampton Roads, really needing no other aid. They offered their services to the Akaba, and were referred to the master of the City of Birmingham. He declined them. Nevertheless they went to the Akaba, to whom the Underwriter gave a hawser, and, the Taurus taking a hawser from the Underwriter, they joined in the towage. When the Akaba and her companions had nearly reached Cape Henry, the towboats cast off, and she went up alone with the City of Birmingham. Just after these two reached an anchorage, and the Akaba had let go her anchor, but before the line between her and the City of Birmingham was let go, the latter steamship came into collision with the British steamship Gordon Castle, riding at anchor in Hampton Roads, in which collision both vessels suffered greatly, and for which the Gordon Castle put in a claim of \$1,000. The agreed value of the Akaba was \$130,000. She was in ballast, with full complement of officers and men. The City of Birmingham, by her deviation of her voyage, lost her regular return trip to Savannah and the earnings thereon, and has been held responsible for the cargo of vegetables and fruit which perished from the delay. She also suffered considerable damages while towing the Akaba, caused by the strain of the towage and the wire hawser. A libel was filed by the City of Birmingham against the Akaba for salvage, and after she was in custody, by virtue of the warrant of arrest, the Boston Towboat Company filed its libel for salvage services rendered by the towboats Taurus and Underwriter, and for the services, use, and aid to salvage rendered by the wire hawser of the Saturn; and a second libel for breach of the contract of towage to New

York. These causes, tried together, came before the district court. The court awarded the City of Birmingham in a lump sum \$30,000 salvage and expenses, gave to the Boston Towboat Company \$250, one day's demurrage of the Saturn at Turk's island, and denied its claim for salvage on every ground. Damages for breach of towage contract were refused. The case comes here on appeal.

Sidney Chubb and Floyd Hughes, for claimant James Marke Wood.
Robert H. Smith and Richard Walke, for Boston Towboat Co.
Robert M. Hughes, for Charles S. Burg.

Before BOND and GOFF, Circuit Judges, and SIMONTON, District Judge.

SIMONTON, District Judge, (after stating the facts.) As to the City of Birmingham: The services of this steamship were salvage services of the most meritorious character. She found the Akaba on a dangerous coast,—perhaps the most dangerous of American coasts,—drifting to leeward in a heavy northeast gale, almost helpless. Notwithstanding that she had a number of passengers and a valuable cargo aboard, a great part of it perishable by delay, she went at once to the distressed vessel, rendered her skillful, prompt, and successful assistance, rescued her from her imminent peril, and, after great toil and danger, securely towed her to a place of safety. It would seem that all the elements which enter into a salvage service exist in this case—promptitude, courage, skill, great peril to life and property, toil, and success. *The Blackwall*, 10 Wall. 13; *Cope v. Dry-Dock Co.*, 119 U. S. 628, 7 Sup. Ct. Rep. 336. As is said by Wallace, J., in *The Baker*, 25 Fed. Rep. 774:

“Neither the value of the property imperiled, nor the exact quantum of service performed, is a controlling consideration in determining the compensation to be made. The peril, hardship, fatigue, anxiety, and responsibility encountered by the salvors in the particular case; the skill and energy exercised by them; the gallantry, promptitude, and zeal displayed,—are all to be considered, and the salvors are to be allowed such a generous recompense as will encourage and stimulate similar services by others.”

It is not necessary that there should be a certainty of loss unless the service was rendered. It is sufficient that there is a reasonable apprehension of danger, and that the service is rendered in reference to that apprehension of danger, and not in the ordinary course of business. See cases quoted in *The Oregon*, 27 Fed. Rep. 872. When we consider the character of the coast near Hatteras, and the supreme necessity for encouraging heroic endeavor in saving life and property endangered upon it, we cannot say that the learned district judge erred grossly in his finding the reward which he fixed. “By the uniform course of decision in this court,” say the supreme court in *The Connemara*, 108 U. S. 359, 2 Sup. Ct. Rep. 754, “during the period in which it had full jurisdiction to reverse decrees in admiralty upon both facts and law, as well as in the judicial committee of the privy council of England, exercising a like jurisdiction, the amount decreed below was never reduced unless for some violation of just principles, or for clear and palpable mistake or gross overallowance.” This part of his decree is affirmed. In the evidence taken in the case items of damage caused by the collision of the

salving vessel with the Gordon Castle appear. The court below alludes to a part of the expense incurred by the City of Birmingham; but in its finding it gives a lump sum, without discussing this collision, or the responsibility of the salved vessel therefor, or stating whether it includes these damages among the expenses. We approve the sum found, but we express no opinion on this point. Indeed, the record does not disclose to what extent the towage of the Akaba contributed to the collision.

With respect to the towboats: The Saturn, their consort, had abandoned her tow, the Akaba, in her extremity. She had no right thenceforward to dispose of her. When the towboats came up to the Akaba, and attempted to force their services on her and the City of Birmingham, the latter vessel was fully competent to complete the salvage service, and in no need of any assistance, the sea being smooth and the weather calm. For these reasons she refused their aid. They were intruders, asserting rights to which they had no shadow of claim. Their offers were properly rejected, and they have no standing in court.

With regard to the wire hawser: The Boston Towboat Company claims salvage for its use. Apart from the fact that the contract between that company and the Akaba expressly "provides that no claim for assistance or salvage or other services shall be rendered," we see no right to salvage for the hawser on the facts of the case. It was used without the knowledge or consent or concurrence of the Boston Towboat Company. Its use, and the service it rendered to the Akaba, can in no sense inure to the benefit of that company as salvage. Salvage is awarded to those who voluntarily and spontaneously render service in saving property at sea. Although salvage as claimed cannot be allowed, yet, under these pleadings, we can entertain another question. The hawser was left in the possession of the Akaba, and was brought into port. It has been lost. The right of property of the towboat company in the hawser was not lost. When articles are lost at sea the title of the owner in them remains, even if they be found floating on the surface or cast upon shore. All that the finder can do is to claim salvage on them. *Cope v. Dry-Dock Co.*, 119 U. S. 630, 7 Sup. Ct. Rep. 336. A fortiori in the case of this hawser left in the control of the Akaba. This being so, the Akaba was a bailee without hire, liable for gross negligence. It does not appear in the case made how this hawser was lost, that is to say, with what absence of care. When the case is remanded to the district court, this can be made the subject of inquiry; and, if it appear that the Akaba is liable, an equitable adjustment of the loss can be made.

The only other question is as to the libel of the Boston Towboat Company for breach of contract of towage. After the Saturn reached Hampton Roads, and was repaired, the libellant offered to complete the towage to New York, either with her or with the towboats Taurus and Underwriter. This offer was made after the Saturn had abandoned the Akaba, and she had been salved by the City of Birmingham, and was in the custody of the court, under the warrant of arrest. We concur with the court below in the conclusion

that there is no merit in this claim, and that the libel should be dismissed.

Except as herein modified, the decree of the district court is affirmed. Let the cause be remanded to the district court for such proceedings as may be necessary in conformity with this opinion.

THE HAVANA.

TURNER et al. v. THE HAVANA. ROSSMAN v. SAME. ELSESSER v. SAME. WANSEER v. SAME. REED v. SAME. ROBERTS v. SAME.

(District Court, S. D. New York. January 25, 1893.)

MARITIME LIEN—REPAIRS AND SUPPLIES — FOREIGN CORPORATION — OWNER—AGENT'S ORDER — CREDIT OF SHIP — ADVERTISING BILLS NOT A MARITIME SERVICE.

The passenger steamboat H. was employed in making daily trips with fishing parties from New York outside of Sandy Hook. She was owned by a New Jersey corporation. The four stockholders resided in New York. The business of the company was done on board the steamer. They had an office in Jersey City for the transfer of stock. Mr. S., one of the stockholders, was vice president of the company and general manager, who ran with the boat on her trips, and ordered, directly or indirectly, all supplies and repairs. The company had no other property, and no reputation or credit. Most of those furnishing supplies supposed Mr. S. to be the master, and all the supplies were furnished on the credit of the ship. *Held*, that the supply men had a maritime lien, excepting a bill for advertising the steamer's excursions in order to get business, which, not being a maritime service, had no lien.

In Admiralty. These were six libels against the steamship Havana to enforce liens for supplies. Decrees for libelants.

Anderson & Howland and Murray, for Turner.

Alexander & Ash, for Reed and Rossman.

Stewart & Macklin, for Wanser and Elsesser.

H. D. McBurney, for Roberts & Bro.

Henry D. Hotchkiss and W. S. Maddox, for the Havana.

BROWN, District Judge. All the above libels were filed to recover payment for supplies of various kinds furnished to the steamboat Havana, mostly during the latter part of 1892. The steamer was engaged in the excursion passenger business, making daily trips in taking fishing parties from New York about six or eight miles outside of Sandy Hook. The supplies were all procured directly or indirectly through the orders of Mr. Schrader, who was the general business manager of the vessel, running with the boat upon her trips and attending to all matters of supplies, a part of which were for the restaurant and the refreshments for passengers on the trips.

Prior to March 15, 1892, Mr. Schrader and three others had been owners of the vessel. They all resided then and reside now within the state of New York. In March, 1892, a company was formed for the purpose of taking the ownership of this steamer and of

carrying on the business called the "Liberty Steamboat Company," which was duly organized as a corporation under the statutes of New Jersey, and kept an office in Jersey City for the transfer of stock. On the 15th of March, 1892, the vessel was transferred by a bill of sale to the new company, and Mr. Schrader was made vice president. No other business of the company was transacted in Jersey City, and no other office was maintained by them elsewhere than on board the vessel, except some little use of a desk of one of the four stockholders at his milk shop at Greenpoint. The four former owners took all the stock of the company, and some stock was held by Mr. Schrader down to the time of trial. The company had no other property than the vessel. All its business was transacted within this state, or on the high seas, and the bills in suit were all contracted here.

Upon the above facts it is claimed by the respondent that no maritime lien arises (1) because the vessel was practically a New York vessel; (2) because the bills were not contracted by the master, but by the owner at its usual place of business; (3) that there was no actual credit of the ship.

Without in any degree departing from the views expressed in the case of *Stephenson v. The Francis*, 21 Fed. Rep. 715, and *Neill v. The Francis*, Id. 921, which have been repeatedly applied in this court, and which have been recently reaffirmed in the court of appeals, in the case of *The Steamship Stroma*, 53 Fed. Rep. 281, I am satisfied that those decisions are not applicable to the present case. The doubt expressed by Judge Butler in the case of *The Mary Morgan*, 28 Fed. Rep. 196, 200, I cannot regard as an open question here, since the decision of the circuit court in this circuit in the case of *The Plymouth Rock*, 13 Blatchf. 505. The rule is settled here that the residence or domicile of the legal owner controls as to the character of the vessel, whether the owner is an individual or a corporation. In the present case the owner was undeniably a New Jersey corporation.

The evidence leaves no doubt, moreover, that all these bills were contracted upon the credit of the vessel. This conclusion does not rest chiefly upon the fact that the articles were charged to the vessel and owners, but from all the other circumstances as well. The Liberty Steamboat Company had no other property. There was nothing but this vessel to look to. The stockholders were not personally liable. It is plain that none of them contemplated any personal liability. As to some of the bills, Mr. Schrader's testimony expressly disclaims any personal liability. The company itself was scarcely known. Several of the libelants did not even know there was such a company. It had neither name, reputation, or credit with the public, or those furnishing these supplies; and aside from the vessel, as I have said, the company was worthless. The articles, moreover, were all furnished to the vessel directly; and the testimony of all the libelants that they were furnished on the credit of the vessel is corroborated by all the circumstances; and any personal credit of the owner, viz. of the steamboat company, instead of the vessel, was in the highest

degree improbable. It is plain, also, that Mr. Schrader, in ordering the supplies, understood them to be supplied on the credit of the vessel. I cannot, therefore, find otherwise than that the supplies were all furnished on the understanding by both parties, that they were furnished on the credit of the vessel, and not on the personal credit of the company.

The circumstance that the orders for all the articles were given either by Mr. Schrader or under his direction, and not by the master, is not material, for two reasons, viz.: (1) The cases of *The Francis*, and numerous other analogous cases, in which no presumption of a lien was allowed, were cases in which the dealings were with the owner in person, i. e. either the general owner, or the charterer as special owner. Here the dealings were not with the owner as such, nor even with Mr. Schrader as vice president; but with Mr. Schrader as the agent of the owners, who was on board as manager, and had charge of this department of the ship's business. In that respect the case is like that of *The Patapsco*, 13 Wall. 329, where the owner was an absent and insolvent corporation, and the supplies were furnished upon the orders of the agent, and not of the owner. Never, so far as I am aware, has a lien been disallowed, or the presumption of a maritime lien refused, for supplies furnished to a foreign vessel simply because they were ordered by the agent of the vessel, instead of the master in person, where the other circumstances of the case have not warranted the inference that a personal credit was intended. Instances of the allowance of such liens in this court have been not infrequent. See *The Comfort*, 25 Fed. Rep. 158, affirmed Id. 159. (2) Besides this, however, Mr. Schrader in the present case was in fact exercising a part of the master's ordinary functions. While the evidence is not explicit as to the duties which were left to the nominal captain of this boat, it seems probable from what appears that he attended solely to the duties of navigation, or those of a pilot only; leaving to Mr. Schrader the management of all other matters in regard to repairs and supplies, which are usually attended to by a master in a foreign port. In fact, Mr. Schrader, running with the ship, exercised a master's functions to such an extent that he was understood by most of the libelants to be the actual master of the ship, and they supposed they were acting under the master's orders.

As these supplies were plainly not expected by either side to be furnished upon the personal credit of Mr. Schrader, or on the personal credit of the Liberty Steamboat Company, but upon that of the ship, the liens claimed must be allowed as maritime liens. The amounts allowed are as follows:

To Turner, \$1,047.45, with interest from December 1, 1892.

To Rossman, \$346.56, with interest from December 1, 1892.

The loan by him of \$200 to Schrader for the purpose of paying necessary bills for advertising in newspapers the excursions of the steamer, in order to keep up her business, cannot be allowed; because such advertising was not a service rendered directly to or upon the ship, but belonged to that preliminary class of services

rendered wholly on land and not deemed maritime, and hence not giving rise to any maritime lien. See *The Thames*, 10 Fed. Rep. 848; *The Crystal Stream*, 25 Fed. Rep. 575; *The Paola R.*, 32 Fed. Rep. 174; *Doolittle v. Knobeloch*, 39 Fed. Rep. 40; *Marquardt v. French*, 53 Fed. Rep. 603.

To Elsesser, only the amount accruing since the vessel was owned by the foreign company, viz. \$131.98, with interest from May 1, 1892.

To Wanser, \$170.40, with interest from December 1, 1892.

To Reed, \$184.95, with interest from December 1, 1892.

To Roberts & Bro., \$232.47, with interest from December 1, 1892. Decrees may be entered accordingly, with costs.

THE ROYAL.

THE SUPERIOR.

THAMES TOWBOAT CO. v. THE ROYAL et al.

(Circuit Court of Appeals, Second Circuit. February 7, 1893.)

1. ADMIRALTY—APPEAL.

The decision of a federal district judge upon questions of fact in a collision case should not be disturbed on appeal unless so inconsistent with evidence to the contrary, irrespective of facts depending wholly on the credibility of witnesses, as to satisfy the appellate court that they are incorrect.

2. COLLISION—TOW AND FERRYBOAT AT PIER.

A tow in the east river was passing near a ferry slip when a ferryboat trying to make the slip crossed the bows of the tug at a distance "of about 300 ft.," but without fault failed to make the slip, and was carried out into the river, colliding with the tow. *Held*, that the decision of the trial judge that the steamer did not back into the river, but that the collision was due to the rebound, and that the tow was negligently passing too near the slip, should not be reversed by the appellate court on the ground that a mathematical calculation would show that the tow must have been at a reasonable distance from the pier, and the collision therefore must have been caused by the backing of the ferryboat, and not by the rebound, when the speed of the tow and the ferryboat, the force of the current, and other elements in the calculation, are uncertain.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by the Thames Towboat Company, owner of the barge Afton, against the steam tug Royal (the Newton Creek Towing Company, claimant) and the ferryboat Superior, (the Brooklyn & New York Ferry Company, claimant,) for collision. The district court dismissed the libel as against the Superior, and entered a decree against the Royal. The Newton Creek Towing Company appeals. Affirmed.

Peter Alexander, (Alexander & Ash, on the brief,) for appellant, claimant of the Royal.

Samuel Park and Geo. B. Adams, (Wilcox, Adams & Green and Franklin A. Wilcox, on the brief,) for appellee the Superior.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This case arises from a collision which occurred in the East river, on the New York side, near the entrance to the ferry slip between piers 56 and 55, between the ferryboat Superior and the barge Afton, which was then in tow of the tug Royal. The collision occurred in the afternoon of a clear day, and the tide was strong flood. The ferryboat was making one of her regular trips from Brooklyn to the slip mentioned, and the tug and tow were proceeding down the river on the New York side on a course parallel with the ends of the piers. The Afton was being towed on a hawser about 180 feet long. The ferryboat shortly before had passed in front of the bows of the tug to make her slip. She failed to make it, and was trying to enter it when she came in contact with the tow at the bluff of the latter's starboard bow.

The question in the case is whether the tug and tow were proceeding down the river so near the ends of the piers when the collision took place that the ferryboat, notwithstanding she was not guilty of any fault or negligence, could not avoid striking the tow. Upon the evidence there is no reasonable support for the theory that the ferryboat missed making her slip, and struck the end of rack A by reason of faulty navigation; and it must be taken as established and uncontradicted that by reason of the swift and suddenly changing currents of the eddy at the slip such an occurrence is at times unavoidable, and was upon the occasion in question. If, as is contended for the ferryboat, while she was trying to enter her slip, her engine having previously been stopped and reversed, she was thrown by the eddy against the end of the division rack A, rebounded, and was carried by the tide, stern up river, against the tow before she could recover control sufficiently to keep out of the way, she was without fault; and if the tug had gone with the tow unnecessarily near the entrance of the slip, and was violating the state statute, which requires steam vessels to be navigated as near as possible in the center of the river, and by reason of her improper proximity to the slip brought her tow in the way of the ferryboat, she was properly held to be solely in fault for the collision. The learned district judge before whom the witnesses for both parties were examined delivered a careful opinion. It appears from it that he believed the witnesses who testified, in substance, that the ferryboat, when she struck the tow, was not backing to get a new start for her slip, was about halfway out of the slip,—that is, her bow was about 20 feet from the end of rack A,—and that the tug, with the tow following her, was on a course so near the ends of the piers to be only about 110 feet outside of the end of pier 56; and he disbelieved the testimony of the witnesses for the tug to the effect that the tug and tow were 300 feet away from the ends of the main piers, and that the ferryboat was backing, to make a new start to re-enter her slip, when she struck the tow. According to the well-settled rule governing appeals in admiralty, we ought not to disturb these findings, unless they are so inconsistent with evidence to the contrary, irrespective of facts depending wholly on the credibility of witnesses, as to satisfy us that they are incorrect. The counsel for the appellant has made a very ingenious and entirely

legitimate argument to bring his case within the operation of this rule. He insists that it is practically undisputed that, when the ferryboat crossed the bow of the tug to make her slip, she crossed at a distance of at least 300 feet away; that the length of the tug, (90 feet,) the length of the hawser, (at least 180 feet,) and the point of collision on the bow of the barge (15 feet aft of her stem) make the total distance from the stem of the tug to the point of contact on the barge at least 285 feet; and that at the rate of speed being maintained by the vessels, respectively, it is impossible that the ferryboat could have gone only 20 feet beyond the line of the tug's course, and upon a rebound have hit the tow. He urges that upon any such theory the tug would have struck the ferryboat, or the latter might have hit the tug, but she could not have hit the barge, which must have been nearly 600 feet behind the line of the intersecting courses when the ferryboat passed in front of the tug. He insists, on the other hand, and we agree to the proposition, that if the tug was 300 feet outside the ends of the pier, as her witnesses testify, their theory of the collision is a probable one.

The trial judge did not assume that the estimates given by the witnesses, whose testimony he accepted as true, were accurate either as to the distance of the tug from the ends of the piers, or the distance the ferryboat rebounded; but he accepted them as approximately correct, making the observation, in his opinion, that no great weight can be attached to estimates of distances in feet when no special attention was given to the subject. The controlling facts which he deemed to be established were that the ferryboat was not backing in order to make a new start for her slip when she struck the tow, and that there was such a brief interval after she rebounded and before she struck the tow that she could not practicably be put ahead. Mathematical calculations seldom form a solid basis for judgment in collision cases. The factors which enter into them are generally uncertain quantities, susceptible of so much elasticity that the resultant is apt to be fallacious. In the present case the only factor which is reliable is that of the distance from the stem of the tug to the place of the blow on the tow. Suppose the ferryboat passed the tug 300 feet in front of the tug's bow, does that mean that her stem, her stern, or her midship was 300 feet away while on the line of the intersecting course? As the ferryboat was 170 feet long, her stern may have passed the bow of the tug only 130 feet away. Were the vessels on courses at right angles, or on converging courses? Was the tug going at a speed of three or five miles an hour? Was the ferryboat going fast, or quite slow, as she was nearing her slip? With how much force did the tide operate on her stern when she rebounded? Different answers may be given, consonant with the testimony, to all these questions. If she was 200 feet away when her midship was opposite the bow of the tug; if by her rebound and the force of the tide she was carried 40 feet back, and her stem thrown up the river; if her headway was almost stopped as her bow neared her slip; and if the tug was going at a speed of 5 miles an hour,—the collision could have happened substantially as the trial judge found it did. We have not

overlooked the somewhat significant omission of the ferryboat to call her engineer, or give any evidence from her engine room. Nevertheless, the trial judge, who saw the witnesses, and had an opportunity to judge of their intelligence and candor, which is denied to us, believed those whose version he substantially adopted, and disbelieved those who located the tug 300 feet away from the ends of the pier at the time of the collision. We have no reason to suppose that he overlooked the considerations that have been addressed to us, or failed to weigh them, and we are not convinced that his judgment upon the merits is not a safer one than any we can form upon the record.

The decree is affirmed, with costs.

THE STEPHEN BENNETT.

THE ELIZABETH T. COTTINGHAM.

SMITH et al. v. THE STEPHEN BENNETT.

BUCH et al. v. THE ELIZABETH T. COTTINGHAM.

(Circuit Court of Appeals, Second Circuit. February 7, 1893.)

1. COLLISION—OVERTAKING VESSEL.—MISSING STAYS.

Two schooners were beating up the coast, the B. following in close proximity to the C., and gaining slightly on her. The C. went about, and immediately afterwards the B. attempted to do the same, but misstayed, and, gathering sternway, got under the bow of the C., and was struck by her. The B. had misstayed once before that morning. *Held*, that the B., knowing her liability to misstay, was in fault in following the C. so closely as to render it necessary for her to tack when the C. did. 42 Fed. Rep. 336, affirmed.

2. SAME.

The C. was not at fault in dropping her peak after she discovered the danger, for the action, if improper, was in extremis.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Libel by John Smith and others against the schooner Stephen Bennett for collision. Joseph L. Buch and others filed a cross libel against the schooner Elizabeth T. Cottingham. The cross libel was dismissed, and decree was given for libellants. 42 Fed. Rep. 336. Respondents appeal. Affirmed.

W. W. Goodrich, for appellants.

Frank D. Sturges, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. About noon of December 6, 1888, the schooners Stephen Bennett and Elizabeth T. Cottingham were in collision off the Jersey coast. The weather was clear, with a strong breeze from N. N. W. Each schooner was heading about west by north, closehauled on the starboard tack, the Cottingham leading the Bennett. At a distance of from one to two miles from the beach, ~~but~~

vessels tacked. The Bennett missed stays, and was drifting astern when the Cottingham, having dropped her peak, ran into the port side of the Bennett. Both vessels were seriously damaged. The district court held that the Bennett was the overtaking vessel, and that, having misstayed on a previous tack that morning, she knew that she was liable to misstay again, and that she had no right to tack so close to the Cottingham as to render collision inevitable in case she should misstay again; and that, the collision being in the open sea, although the Cottingham might have gone a little nearer to the beach than she did, it was no fault in her to tack when she did, and that it was the duty of the Bennett not to tack so close to her as she did.

The Bennett, being the overtaking vessel, must be held at fault for the collision, unless a preponderance of proof shows that she was free from fault. The most important question of fact in the case is, which of the two tacked first? The evidence on this point is conflicting, but in it we do not find sufficient to satisfy us that the district judge was in error in holding that the Bennett did not tack before the Cottingham, as the appellant insists she did. She was under no obligation to tack first, but it was her duty to tack immediately upon the Cottingham's doing so. This she tried to do, but failed because she misstayed, and the distance between the vessels was not sufficient to prevent collision under such circumstances. But for that distance the Bennett, as the overtaking vessel, was responsible. She chose her own distance and location relative to the other vessel, and was bound to so settle them that she could fulfill her obligation of tacking as soon as the leading vessel tacked, and avoiding her when so doing. There was no improper action on the part of the Cottingham tending to confuse, mislead, or embarrass the Bennett. The vessels were not in a narrow channel, but in the open sea, and there was no obligation on the part of the leading vessel to beat out her tack, provided she did not undertake to come about when so near the overtaking vessel as to involve risk of collision. But there was no such risk apparent. Whatever was the precise distance apart, there seems to be no question on the evidence but what it was sufficient to allow of the execution of the maneuver had not the Bennett misstayed. The master of the Cottingham, however, was not bound to anticipate such a contingency, though past experience that same day had warned the Bennett it was to be taken into account when she selected her distance and location from another vessel, which might be anticipated to tack at any time.

The maneuver of the Cottingham in dropping her peak when she perceived the situation of the Bennett, if improper navigation, was in extremis, and not a fault. Nor can we see that the absence of a lookout astern on the Cottingham contributed to the collision. If there, he could only have reported the situation as it was, which, as we have held supra, was such as to justify the Cottingham in tacking. The decree of the district court is affirmed, with costs.

RICHARDS v. BELLINGHAM BAY LAND CO.

(Circuit Court of Appeals, Ninth Circuit. January 16, 1893.)

No. 58.

1. DOWER—ABOLITION BY STATUTE—EFFECT AS TO EXISTING MARRIAGES.

At a time when the right of dower existed in Washington Territory, a husband conveyed land without joining his wife in the deed, and, at the time of his death, 1 Hill's Ann. St. & Codes Wash. §§ 1405, 1482, abolishing the right of dower, were in force. *Held*, that the widow was not entitled to dower in the land so conveyed. 47 Fed. Rep. 854, affirmed.

2. SAME—CONSTITUTIONAL LAW—LEGISLATIVE POWERS.

An inchoate right of dower is not such a vested right or interest as cannot be taken away by legislative action. 47 Fed. Rep. 854, affirmed. *Davis v. O'Ferrall*, 4 G. Greene. 168; *Young v. Wolcott*, 1 Iowa, 174; *O'Ferrall v. Simplot*, 4 Iowa, 381-400; *Pierce v. O'Brien*, 29 Fed. Rep. 402,—distinguished.

3. SAME—CONSTRUCTION OF STATUTE—RETROSPECTIVE OPERATION.

The inchoate right of dower, as it existed in Washington Territory prior to Laws Nov. 14, 1879, § 18, (1 Hill's Ann. St. & Codes Wash. § 1482,) which abolished dower, was not a right "established, accrued, or accruing," as to which, by section 31, such act was not to be construed as operating retrospectively.

4. CONSTITUTIONAL LAW—TITLES OF LAWS—OBJECTS EXPRESSED.

Section 3 of Laws Wash. T. Nov. 12, 1875, entitled "An act to regulate the descent of real estate, and the distribution of personal property," and providing that "the provisions of section 1 (1 Hill's Ann. St. & Codes Wash. § 1480) as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents, and take the place of tenancy in dower and tenancy by the curtesy, which are hereby abolished," is not void for the reason that it is not embraced within the objects of the law within which it is found and enacted.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

In Equity. Action by Henrietta C. Richards against the Bellingham Bay Land Company for assignment of dower. Decree for defendant. 47 Fed. Rep. 854. Complainant appeals. Affirmed.

Alfred L. Black and E. B. Leaming, for appellant.

William Lair Hill, for respondent.

Before McKENNA, Circuit Judge, and KNOWLES and HAWLEY, District Judges.

KNOWLES, District Judge. Plaintiff instituted an action in equity in the United States circuit court for the district of Washington, asking for an assignment of dower in certain lands held by the defendant on Bellingham bay, state of Washington, the same being known as the "Morrison Donation Claim." The bill of complaint sets forth that one Charles E. Richards, in his lifetime, was the husband of plaintiff, and that they continued to live together and cohabit as such up to the time of his death, on the 19th day of May, 1889; that prior to said marriage said Charles E. Richards became seised of an estate in fee in said lands; that subsequent to said marriage he sold the same to one Robert H. Vance; that plaintiff did not join in the conveyance of said lands to said Vance, and has

never in any manner relinquished her right of dower therein; and that she is now the widow of said Richards. As it appears from the bill that the said defendant now holds the legal title in fee to said lands, the court is led to infer that it must have derived the same in some manner through mesne conveyances from said Vance. The defendant demurred to this bill on the ground that it appears by plaintiff's own showing therein "that she is not entitled to the relief prayed by the said bill, or to any relief in the premises." The court sustained this demurrer, and entered a decree in words as follows:

"That it be adjudged and decreed that said complainant is not entitled to relief upon or on account of the matters alleged in her said bill of complaint, and that this cause be and is dismissed, at the costs of the said complainant, Henrietta C. Richards."

From this judgment plaintiff appealed to this court.

The question presented is as to whether the bill states facts sufficient to show that plaintiff is entitled to dower in the land described, under the laws of the territory of Washington, at the date of her husband's death. The territory enacted several statutes bearing upon the question of dower. I do not think it necessary to go into the history of this legislation. Suffice it to say that at the time of the death of Richards the following statutes existed:

"The provisions of section fourteen hundred and eighty-[one] of this volume of General Statutes, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents, and take the place of tenancy in dower and tenancy by the curtesy, which are hereby abolished." 1 Hill's Ann. St. & Codes Wash. § 1482.

"No estate is allowed the husband, as tenant by curtesy, upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband." Id. § 1405.

The first of these statutes seems to have been one of the provisions of an act of the legislative assembly entitled "An act to regulate the descent of real estate, and the distribution of personal property." The latter was a part of an act defining the property rights of husband and wife. There was a statute of said territory upon the subject of dower, which was substantially declaratory of the common law upon that subject existing at the time of the marriage of plaintiff with said Charles E. Richards, and at the time of the conveyance of said lands to Vance. Appellant urges that the law upon the subject of dower at the date of the alienation of said lands to Vance should control, and not the law upon that subject at the date of the death of Richards. This presents for consideration the nature of dower rights. In the case of *Dolton v. Cain*, 14 Wall. 472, in speaking of the wife's right of dower in the estate of her husband, the supreme court said, "she had no present title to the land, either legal or equitable." Washburn, in his work on Real Property, (volume 1, p. 301,) says of a dower right during the life of the husband, "Nor is her right, in any sense, an interest in real estate, nor property of which value can be predicated." To the same effect is the rule expressed in *Moore v. City of New York*, 8 N. Y. 110. In the case of *Randall v. Kreiger*, 23 Wall. 137, the supreme court after speaking of the different kinds of dower known

to the common law, and the abolition of two of them by St. 3 & 4 of Wm. IV., c. 105, said:

"The dower given by law is the only kind which has since existed in England, and it is believed to be the only kind which ever obtained in this country. During the life of the husband the right is a mere expectancy or possibility. In that condition of things the lawmaking power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave may increase, diminish, or otherwise alter it, or wholly take it away."

Other authorities might be cited to the same effect.

We find from these that dower is not an estate in land, vested or otherwise. It is a right without value, unless by some modern methods a possibility may be valued. A possibility or contingency is not an estate. It may be affirmed generally where a right is given by law, until that right becomes vested in some way in property the law may be changed or repealed, and the right taken away. *Suth. St. Const.* §§ 163, 164; *People v. Livingston*, 6 *Wend.* 526; *Van Inwagen v. City of Chicago*, 61 *Ill.* 31; *Marks v. Borum*, 25 *Amer. Rep.* 764. This rule is enforced in the cases of *Frisbie v. Whitney*, 9 *Wall.* 187; *Rector v. Ashley*, 6 *Wall.* 142. Dower does not become a vested right in the wife until the death of her husband. A possibility of dower is no vested right in the estate of dower, or anything the law recognizes as property. The legislative power of the territory of Washington had the right "to wholly take it away" then, to use the language of the supreme court. The cases cited from the decisions of the supreme court of Iowa (*Davis v. O'Ferrall*, 4 *G. Greene*, 168; *Young v. Wolcott*, 1 *Iowa*, 174; *O'Ferrall v. Simplot*, 4 *Iowa*, 381-400; *Pierce v. O'Brien*, 29 *Fed. Rep.* 402) are not in point upon the issue here presented. In the first three of these, parties purchased real estate when there was a possibility, under the laws of the state, that there might be dower in the same to the extent of a life estate of one third thereof. Burdened with this possibility, the title to this real estate became vested in the purchaser. The court held that it was not competent to enlarge this dower possibility to an estate in fee, to the extent of one third thereof, or more. There can be no doubt of the correctness of these decisions. If they did maintain the rule contended for by appellants, they would be contrary to the weight of authority upon this subject. The rule is that dower must be measured and allotted according to the law at the time of the death of the husband, and not, as contended, at the time of the conveyance, by the husband, of his lands. The rule appellant contends for would be contrary to the rule above expressed by the supreme court, and not founded upon reason. The case of *Pierce v. O'Brien* was one where the law provided that the wife should have one third in value of the real estate possessed by the husband during marriage, as dower. The question was at what time this value should be estimated,—whether at the time of the conveyance by the husband, or at the time of his death. The court held, according to the general rule upon this subject, at the time of the conveyance, so as to exclude the value of subsequent improvements. This is not the question here presented.

The next question presented is, did the legislative assembly take

away from appellant her possibility of dower before the time of her husband's death, in 1889? If the statutes above specified can stand, there can be no doubt upon this point. It is urged that the first of the above statutes is void for the reason that it is not embraced within the object of the law in which it is found and enacted. There was a provision in the organic act of the territory of Washington which reads as follows: That "every law shall embrace but one object, and that shall be expressed in the title." Rev. St. U. S. § 1924. The law in which the said provisions in regard to dower and curtesy are found provides for the descent of real property of a decedent. In this law it is provided that if a deceased person dies, leaving a husband or wife, and one child, one half of the real estate of which said person died seised goes to the surviving husband or wife, and one half to the child. If more than one child survived, then one third to the surviving husband or wife, and the balance to be divided equally among said children. In case of no children, then there are provisions for father and mother, brothers and sisters, inheriting half of the estate. In certain contingencies the surviving husband or wife receives all of the estate. The estate here provided for is a fee, or whatever estate the husband had in said real property at the date of his death. It appears to me to be within the object of such a statute to abolish dower and curtesy. If either of these existed, they would interfere with, and cloud, the estates provided for in that statute, as inherited by the persons therein named. Take, for instance, a case where one half of the estate would go to the wife, and one half to a child. How would dower be allotted? One third out of the whole estate? Then the one third of the child's estate would have charged upon it this life estate. The mother, it is true, would have her estate charged with the same, or merger would take place. But this is not what was contemplated by the statute. I might refer to other provisions of that statute which I am sure would show that the legislature did not wish the estates inherited should be charged with any such estates as those of dower or curtesy. It was, then, of necessity, the right of the legislature, by positive statute, to prevent the complications which might arise if these rights existed, and do it in the same law or statute where they were providing for the estates to be inherited. Why should another statute be resorted to, to define and clear the titles provided for in this?

There is another point to be considered. In this statute a more valuable provision for the wife was made than the old right of dower. This has been proven to be so in practice. In providing for larger rights, was it not within the object of such a statute to abolish the lesser? I think it was. Judge Cooley, in his work on Constitutional Limitations, (section 144,) in writing upon this subject, says:

"The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act, relating to that alone, would not only be unreasonable, but would actually render legislation impossible."

In discussing such constitutional provisions as the one under consideration, in Sutherland on Statutory Construction, (section 92,) I find the following:

"In cases not clearly within the mischief intended to be remedied by requiring the subject or object of an act to be single and expressed in the title, legislation will not be adjudged void, on any nice or hypercritical interpretation. Sound policy and legislative convenience dictate a liberal construction of the title and subject-matter of statutes to maintain their validity. Infractions of this constitutional clause must be plain and obvious."

The same rule is expressed in End. Interp. St. § 59.

With these views of that statute, and the rules of law above expressed, the contention of appellant upon this point cannot be maintained.

In regard to the last of the above statutes the appellant urges that, by an express statute, it is confined to cases of dower, where the right accrues after the passage of the act. That express statute is as follows:

"This act shall not be construed to operate retrospectively, and any right established, accrued, or accruing, done prior to the time this act goes into effect, shall be governed by the law in force at the time such right was established or accrued."

As before stated, the provision of the statute now for consideration was one of the provisions of an act defining the property rights for husband and wife. In this act community property is established, and the incidents in regard to such property regulated. The above provision applies to the whole of this act. Considering the nature of the right to dower before the death of the husband, can it be said to be one established, or accrued or accruing? If it can be wholly taken away by statute, it is not established or accrued. Can it be said to be an accruing right, that is, one that is increasing or enlarging or augmenting? It is true that the possibility of dower may at times be said to be approaching the time when it will be realized. But this is another thing from saying that the right is increasing or augmenting. The possibility or expectancy may become stronger or greater as the husband's death approaches, but not the right. That remains the same. I am satisfied the construction sought to be placed upon this is not correct, and that it does not apply to a dower right that has not become a vested one. To hold that it did would mar the statute in which it is found materially, and be inconsistent with its manifest intent. If I should be wrong in this, the former statute I have considered would be sufficient upon which to determine this case. Holding, then, that, under the laws of Washington Territory, appellant had no dower in the lands described at the time of her husband's death, the judgment of the court below must be affirmed, and it is so ordered.

BABCOCK & WILCOX CO. v. WORLD'S COLUMBIAN EXPOSITION CO. et al

(Circuit Court, N. D. Illinois. February 23, 1893.)

INJUNCTION—CORPORATIONS—WORLD'S FAIR.

Complainant had an understanding with a representative of an exposition company that it was to supply certain additional boilers, if required for use in the exposition building, the boilers to be used also as exhibits. The representative told complainant that the arrangement would have to be submitted to the company for approval, but this was never done. The company was only authorized to erect and equip the building, the control of the exhibits being vested in a commission appointed by congress. *Held*, that complainant was not entitled to an injunction to prevent the use of other boilers in the building.

In Equity. Suit by the Babcock & Wilcox Company against the World's Columbian Exposition Company and others to enjoin the defendants from allowing the Sterling Boiler Company to put its boilers in machinery hall. Bill dismissed.

W. E. Mason, for complainants.

E. Walker, for defendants.

GROSSCUP, District Judge. The Columbian Exposition will, when completed next summer, be the product of two agencies, namely, the World's Columbian Exposition Company, a corporation under the laws of the state of Illinois, and the World's Columbian Commission, representing the United States. The former is the agency of Chicago and Illinois, to give to the exposition a home; the latter is the hand of the government, which makes it a national enterprise. To the former belongs the duty and power of looking to the erection of the necessary buildings and their equipment for the purposes designated, such as the supply of heat, power, light, water, etc.; to the latter is given the duty of installing the exhibits, and administering the exposition in all its branches as a great national enterprise. This general line of demarcation between the duties and powers of these respective agencies is easily traced, but in the practical application of these powers so many of their incidents apparently overlapped each other that complications were certain to arise. To meet these instances, and avoid a clash between the two agencies, a council of administration, composed of two members from each board, was created. To this council was given the absolute and final jurisdiction and control over all matters of general administration of the exposition, including the installation of exhibits, and the expenditures of all moneys for work and material exceeding \$2,000 in amount. Some time early in 1892, the Illinois corporation entered into a contract with six companies and persons constituting what was called the "Temporary Association," to supply the exposition with a steam-boiler plant. The complainants were not included in this contract, but subsequently were substituted for another company in the Temporary Association, and accordingly furnished to the exposition, and set up in its machinery hall, a number of their boilers as a part of the same plant. The understanding

was that these boilers should also be installed as exhibits, and, on account of the advantages flowing to the members of the association from this feature, the consideration received was regarded as much less than the actual cost of putting in the boilers. In the portion of machinery hall in which these boilers were set up, there remained a further space which, it was understood, might be occupied by other boilers, if the same were found necessary to the requirements of the exposition. The complainants claim that they had an understanding and agreement with one Sargent, representing the chief of construction and the local corporation, under which they were to have the exclusive privilege of putting in these additional boilers, if needed, and making them an exhibit in the same manner that the boilers already contracted for were to be exhibits; that in reliance on this understanding, they proceeded to make their boilers according to certain plans and specifications, and were ready and willing to place them in the space allotted; but that the exposition company refused to abide by this understanding, and is about to allow another company, known as the "Sterling Boiler Company," to supply this additional plant. The complainants aver that the exhibit feature of this alleged privilege was the chief inducement for their entering into it; and that the damages they would suffer from failure to enjoy it are so indefinite and uncertain in amount, and yet so actual and decided, that a court of law could not give them full relief; and therefore pray that this court order the alleged understanding or agreement to be specifically performed, and grant an injunction restraining the company from putting in the boilers of any other company.

The granting of the relief prayed for is entirely within the discretion of the court, but, before that jurisdiction can be exercised, the judgment of the court must be satisfied—First, that an understanding actually existed, and was mutually regarded by both parties as a subsisting and binding obligation between them; second, that Sargent had authority to enter into such an agreement; third, that the reasons assigned for the interposition of a court of equity by injunction or specific performance are applicable to the situation brought to the attention of the court. I am of the opinion that the complainants have failed to establish either of these propositions. There were unquestionably conversations out of which an impression such as the complainants insist upon would naturally arise, but I fail to find any clear, definite, or satisfactory evidence that the parties understood they were entering into a mutual obligation such as is claimed. Sargent expressly testifies that he told the representative of the complainants that the promise of the privilege held out by him would first have to be submitted to and approved by the council of administration. He and the complainants probably thought there would be no difficulty in receiving such approval, but the negotiation certainly could not have been regarded by them as final while in this state of possible uncertainty. As a matter of fact, the proposed privilege was never submitted to the council, and complainants were never advised that it had received the approval of that body. It is equally clear that Sargent had no power to grant

a privilege of that character. It fell partly, at least, within the powers of the commission, and there is nothing in this case showing that he in any respect represented the commission. When he announced to the complainants that the matter of the privilege must first go to the council of administration, he, in effect, expressly advised them of the limitation upon his authority.

But even if the agreement was made as claimed, and Sargent had authority to enter into it, from the Illinois corporation, it would, in my mind, be a case in which the relief prayed for could not be granted. Nothing is clearer than that the installation of the exhibits is exclusively within the control of the commission. In respect of these, the local corporation and its agents have no authority. It is true that these boilers were to be placed for the double purpose of affording steam power and an exhibit. In the first aspect, they might fall within the powers of the local corporation, but, in the second, they would clearly fall within the exclusive control of the commission. Now, the injury complained of, and upon which the jurisdiction of a court of equity is predicated, is not that the complainants will suffer any less on account of these boilers being excluded from the steam plant, but that they will suffer loss by the exclusion of them as exhibits. They admit that, but for the exhibit feature of this alleged privilege, the contract would be of no value to them. The boilers could be sold to the trade for a greater sum than the alleged contract price. Their complaint, therefore, is essentially and exclusively a complaint against being allowed to install an exhibit. The testimony nowhere shows that the commission, or either of its authorized agents, have ever allotted to them this space, or agreed that they might install this exhibit. Indeed, it is doubtful if the court could, under any circumstances, interfere with the discretion of the director general. For these reasons, the injunction is refused, and the bill dismissed.

PUTNAM v. RUCH et al.

(Circuit Court, E. D. Louisiana. February 21, 1893.)

No. 12,169.

1. CONSTITUTIONAL LAW—CORPORATIONS—ANNULMENT OF CHARTER.

Article 258 of the Louisiana constitution of 1879, which in terms abolishes the "monopoly features" of existing corporations other than railroad companies, operated at once and of its own force, and, if sufficient, as applied to any particular corporation, to entirely annul its charter, that result was accomplished immediately without the doing of any act such as is necessary in case of a forfeiture for an act or omission by the corporation, and a stockholder could thereafter bring in his own name a suit to enjoin a wasting of the corporate property, and to wind up the affairs of the corporation and recover his share of the corporate assets.

2. SAME.

Articles 248 and 258 of the Louisiana constitution, providing for regulating the slaughter of cattle, and abolishing all monopoly features in the charter of any corporation existing in the state, did not entirely avoid and annul the charter of the Crescent City Live-Stock Landing & Slaughter-

house Company, whose charter gives it the exclusive right to slaughter cattle in New Orleans, but merely abolishes the monopoly feature thereof.

B. CORPORATIONS—RIGHTS OF STOCKHOLDERS—BILL TO ENJOIN WASTE.

A stockholder cannot maintain a bill to enjoin the wasting of corporate property unless the corporation itself refuses to bring the action, in which case it must be made a party defendant.

4. SAME.

A stockholder who brings a bill to enjoin waste of corporate property on the theory that the corporation has ceased to exist cannot make the corporation a party defendant, and if the corporation had been abolished this action would lie.

In Equity. Bill by Forest L. Putnam against Louis Ruch and others to have a receiver appointed, and for other relief touching property of the Crescent City Live-Stock Landing & Slaughterhouse Company, which plaintiff claimed had become extinct by constitutional provision. Heard on application for the appointment of a receiver and for an injunction pendente lite. Denied.

J. R. Beckwith, for complainant.

Rouse & Grant and Drolla & Augustin, for defendants.

BILLINGS, District Judge. This case has been heard upon an application for the appointment of a receiver, and for an injunction pendente lite on bill of complaint, exhibits, and numerous affidavits. The defendants are officers and stockholders of a corporation known as the Crescent City Live-Stock Landing & Slaughterhouse Company. The corporation has not been made a party to the suit. The questions presented in this case are almost purely legal. They are two: First, if articles 248 and 258 of the constitution of 1879 avoided and annulled the charter of the corporation, will this bill lie? and, second, did these articles annul the charter?

As to the first question: The bill of complaint is founded upon the now familiar doctrine that a charter of a corporation created by the legislature, which is embraced within the subject-matter of the public health or public morals, lacks an element of a contract, in that it is with reference to a thing over which legislatures lack power or authority to bind their successors, and is only continued at the will of the state, and may be abrogated at any time by either the legislature or the constitution, (*Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659,) although, where the charter is in terms recognized by the state constitution, it is beyond legislative repeal or recall, (*New Orleans v. Houston*, 119 U. S. 265, 7 Sup. Ct. Rep. 198.) The next proposition of the solicitor for the complainant cannot be controverted, and is that this recall may be express or by necessary implication. Upon this conceded law he stands, and next affirms that in case there has been a recall or repeal of the charter of the slaughterhouse company by the constitution of 1879, his bill of complaint will lie. A careful consideration of this question leads me to the conclusion that he is correct. Such an abrogation is not like the liability which a corporation incurs to forfeiture of its charter by reason of some act or omission of the corporation. The constitution is supreme, and, in respect to this matter, enforces and executes itself. Without the intervention of any instrumentality,

or the doing of any act, it immediately destroys and sweeps away the inconsistent charter to the extent of its inconsistencies. But where a liability to a forfeiture of a charter has been incurred by a corporation, the corporation and its charter continue in existence till, at the instance of the state, either by a decree of a competent court or a legislative act, the forfeiture has been made operative to the extinction of the corporation. If the corporation had become extinct, it seems to me this suit, which is that of a stockholder to recover his share of the corporation assets in the hands of the defendants, would clearly be maintainable.

This brings me to the question, which is seriously debated, whether the article annulled the charter. Act 118 of the acts of 1869 creates the corporation, and invests it with its powers and rights which are to be found in the 1st, 2d, and 3d sections, and are as follows:

"Section 1. Be it enacted by the senate and house of representatives of the state of Louisiana in general assembly convened, that from and after the first day of June, A. D. (1869,) eighteen hundred and sixty-nine, it shall not be lawful to land, keep, or slaughter any cattle, bees, calves, sheep, swine, or other animals, or to have, keep, or establish any stock landing, yards, pens, slaughterhouses, or abattoirs at any point or place within the city of New Orleans or the parishes of Orleans, Jefferson, and St. Bernard, or at any point or place on the east bank of the Mississippi river, above the present depot of the New Orleans, Opelousas and Great Western Railroad Company, except that the 'Crescent City Stock-Landing and Slaughterhouse Company' may establish themselves at any point or place, as hereinafter provided. Any person or persons or corporation or company carrying on any business or doing any act in contravention of this act, or landing, slaughtering, or keeping any animal or animals in violation of this act, shall be liable to a fine of two hundred and fifty dollars (\$250) for each and every violation, the same to be recoverable, with costs of suit, before any court of competent jurisdiction. Sec. 2. Be it further enacted," etc., "that Wm. D. Sanger, Joseph H. Pearson, J. R. Irwin, John Wharton, Franklin J. Pratt, R. T. Packwood, N. W. Travis, Henry V. Barringer, L. P. Sanger, W. S. Mudgett, Oliver D. Russell, J. Viosca, S. P. Griffin, L. H. Crippen, Wm. McKenna, A. J. Oliver, F. G. Clark, and their successors, be and are hereby created a body politic and corporate to be known and designated as the Crescent City Live-Stock Landing and Slaughterhouse Company, and by that name and style shall sue and be sued, purchase, hold, sell, contract, lease and release, grant and transfer, and may do all things necessary for the purposes hereinafter mentioned, and perform all other acts, and exercise and enjoy all other rights and privileges, incident to corporations, adopt and use a common seal, make, publish, and alter at pleasure by-laws, rules, and regulations for the government of the company or corporation and the carrying on of its business, shall determine and appoint their officers, and fix their compensation and term of office, and shall fix the amount of the capital stock of the said company or corporation and the number of shares thereof. The domicile of the company or corporation shall be in the city of New Orleans, and the president shall be the proper officer on whom to serve citations, notices, and other legal process wherein this company or corporation may be interested. Sec. 3. Be it further enacted," etc., "that said company or corporation is hereby authorized to establish and erect at its own expense, at any point or place on the east bank of the Mississippi river within the parish of St. Bernard, or in the corporate limits of the city of New Orleans, below the United States barracks, or at any point or place on the west bank of the Mississippi river below the present depot of the New Orleans, Opelousas and Great Western Railroad Company, wharves, stables, sheds, yards, and buildings necessary to land, stable, shelter, protect, and preserve all kinds of horses, mules, cattle, and other animals, from and after the time such buildings, yards,

etc., are ready and complete for business, and notice thereof is given in the official journal of the state; and the said Crescent City Live-Stock Landing and Slaughterhouse Company shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughterhouse business within the limits and privileges granted by the provisions of this act, and cattle and other animals destined for sale or slaughter in the city of New Orleans or its environs shall be landed at the live-stock landing in the yards of said company, and shall be yarded, sheltered, and protected, if necessary, by said company or corporation; and said company or corporation shall be entitled to have and receive for each steamship landing at the wharves of the said company or corporation ten (10) dollars; for each steamboat or other water craft, five (5) dollars; and for each horse, mule, bull, ox, or cow landed at their wharves, for each and every day kept, ten (10) cents; for each and every hog, calf, sheep, or goat, for each and every day kept, five (5) cents, all without including the feed; and said company or corporation shall be entitled to keep and detain each and all of said animals until said charges are fully paid. But if the charges of landing, keeping, and feeding any of the aforesaid animals shall not be paid by the owners thereof after fifteen days of their being landed and placed in the custody of the said company or corporation, then the said company or corporation, in order to reimburse themselves for charges and expenses incurred, shall have power, by resorting to judicial proceedings, to advertise said animals for sale by auction in any two newspapers published in the city of New Orleans for five days, and after the expiration of said five days the said company or corporation may proceed to sell by auction, as advertised, the said animals, and the proceeds of said sale shall be taken by the said company or corporation, and applied to the payment of the charges and expenses aforesaid, and other additional costs, and the balance, if any, remaining from such sale, shall be held to the credit of and paid to the order or receipt of the owner of said animals. Any person or persons, firm or corporation, violating any of the provisions of this act, or interfering with the privileges herein granted, or landing, yarding, or keeping any animals in violation of the provisions of this act, or to the injury of said company or corporation, shall be liable to a fine or penalty of two hundred and fifty (250) dollars, to be recovered, with costs of suit, before any court of competent jurisdiction. The company shall, before the 1st of June, (1869,) eighteen hundred and sixty-nine, build and complete a grand slaughterhouse of sufficient capacity to accommodate all butchers, and in which to slaughter five hundred animals per day; also that a sufficient number of sheds and stables shall be erected before the date aforementioned to accommodate all the stock received at this port, all of which to be accomplished before the date fixed for the removal of the stock landing, as provided in the first section of this act, under penalty of a forfeiture of their charter."

Articles 248 and 258 of the constitution of 1879 are as follows:

"Art. 248. The police juries of the several parishes, and the constituted authorities of all incorporated municipalities of the state, shall alone have the power of regulating the slaughtering of cattle and other live stock within their respective limits: provided, no monopoly or exclusive privilege shall exist in this state, nor such business be restricted to the land or houses of any individual or corporation: provided, the ordinances designating the places for slaughtering shall obtain the concurrence and approval of the board of health or other sanitary organization."

"Art. 258. All rights, actions, prosecutions, claims, and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this constitution and not inconsistent therewith, shall continue as if the said constitution had not been adopted. But the monopoly features in the charter of any corporation now existing in the state, save such as may be contained in the charters of railroad companies, are hereby abolished."

It is seen that No. 118 of the acts of 1869 incorporates the slaughterhouse company, names the incorporators, gives it the right

to slaughter animals, build landings, etc., and, within certain territorial limits, makes this right exclusive. Section 10 limits the existence of the corporation to 25 years. Articles 248 and 258 give to the police juries and municipal authorities the authority to regulate the slaughtering of animals, provided, as to locality, the approval of the respective boards of health has been obtained, and abolishes all monopoly features and restrictions as to localities. The part of the charter which was abrogated was the exclusive right to slaughter, etc., within certain limits. There was also effected by means of the provisions of the new constitution above quoted, a subjection of the slaughterhouse company, along with all other persons and corporations engaged in slaughtering animals, in certain respects, to the parish and health authorities. This left the slaughterhouse company an existing corporation for the period prescribed by its charter, with all its corporate powers, minus its right to exclude any other person, and subject to the necessity, along with all others engaged in the same business, of having the approbation of the parish and health authorities in the location and the manner of conducting its business. There is no averment in the bill that the corporation has not the approval of the local authorities. The case is not a case of total repeal, as is the Case of Hyde Park. When the franchise of a corporation consists of a single faculty or right, and that faculty or right is of such a nature that it can rightfully be withdrawn by a constitutional provision, the adoption of a constitutional provision, irreconcilable with that faculty or right, would necessarily repeal the charter. When the franchise consists of several faculties or rights, some reconcilable and some irreconcilable with the constitutional provision, the repeal by implication calls for the same discrimination as would an express repeal where only specified parts are recalled. Only the irreconcilable faculties or rights are repealed or withdrawn, and the corporation with the faculties consistent with the new provision would survive. In a word, the new constitution still permits the slaughtering of animals, which was the business of the corporation, and only affects that business with conditions and limitations. This leaves the corporation and its business in existence shorn of its exclusiveness, and dependent upon the sanction of the local and health authorities.

There is another aspect of the bill which must be considered. There is a charge contained in it of threatened waste by the defendants. The theory of the bill is that no corporation exists. If the court assented to this view, the waste might be enjoined, and, of course, the corporation need not be made a party, for it would be a corporation no longer in existence; but since, in my view, the existence of the corporation, though in a shorn and restricted state, continues, if such an action could be maintainable, it would be in case the corporation refused to bring it, and the corporation would have to be a party defendant. *Robinson v. Smith*, 3 Paige, 222, 231, 232; *Cunningham v. Pell*, 5 Paige, 606, 612; *Smith v. Hurd*, 12 Metc. (Mass.) 371; *Kendig v. Dean*, 97 U. S. 423, 425. My conclusion, therefore, is that the application for the appointment of a receiver and for the injunction must be refused.

UNITED STATES v. INSLEY et al.

(Circuit Court of Appeals, Eighth Circuit. February 6, 1893.)

No. 125.

1. BAIL BONDS—ENFORCEMENT IN FEDERAL COURTS—STATE LAWS.

While, under Rev. St. § 1014, all proceedings for holding accused persons to bail to answer before a federal court, are assimilated to the proceedings in vogue for similar purposes in the state where the proceedings take place, still, in enforcing a forfeited bond taken in a criminal case, the United States is not restricted to the remedies provided by the laws of the state, but may proceed according to the common law. Hence a forfeited bond may be proceeded on by *scire facias* in Kansas, though by the Kansas law an independent action is necessary.

2. JUDICIAL SALE—DEED—ABATEMENT AND REVIVAL OF ACTIONS.

Where a sale is had and approved, and a deed ordered, and before its execution the judgment debtor dies, it is not necessary to revive proceedings in the name of the heirs or legal representatives before the deed is executed.

Appeal from the Circuit Court of the United States for the District of Kansas.

In Equity. Bill by the United States against the heirs at law and administratrix of Moses McElroy, and the heirs at law of Polly Palmer, to redeem certain land claimed under a mortgage. The circuit court dismissed the bill on the ground of laches, (25 Fed. Rep. 804,) but this decree was reversed on appeal to the supreme court. 9 Sup. Ct. Rep. 485. After another hearing in the circuit court the bill was again dismissed, and the United States again appeals. Reversed.

Statement by THAYER, District Judge:

This is a bill filed by the United States for an accounting, and to redeem a piece of property situated in the city of Ft. Scott, state of Kansas, which is now, and for many years last past has been, in the possession of Elizabeth McElroy. The facts on which the right of redemption is predicated are as follows: On the 3d day of August, 1869, Moses McElroy became surety in a bond before a United States commissioner in the penal sum of \$2,000, for the appearance of Joseph H. Roe and C. A. Ruther before the United States district court for the district of Kansas at its next term, to be held in October, 1869, to answer to the charge of willfully violating the internal revenue laws of the United States. The bond in question appears to have been duly returned to, and to have been filed in, the United States district court for the district of Kansas; and on the 12th day of October, 1869, it was declared forfeited by said court, for the failure of the principals therein to appear. A *scire facias* was thereupon issued by said court, and was made returnable October 30, 1869. The writ of *scire facias* was duly served on McElroy on October 14, 1869, and on the 6th day of the following November final judgment appears to have been entered on the bond against McElroy, and against another surety, who was also duly served, in the sum of \$2,000 and costs. Under the judgment last aforesaid a pluries execution was issued on the 27th day of April, 1871, and at a sale made under said execution the United States became the purchaser on June 6, 1871. The sale thus made was approved by the United States district court for the district of Kansas on the 16th day of October, 1871, and a deed was then ordered to be executed; but such deed was not in fact made until October 30, 1883, after the death of McElroy, the judgment debtor.

The lot in controversy appears to have been acquired by purchase by McElroy on the 5th day of August, 1869, and to have been mortgaged by

McElroy and wife on the day succeeding the purchase to one Polly Palmer, for the sum of \$3,500. On the 30th of May, 1871, Polly Palmer brought an action against McElroy and wife to foreclose said mortgage, in the district court of Bourbon county, Kan., in which proceeding a judgment and decree of foreclosure was duly entered against McElroy and wife on the 4th day of October, 1871. On the 25th of October, 1871, an order of sale was issued in said cause; and, at a sale had thereunder on the 4th day of December following, Polly Palmer became the purchaser of the lot now in dispute, for the sum of \$3,786.06, which sale was approved, and a deed was duly executed to Polly Palmer on the 4th of January, 1872. It is conceded that the title thus vested in Polly Palmer was subsequently transferred to Elizabeth McElroy, one of the defendants in this suit, and that she held such title, and was in possession of the premises in controversy, at the time the United States filed its bill to redeem, on the 24th of November, 1884. The United States was not made a party to the suit brought by Polly Palmer to foreclose the mortgage above referred to.

E. F. Ware, Sp. Atty., for the United States.

J. D. McCleverty, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, (after stating the facts as above.) When this case was before the supreme court of the United States on appeal from a former decree of the circuit court, dismissing the bill, it was held that the appellees could neither invoke the plea of laches nor limitations as a defense to the right of the United States to redeem. U. S. v. Insley, 130 U. S. 263, 9 Sup. Ct. Rep. 485. We are relieved, therefore, of the necessity of considering such defenses, and will confine our attention to the question whether the second decree dismissing the bill can be sustained upon the ground on which the circuit court appears to have rested its decision. The circuit court held, in effect, that a bail bond or recognizance taken in a federal court or before a United States commissioner sitting in Kansas, for the appearance before a United States court of that district of a person charged with an offense against federal laws, can only be enforced in the mode prescribed by the laws of Kansas; that by the statutes of that state (paragraph 5218, Gen. St. 1889) such bonds and recognizances can only be enforced by a civil action brought in some court of competent jurisdiction after the lapse of the term at which the forfeiture is declared; and that the judgment in favor of the United States against McElroy was null and void, and not merely voidable, because it was rendered on scire facias, and before the adjournment of the term at which the forfeiture was declared. As the view thus entertained by the trial court places the federal courts in a condition of practical dependence upon local laws in a matter which is intimately connected with the efficient exercise of their criminal jurisdiction, we think it should not be adopted, unless it is clearly warranted by some federal statute.

It has frequently been held that United States commissioners derive their power to take bail for offenses against the laws of the United States from section 1014 of the Revised Statutes of the United States. That section provides that, "for any crime or offense against the United States, the offender may, by any justice or

judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge, * * * or other magistrate of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, * * * be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense." By reason of the provision contained in that section, that federal judges and commissioners shall proceed "agreeably to the usual mode of process against offenders in such state," it has also been held that the purpose was to assimilate all proceedings for holding accused persons to bail, to answer before a court of the United States, to the proceedings in vogue for similar purposes in the state where the proceeding should take place. It has accordingly been ruled that recourse must be had to the laws of the state where an examination is held to determine a commissioner's power to take bail for an appearance before himself, as well as to determine his right to adjourn a hearing, and the length of time such hearing may be adjourned. *U. S. v. Rundlett*, 2 Curt. 41, 48; *U. S. v. Case*, 8 Blatchf. 250; *U. S. v. Martin*, 17 Fed. Rep. 150; *U. S. v. Horton*, 2 Dill. 94. The decisions construing section 1014 have thus far only gone to the extent of holding that state laws control as to all questions of procedure before a United States commissioner up to the time the proceedings are certified to the court having jurisdiction to try the offense. But it has never been decided, so far as we are aware, that, in enforcing a forfeited recognizance or bond taken in a criminal case, the United States is restricted to those remedies which are provided by the laws of the state where the court happens to be held. As certain state magistrates were authorized by section 1014 to commit persons for trial who were accused of offenses against the laws of the United States, it was eminently proper to provide that, in the discharge of such duties, they might proceed in accordance with state laws, with which they were familiar. But no reason exists for limiting the federal courts, when proceeding to enforce a forfeited recognizance or bond which has been taken or duly lodged therein, to those remedies which are prescribed by state statutes. In the trial and disposition of criminal cases the federal courts proceed according to the course of the common law as modified by acts of congress. It has recently been held that the competency of witnesses in criminal trials in the courts of the United States is not governed by the statutes of the state where such trials are had, but is to be determined by the common law. *Logan v. U. S.*, 144 U. S. 263, 303, 12 Sup. Ct. Rep. 617. See, also, *U. S. v. Reid*, 12 How. 361, 363. We think there is equal reason for holding that the courts of the United States may resort to such remedies for enforcing a bond or recognizance which has been duly returned by a federal commissioner or other committing magistrate, as are given by the common law. The federal courts, we believe, have heretofore acted upon the assumption, and with great unanimity, that, in the matter of enforcing a forfeited bond or recognizance, it was proper to issue a *scire facias*, and to enter a final judgment

against the principal and his sureties on the return of such process duly served, if no sufficient cause was shown for setting aside the forfeiture. That is one of the approved common-law methods of enforcing such obligations after a forfeiture is declared, and it has on some occasions been supposed that it was the only appropriate method, although it is now well settled that an original action may also be brought on bonds of that character. *Com. v. Green*, 12 Mass. 1; *Com. v. McNeill*, 19 Pick. 127. We are constrained to hold, therefore, that the judgment against McElroy in the sum of \$2,000, which was rendered by the United States district court for the district of Kansas on the 6th day of November, 1869, was a valid judgment, and that it was not even voidable.

Another position was taken by the defendants in the circuit court, and seems to be relied upon in this court, that the marshal's deed to the lot in controversy, which was executed after the death of McElroy, is void, and conveys no title, for the reason that the action was not revived in the name of his heirs or legal representatives before the deed was executed. With reference to that contention, it is only necessary to say that as the sale of the lot was made and approved, and a deed was ordered to be executed, during the lifetime of McElroy, we do not perceive that the right of the United States to redeem is in any way impaired, even though it be true that the deed is in fact void. The deed is the mere evidence of transactions that had been fully consummated in the lifetime of the judgment debtor. But we are unwilling to concede that the deed is defective for the reasons above stated and urged. The law seems to be quite well settled that a deed made under such circumstances is valid, notwithstanding the failure to revive. *Herm. Ex'ns*, § 213, and citations. The decree of the circuit court is therefore reversed, with directions to enter a decree in favor of the United States, in such form as the parties have heretofore stipulated shall be entered in case the right of the United States to redeem was sustained.

STOCKTON et al. v. RUSSELL et al.

(Circuit Court of Appeals, Fifth Circuit. November 25, 1892.)

No. 74.

INJUNCTION—WHEN GRANTED—EQUITY.

Defendant, who owned and controlled the majority of stock in a railroad company, and was president thereof, sold the same to complainants for \$29,000. The latter paid \$5,000 in cash, and for the balance gave their notes, payable in 90 days. By the contract defendant was to retain possession of the stock, with the right to vote the same, as security for the notes, but was to vote it as requested by complainants. Thereafter complainants were permitted to operate the road, and shortly afterwards one of them was elected president, and the other secretary, and both were made directors. Complainants, however, defaulted on the notes, and, though the time was extended 10 days, they never paid any part thereof. Thereafter the board of directors requested complainants to resign their positions, whereupon the latter took possession of the books and records of the company, discharged the superintendent and all the employees, and

put new employes in possession. The directors then passed a resolution requiring that the old superintendent be restored and have possession of the property, but complainants refused to comply therewith, or to recognize the authority of the board. Thereupon the board removed complainants from their official positions, and ordered them to turn over the property to defendant, as agent of the directors. On exhibiting these resolutions to the employes of the road, the property was turned over to defendant, but complainants again regained possession by means of warrants issued by a justice of the peace, charging the employes with criminal trespass. In the mean time they had expended money on the property, put heavy charges on it for labor and material, and had bought a steam ferry, to run in connection with it and other lines of transportation. To protect their possession, complainants filed the bill herein, and obtained a decree enjoining defendant from paying the employes, or from interfering with complainants' possession and control. *Held*, on appeal from the injunctional decree, that the same should be reversed, and that the bill was entirely without equity, and should be dismissed.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

In Equity. Bill for injunction brought by James A. Russell, David M. Yeomans, and Horace Scott against John N. C. Stockton, S. L. Earle, Thomas P. Denham, Arthur Meigs, and the Jacksonville, Mayport & Pablo Railway & Navigation Company. Decree for complainants. Defendants appeal. Reversed.

C. M. & J. C. Cooper, for appellants.

H. Bisbee, (H. H. Buckman, on the brief,) for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. On February 10, 1892, John N. C. Stockton, as administrator of the estate of Alexander Wallace, deceased, one of the appellants, held and owned 571 shares of the capital stock of the Jacksonville, Mayport & Pablo Railway & Navigation Company, being a majority of the stock of said company, and he was entitled to have issued to him 442 additional shares of such stock, and had a lien on 83 shares of such stock of John B. Togni, for moneys due from said Togni to said estate. On that date, he, as such administrator, joined by Mary Wallace, the widow of said Alexander Wallace, made a contract with the appellees, Yeomans, Russell, and Scott, for the sale to them of said stock. Appellees paid him \$5,000 on account of said contract, the remainder of the consideration being payable in 90 days, according to said contract, and also evidenced by the promissory notes of said appellees of same date as the contract, payable 90 days after date, one note for \$8,000, and one for \$16,000. Neither of these notes, nor any part of said remainder of consideration money of said contract, has ever been paid. At the time said contract was made, the appellants John N. C. Stockton, Thomas P. Denham, S. L. Earle, and Arthur Meigs were directors of said company, and were a majority of the board, and said Stockton was president of said company. Thereafter appellees were permitted to operate the road under said board of directors and president; and on the 6th of April, 1892, at a meeting of said board of

directors, said Russell was elected president of the company, and said Yeomans was elected secretary and treasurer thereof, and they were elected directors by said board of directors, to fill vacancies caused by one William Wallace and said Togni having ceased to be directors; and the board of directors unanimously resolved that the delivery of the bonds of the company to the Mercantile Trust Company of New York, which the stockholders had authorized to be issued, be made with the direction to hold the said bonds until \$31,150.92 be paid to John N. C. Stockton. The amount was made up of the remainder of the consideration of said stock contract, and some other items. Appellees defaulted, and failed to pay the remainder of said consideration, and, though said Stockton gave them an extension of time of 10 days on their notes therefor, they still failed to pay the same or any part thereof. After said default, the appellants, as the directors of said railway company, sought to have the bonds which had been placed in the hands of said trust company returned to said railway company, through the American Exchange National Bank of New York. Said board of directors thereafter, by resolution, requested said Russell and Yeomans to resign the positions, respectively, of president and secretary and treasurer, whereupon said Russell and Yeomans, by their agent, E. M. Yeomans, entered the office of the company in the early morning, and took away and removed the records and officers of the company, discharged the superintendent and all the employees of the company, and put new employees in possession. On March 26, 1892, the Jacksonville, St. Augustine & Halifax River Railway Company sold to the said Jacksonville, Mayport & Pablo Railway & Navigation Company all the capital stock of the Jacksonville Ferry Company and certain steam ferryboats, which property appears to have been paid for by appellees. On June 21, 1892, said Stockton, as administrator, and Mary Wallace, filed in the state court their bill against said Russell, Scott, and Yeomans, making the railway company also a defendant, for injunction against said Russell, Scott, and Yeomans, to have the court appoint a receiver to preserve the property, and for sale of the stock covered by said contract, and a restraining order was granted by said court. This suit was on June 25, 1892, transferred to the United States circuit court for northern district of Florida, on application of said Russell, Scott, and Yeomans. After said suit had been brought, said Russell, Scott, and Yeomans for the first time demanded that said Stockton, administrator, transfer said Wallace stock to them. On June 30, 1892, said board of directors passed a resolution requiring that Superintendent Earle be restored by said President Russell to his position of superintendent, and have possession of the property of the company belonging in the custody or control of the superintendent, to which said Russell replied that he refused to do so, and that he would not recognize the authority of the board, or be governed in any manner by any action it might take. Thereupon, on July 1, 1892, said board removed said Russell as president of said company, and said Yeomans, being absent from Jacksonville, and having absented himself for a considerable time, without the consent of the board of directors, was re-

moved from the office of secretary and treasurer of said company, and they were ordered to turn over the property of the company to said Stockton, as agent of the board of directors. By further resolution, said Earle was declared to be superintendent of said company's railroad, and authorized to take possession of same and its property, and to assume management of same. On exhibiting these resolutions to the employes in charge of rolling stock, they delivered possession of same to said Stockton and Earle, for said board of directors, and they proceeded with the operation of the road. Afterwards, to wit, July —, 1892, said appellees, getting a warrant from a justice of the peace, on a charge of criminal trespass, against the employes of said railway company, arrested the employes in charge of the property of said company and operating its trains, and took possession of said railroad and rolling stock. They then immediately filed their bill herein, got a restraining order, and afterwards the decree and injunctive order appealed from herein, which enjoins the defendants from paying any officer or employe of said road; from interfering in any manner with the complainants (appellees) in the possession and control of said road and all of its property; from voting, or offering to vote, any of the stock of said company; from exercising, or attempting to exercise, any powers as president or as directors of said company; from exercising, or attempting to exercise, any acts of ownership or control over any part of said railroad or its property.

It is clear from this record that appellant Stockton was to hold the stock about which he contracted with appellees as security for the \$24,000 which they were to pay in 90 days from the date of said contract, and that he was to so hold it as to entitle him to vote it, but he was to vote it as they should instruct. It is apparent, also, that he did this until they were in default, putting appellees in control of the road as officers of the company, and that, after the appellees had made default, the appellant undertook, by exercising his power as the holder of the stock, to resume possession and control of the property. Whether his acts and efforts in this respect were regular and strictly lawful becomes wholly immaterial in the view we take of the complainants' (the appellees') bill. To take their view of it, they bought a property for \$29,000, of which they paid only \$5,000, and were to pay the other \$24,000 in 90 days. The property was represented by a certain number of shares of stock in a railroad. The stock was to be transferred to them, but was to be held by their vendor as his security; was to be voted by him as they instructed. They were put in control of the railroad. They expended large sums of money on the property, and put heavy charges on it for labor and material and right of way; bought a steam-ferry property, to run in connection with it and with other lines of transportation; have, in their view, greatly enhanced the value of the property; are amply solvent, and able and willing to pay all they owe the appellant, but do not now pay or tender any part, and never have paid him any part, of the \$24,000. In some way he resumed possession of the road, and its employes and officers were receiving their pay from him, and reporting and delivering the earn-

ings as he directed. In some way the appellees reclaimed possession, and, being fearful that they could not hold it peaceably and fully, they attempt to come into equity, and get the court to aid them with a sweeping injunction, and to take their embarrassments off their hands; operate the property, and extend its operations; sell bonds, and pay part of the proceeds into court, to secure whatever they may owe the plaintiff; and to grant them general relief. To our minds it seems so clear that the bill shows no equity that no argument or authority could make it clearer. The decree appealed from should be reversed, at appellees' cost, with direction to the court below to dismiss the complainants' bill; and it is so ordered.

UNITED STATES v. TURNER.¹

(Circuit Court, S. D. Alabama. December 27, 1892.)

1. PUBLIC LANDS—HOMESTEAD.

A homestead entry operates as an appropriation of the land covered by it, and segregates this tract from the mass of the public domain.

2. SAME—TITLE OF HOMESTEADER.

A homesteader has not the legal title before final proof, but has an immediate equitable interest and the exclusive right of possession until forfeited by failure to carry out the terms of entry.

3. SAME—POWER TO GRANT RIGHT OF WAY.

A homesteader may, even before final proof, grant a right of way to a railroad, provided no damage is done under it to the freehold.

In Equity. On petition of the United States for rule against Noel E. Turner for contempt in violating an injunction against operating a railroad over government lands. Rule dismissed.

M. D. Wickersham, U. S. Dist. Atty.
McIntosh & Rich, for defendant.

TOULMIN, District Judge. The petition shows that on the 24th October, 1891, the complainants filed a bill in this court showing, among other things, that they possessed the title to and dominion over certain lands, which then were a part of the public domain of the United States, and described as the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, section 15, township 3 N., range 4 W., in Washington county, Ala., and that the defendant, with others, had unlawfully cut timber upon said land, and made excavations and built ungainly embankments thereon, in the building and construction upon and over said land a "rail log road," and that complainants in said bill prayed that an injunction might issue to restrain the defendant from any further operation of the said railroad upon or through the said public land of the United States; and also that he might be compelled to remove his said road and material from said land. The petition further shows that on May 18, 1892, a final decree granting the injunction as prayed for was rendered by the court. The petition avers that subsequent to the rendition of said decree

¹Reported by Peter J. Hamilton, Esq., of the Mobile, Ala., bar.

the defendant did take up and remove the rails of the said road from the land, but did not disturb the cross-ties, and further avers that shortly thereafter the defendant caused the said rails to be carried back to said land, and to be replaced in their original position, and has since continuously operated the same. On this petition notice was ordered to issue to the defendant to appear and show cause why he should not be committed for contempt for the act complained of, as a disregard and violation of the injunction.

The defendant now comes and files his answer to said petition, wherein he admits that all the averments of fact as contained in the petition are true, but says that subsequent to the rendition of the decree granting the injunction, and before he caused the said railroad to be relaid and re-established on said land, one James F. Logan duly entered the land as a homestead under the laws of the United States, went into possession thereof under such entry, was residing with his family thereon, and had made valuable improvements on the same; and that said Logan, under a contract made with him, granted him the right of way over the land, and permission to place his railroad thereon. The answer, with the affidavits as exhibits thereto, show that no damage has been done to the land by the placing of the said rails thereon, or the operation of the said railroad over the same.

It appears, then, that at the time the bill of complaint referred to was filed, and at the time the final decree thereon was rendered, the parcel of land in question was a part of the public domain; that subsequently it became the homestead of James F. Logan, and at the time the defendant replaced his railroad on the land it was the homestead of said James F. Logan, and was possessed and occupied by him as such. The homestead entry operated as an appropriation and reservation of the lands embraced in the same, and segregated the tract from the mass of the public domain. *Wilcox v. Jackson*, 13 Pet. 516; *Witherspoon v. Duncan*, 4 Wall. 218; *Railroad Co. v. Johnson*, (Kan.) 16 Pac. Rep. 129. The land, when homesteaded, ceased to be a part of the public domain. Its status had changed between the date of the decree granting the injunction and the time the rails were replaced on the land under the permission given by Logan, the homesteader. The principal point in controversy here is in respect to Logan's right to grant such permission. The petitioner, by its attorney, contends that because Logan holds under a homestead entry, and has not yet acquired the full legal title to the land, he had no authority to grant a right of way to defendant, and to permit him to build and operate his railroad thereon. I cannot agree with this contention. The homesteader has an interest in the land beyond the bare improvements placed thereon. It is true that he has not a legal title, and may never acquire it; but when he makes a bona fide settlement, and a valid entry of the land, he acquires an immediate interest to the entire tract, which gives him the right of possession. *Railroad Co. v. Johnson*, *supra*. The supreme court of Kansas in that case said "that the legislation of congress with respect to the interest acquired by the homestead settler contemplates not only that he owns the improvements, but

that he has an equity in the land itself, which he may transfer for a right of way. It further recognizes that, until this equity is obtained by purchase or otherwise, the right of a railroad company to enter and appropriate any portion of a homestead for a right of way is incomplete." The homestead entry gives the homesteader the exclusive right of possession, not only against individuals, but against the government. The opinion of the supreme court of Kansas, *supra*, which was concurred in by all the justices, fully sustains the opinion I hold on this subject. That court, in its opinion, quotes from an official opinion of Atty. Gen. MacVeagh, given in 1881, wherein he says:

"Upon entry the right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land, subject to the further performance by the settler of certain conditions, (in the event of which he becomes invested with full and complete ownership); and until forfeiture by failure to perform the conditions it must, I think, prevail, not only against individuals, but against the government. That, in contemplation of the homestead law, the settler acquires by his entry an immediate interest in the land, which, for the time being at least, thereby becomes severed from the public domain, appears from the language of section 2297, Rev. St., wherein it is provided that in certain contingencies the land so entered shall revert to the government." 1 Copp, Pub. Land Laws 1882, p. 388.

U. S. v. Ball, 31 Fed. Rep. 667; U. S. v. Freyberg, 32 Fed. Rep. 195.

If the homesteader has the exclusive possession of the land covered by his entry, if his right amounts to an equitable interest, which must prevail, not only against individuals, but against the government, it is clear to me that he has the right to grant any part of his possession and equitable interest to any other persons for their use and enjoyment so long as they do no damage to the freehold or contingent reversionary interest of the government. If the homesteader or the defendant (who occupies and uses a portion of the land under and by permission of the homesteader) should commit any waste, or do or attempt to do any permanent injury to the freehold, the government, holding the legal title, and having a contingent reversionary interest in the land, could enjoin and prohibit the same. This is the only interest and right the government has until the right of the settler is defeated by failure on his part to comply with the requirements of the law in such cases. The case of *U. S. v. Railway Co.*, (which was a case in this court),² is cited by the United States attorney to sustain his contention here. There was no decision by the court in that case touching the question involved in this. On a motion for a preliminary injunction, based on the bill, amendments, and exhibits, the circuit judges gave their individual opinions, in which they said that on the case as thus made an injunction *pendente lite* should issue to restrain the defendants from cutting timber or otherwise trespassing on the lands of the United States, whether homesteaded or not, for the location, building, and construction of their side and spur tracks. The bill

²No opinion filed.

averred that the defendants were cutting down and destroying timber, making excavations, and doing all manner of damage of an irreparable character to the land over which they were building their railroad spur and side tracks, and that in building the same they were going over homesteads against the objection and protest of the settler in some instances, and in others over homesteads the entries of which had been canceled, or were held for cancellation. In the case now before the court the facts shown by the pleadings and affidavits are that no damage is being done the freehold,—no injury of any kind to the property; that the land occupied and used is that of a valid homestead entry; and that it is so occupied and used with the consent of the homestead settler. So it will be observed that the opinion of the circuit judges referred to was based on an entirely different state of facts from that now presented to the court. My conclusion is that the rule should be dismissed, and the defendant discharged, and it is so ordered.

DE CHAMBRUN v. CAMPBELL et al.

(Circuit Court, N. D. New York. February 16, 1893.)

No. 5,924.

JUDGMENT—RES JUDICATA.

Where, in a suit in a federal court against a trustee for a discovery and accounting, it appears that the precise questions were presented and adjudicated in prior litigation in the state courts, between the same parties, as to the same subject-matters, and there is no evidence of fraud in procuring the adjudications, the doctrine of *res judicata* applies, and complainant will be denied relief.

In Equity. Bill by Charles A. de Chambrun against Douglas Campbell and Frances A. Gesner for a discovery and accounting. Upon complainant's death, Pierre de Chambrun, his administrator, was substituted. Bill dismissed.

Everett P. Wheeler and Wyllys Hodges, for complainant.

Louis Marshall, for defendant Campbell.

David Thornton, for defendant Gesner.

COXE, District Judge. This action was originally brought by Charles A. de Chambrun against the defendant Campbell, as trustee, alleging negligence, fraud and breach of trust, by which certain moneys and securities belonging to the complainant were diverted and lost. The judgment demanded is that the rights of the defendant Gesner in the trust be adjudged and determined, that thereafter a final accounting be had between the complainant and Campbell, and that the latter shall be adjudged to pay over to the complainant all moneys and securities found due on such accounting. Charles A. de Chambrun died September 13, 1891, and his son Pierre, as administrator, revived the action. The leading facts, out of which this controversy arises, so far as it is necessary to refer to them for the purposes of the present decision, are as follows:

On the 20th of April, 1876, Charles A. de Chambrun entered

into a contract with the French heirs of Stephen Jumel by which they appointed him their special attorney to take all necessary steps to recover property belonging to them in the city of New York. They bound themselves to pay to him 47½ per cent. of all the gross sums recovered by him, for which amount he was given a lien and mortgage on all the property to which their right should be established. Very soon after the execution of this instrument De Chambrun commenced transferring to lawyers and others, whose assistance he considered necessary in his effort to recover the property, various interests in the said 47½ per cent. to secure them, respectively, for money advanced and services rendered or to be rendered. In some instances these agreements provided for a transfer of a percentage of De Chambrun's interest, in others a definite sum was named. To secure these interests a specific lien or mortgage upon De Chambrun's interest was given. The transfers, about which there seems to be no dispute, aggregated over \$150,000 in specific amounts in addition to about 30 per cent. of De Chambrun's interest. In other words, assuming the 47½ per cent. to amount to \$178,000, he had transferred interests therein amounting to over \$200,000. In addition to these, other agreements, which have been successfully disputed upon the law or the facts, transferred about 112 per cent. of De Chambrun's interest in the property. There is no question that De Chambrun had incumbered his interest for much more than its value. If the liens created and acknowledged by him were all paid there could be no remainder coming to him. Soon after the agreement between the French heirs and De Chambrun proceedings to recover the land were commenced, and after years of arduous litigation, in which the defendant Campbell acted as one of the counsel for the French heirs, a compromise was effected which resulted in these heirs recovering real property of the appraised value of \$152,525.43, which was conveyed in the spring of 1883 to a trustee for their benefit.

Various efforts to adjust the interests of the different claimants to this fund having failed, a suit was commenced in January, 1886, by Stephen M. Chester, as assignee of the claim of one of the lawyers who had been retained by De Chambrun early in the proceedings, to have the amount of his lien and of the other liens determined and paid. All of the parties interested in the said fund, including De Chambrun and Campbell, were made defendants. The complaint set out, in extenso, all the facts relating to the Jumel litigation, the fact that De Chambrun, Campbell and the other parties with whom De Chambrun had contracted, claimed to share in and to have liens upon the said property, and demanded judgment that the plaintiff's lien and all other liens, including those of De Chambrun and Campbell, be fixed and their priority determined. The defendants all filed answers fully stating the nature of their interest in the fund. So far as Campbell and De Chambrun are concerned their respective claims, which were entirely antagonistic, were set out fully and in detail. There can be no pretense that De Chambrun after reading the averments of Campbell's answer, which was served upon him, had any doubt as to the nature of Campbell's position.

He knew that Campbell claimed to recover for his own services, and also as assignee under various contracts which had been transferred to him, and that each of these claims was alleged to be paramount and superior to any interest De Chambrun might have in the fund. In short, De Chambrun knew that Campbell made the same claims and took the same position in that action that he takes in this. On the other hand De Chambrun, who was an attorney and appeared in person, denied that Campbell and most of the other parties to whom he had before given assignments and liens had "any right, share, lien or interest in or upon the said lands and moneys."

The attitude of De Chambrun and Campbell in the Chester suit was one of bitter hostility. Each knew that the other's position if sustained would defeat his own; and though both were defendants their respective contentions were fully as antagonistic as if they had occupied the position of plaintiff and defendant. It was, in short, a struggle for priority among claimants to an inadequate fund. The trial of the issues thus joined was referred to Mr. Hamilton Cole, a prominent and most reputable member of the New York bar. At the trial De Chambrun was represented by counsel who objected to the proof of Campbell's claim and proposed findings which, if adopted, would have entirely excluded Campbell from participation in the fund. The referee declined to find as De Chambrun requested and the latter excepted to his rulings. The referee reported in favor of various lien holders and fixed the order of priority among them, awarding the balance, if any, to De Chambrun. On this report a decree was duly entered. De Chambrun, among others, appealed from this judgment, but it was finally affirmed by the court of appeals. *Chester v. Jumel*, 125 N. Y. 237, 26 N. E. Rep. 297.

Pending the suit of *Chester v. Jumel* an action was commenced by Jean Albert Tauziede, and another, against the same defendants, substantially, as in the Chester suit, praying that the trust property be sold, that the French heirs be paid the 52½ per cent. due to them from the proceeds of such sale and that the remaining 47½ per cent. be paid into court to be disposed of as the court might direct. Campbell and De Chambrun both answered, setting up facts, in substance, the same as in the Chester suit. The trustee having realized the sum of \$336,226 from the sale of the property in his hands, judgment was entered in the Tauziede Case, on the 4th of October, 1888, providing for a division of the fund and fixing the amounts which should be paid to the various claimants. Subsequently they were paid pursuant to the terms of this judgment, which was affirmed by the court of appeals, May 3, 1892. *Tauziede v. Jumel*, 133 N. Y. 614, 30 N. E. Rep. 1000. The first conclusion of law in the Tauziede Case is as follows:

"It is ordered, adjudged and decreed that the judgment entered in this court on the 21st day of May, 1888, as directed by the report of Hamilton Cole, referee, in the action wherein Stephen M. Chester was plaintiff and François Henry Jumel and others were defendants, determines and adjudicates the rights of the parties hereto and is hereby declared to be conclusive upon all parties to this action."

Without dwelling further upon the details of the prior litigations it is thought that it may be stated generally that in the Chester and Tauziède Cases precisely the same questions were presented, or might have been presented, as in the case at bar. When the Chester Case was tried De Chambrun knew all the facts regarding Campbell's claim and his own claim that he knew when this suit was instituted. The parties were the same, the subject-matter was the same, and every argument now urged might have been urged, and many of them, apparently, were urged in those actions. De Chambrun appeared personally and by counsel and endeavored to defeat Campbell's claim. The court decided against him and sustained Campbell. He appealed and the judgment against him was affirmed. It is not pretended that this judgment was the result of any fraud on the part of the referee. Such a pretense was emphatically disclaimed on the argument, and it stands to-day as the executed judgment of the supreme court of New York, unimpeached and unimpeachable. That this judgment and a decree of this court rendered in accordance with the prayer of the bill would be hopelessly repugnant, cannot be denied. In fact, the Chester judgment having decided the same questions between the same parties, having settled the rights of the defendant Campbell and the complainant's intestate, and having ordered the distribution of the fund accordingly, stands an insurmountable barrier directly across the complainant's path.

The principal accusation against Campbell seems to center in the disposition of the so-called Chase claim. Nelson Chase was a tenant upon and a claimant of the Jumel estate, his title being disputed by the heirs of Stephen Jumel. On the 3d day of March, 1876, De Chambrun entered into a contract with E. Delafield Smith whereby he agreed to pay to said Smith an indebtedness due him from said Nelson Chase to the amount of about \$25,000, which was "to be paid to the said Smith out of the proceeds of said Jumel estate so acquired by the said heirs, or any interest therein, after the payment of all proper disbursements, and is hereby made a charge upon the same." Smith died April 12, 1878. On the 17th of May, 1882, Margaret J. Smith, as executrix of E. Delafield Smith, assigned to Campbell all of the claims held by said Smith, including the Chase claim. She was, however, to receive \$25,000 and interest, before any payment under the assignment was to be made to Campbell who assigned to her a lien upon the fund in his favor, created by De Chambrun, for \$25,000. The bill alleges that the true intent and purport of these assignments was that the claim of the estate of E. Delafield Smith should, as between De Chambrun and the said Smith estate, be limited to the sum of \$25,000. That Campbell was to hold the legal title to all the claims which E. Delafield Smith had upon the Jumel fund, including the Chase claim, subject only to his lien for legal services, in trust for De Chambrun, who was to have the balance after paying Mrs. Smith \$25,000 and Campbell his charges as counselor. Complainant's contention is that if the Smith claims had been allowed in full, including the Chase claim, his intestate would have received a large sum, to wit, about \$50,000.

All of the material facts regarding the Smith claim and the Chase claim were known to De Chambrun long before the Chester suit was instituted, yet in his answer he denies "that Douglas Campbell and Margaret J. Smith, individually or as executrix of the last will and testament of E. Delafield Smith, * * * have any right, share, lien or interest in or upon the lands and moneys in the hands of the said" trustee. In their answers in the Chester suit Campbell and Mrs. Smith set out all the facts regarding these claims, and Campbell produced proof thereof at the hearing before the referee. The complainant's brief admits that "Campbell did in point of fact plead and prove the [Chase] claim." The proof was received against the objection of De Chambrun's counsel. Subsequently he presented requests to the referee, among them the following:

"That Margaret J. Smith is not entitled to recover in this action. That the contract of January 5, 1877, between De Chambrun and E. Delafield Smith gives no lien upon the property held by Elliott as trustee. That Douglas Campbell has no interest in or lien for legal services upon the contract and claims assigned to him by Margaret J. Smith on May 17, 1883."

These requests were refused and counsel for De Chambrun excepted.

The instrument of July 21, 1882, in which Campbell declared that he held the Smith assignments for the benefit of De Chambrun, subject only to his interest therein and lien thereon for legal services, was brought to the attention of the referee by another defendant, Mrs. Gesner, who is also a defendant in this suit. This instrument was put in evidence in the Chester suit by Mrs. Gesner, together with an assignment by De Chambrun to her of said instrument and all his right, title and interest therein. The referee found all these facts and in his tenth conclusion of law divided the fund in accordance with this declaration of trust of July 21, 1882. The court in the Chester Case had all the evidence that this court has and all the evidence that could be produced bearing upon the Chase claim. The referee made full findings regarding this claim, but did not allow it. Why he did not allow it is not a pertinent inquiry here. It is enough that with all the facts before him he did not do so. No one till now seems to have questioned his decision. It cannot be attacked collaterally. The only person connected with the Chester suit who took any steps to have the claim allowed was the defendant Campbell. He alleged the claim in his answer and proved it on the trial, and yet he is accused of negligence, conspiracy and fraud in not having had it allowed. De Chambrun, who did everything in his power to defeat the claim, now, through his representative, accuses Campbell of attempting to defraud him because he did not, in some way not pointed out, coerce the referee into finding that the claim was valid. The argument in this regard seems to proceed upon the theory that the referee was a mere puppet in the hands of Campbell and that the cause was decided by the latter and not the former. But all this is the merest conjecture without a particle of evidence to support it, and the theory cannot be reconciled with the well-known character of the referee for honor, independence and ability.

Campbell is repeatedly charged with neglect of duty, because he did not "procure" the allowance of the Chase claim and did in fact "procure its disallowance." By what means he could procure its allowance, other than by the means adopted by him of alleging and proving the claim, is not pointed out. Even if the claim were omitted by mistake it could not avail the complainant in this action, but that it was so omitted is simply incredible. The record shows that some 14 lawyers were engaged before the referee, the various questions raised were hotly contested and debated, an opportunity to propose findings was given to all, the referee had had large experience in such causes and the case went to the special term, the general term and to the court of appeals. To imagine that a mistake involving \$50,000 could pass unnoticed through such an ordeal taxes credulity too far. So, also, the contention that Campbell and Schermerhorn were engaged in a conspiracy to impose upon the referee and cheat the defendant is not sustained by the evidence. The Chase claim was proved as the other claims were proved and the evidence was submitted to the referee. True, the referee decided against the claim as he did against several others, but fraud cannot be predicated of such a result. There is no proof that Campbell imposed upon the referee or induced him to sign a report leaving out the Chase claim, or that he did any fraudulent act to induce the judgment in the Chester suit. Some facts and circumstances are pointed out from which inferences are drawn prejudicial to the fair dealing of Campbell, but this is not enough when it is sought to set aside a judgment on the ground of fraud. Something more than presumption and conjecture is needed.

Without pursuing the discussion further I may say, as a result of my examination of this complicated record, that I fail to find any proof which will warrant a finding that the Chester judgment was procured by the trickery or fraud of the defendant Campbell. This being so the well-known rule applies: That a judgment, not fraudulently procured, rendered by a court of competent jurisdiction in an action involving the same subject-matter between the same parties, or their privies, "is, as a plea, a bar, or, as evidence, conclusive" as to all matters actually determined or which might have been litigated and decided "as incident to or as essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense." The complainant's intestate proceeded in the Chester suit upon the theory that he could subordinate all the other liens to his. He was defeated and now his administrator seeks to recover upon a totally different and antagonistic theory which might have been presented in the Chester suit, but was not. It is too late now. Parties are not permitted so to experiment with the courts. The wise and salutary doctrine of *res judicata* is, it is thought, controlling of the issues in this cause. The bill is dismissed.

LEWIS v. LOPER.

(Circuit Court, S. D. Ohio, W. D. February 3, 1893.)

No. 4,425.

1. PARTNERSHIP—DISSOLUTION AND ACCOUNTING—OPENING OF SETTLEMENTS.

Semiannual settlements of partnership accounts, made prior to dissolution, and entered in part by the complaining partner into the firm books, from original memoranda in his handwriting, will not be opened without proof of fraud or mistake, where each partner had equal opportunity of knowledge.

2. SAME—ACQUIESCENCE IN CHARGES.

After a lapse of 12 years it is too late to challenge charges and entries upon the firm books, which have remained unquestioned for that period.

3. SAME—EVIDENCE—PRESUMPTIONS.

One partner, claiming that the profits in a firm dissolved 14 years previously were not credited to him, was at the time under a financial cloud, and his name did not appear, and the profits were credited to the other partner, who testified that he paid over the share. There had been a settlement of the accounts. *Held*, that the presumption arising from the acquiescence in the settlement and the long delay were sufficient to defeat the claim.

4. SAME—SHARING OF LOSSES.

Losses by a firm in which the interest of the partners are equal must be borne equally, although the moneys advanced to form such partnership were paid by another firm, in which their interests were unequal.

5. SAME—CHARGES FOR INTEREST ON MONEY BORROWED.

On the formation of a partnership one partner agreed to furnish all the capital of the firm, which was stipulated to be a certain sum. This money was so furnished, but afterwards the firm borrowed a large sum in addition, and for many years used it in the business. *Held*, that on a partnership accounting the other member was chargeable with his share of the moneys paid as interest on the amount borrowed.

6. SAME—BENEFITS ACCRUING TO ONE PARTNER.

On a copartnership accounting one partner is entitled to credit himself with a firm debt transferred to him by his father, and charged against him as an advancement.

7. SAME—RIGHT OF LIQUIDATING PARTNER TO BORROW MONEY.

Where a partnership is formed in Pennsylvania, the place of residence of the partners, and liquidation and dissolution are there conducted, the liquidating partner is entitled to credit for interest on money borrowed for liquidating purposes; the law of such state authorizing the borrowing of money for such purpose.

In Equity. Bill by Harold R. Lewis against George J. Weaver Loper for a copartnership accounting. Decree for plaintiff.

Ramsey, Maxwell & Ramsey, for complainant.

Adolph L. Brown and Healy & Brannon, for defendant.

SAGE, District Judge. It is averred in the bill that on the 1st of March, 1888, the complainant and defendant were, and since December 23, 1878, had been, engaged as partners under the firm name of Harold R. Lewis & Co. in the oil business, under a partnership agreement whereby each was to share equally in the profits

and to be liable for one half of the losses of said business. On March 1, 1888, they were also, and since November 25, 1887, had been, engaged as partners under the firm name of Lewis & Loper, in the manufacture of binder twine, rope, and other products connected with the general cordage business, under a partnership agreement whereby the complainant was entitled to five-eighths interest in the profits and liable for five eighths of the debts and losses, and the defendant to three-eighths interest in the profits and liable for three eighths of the debts and losses of said business. On March 1, 1888, the parties dissolved both of said partnerships, and agreed that the complainant should act as liquidating partner in the settlement of the business, and that the defendant should render him assistance as far as possible. All the assets of the partnership, excepting a small tract of land in Minnesota, of not much value, and not salable, belonging to the firm of Harold R. Lewis & Co., have been collected and sold, and all the debts have been paid or satisfied, except a claim hereinafter more particularly described, held by Samuel G. Lewis against each of said firms for money advanced by him to them. The bill sets forth that the defendant is indebted to the complainant in the sum of \$46,364.77, with interest, and prays for an account, and for a decree for the balance due him.

The defendant answers that the partnership of Harold R. Lewis & Co. began about the middle of the year 1881,—at what exact date he is unable to state,—and avers that about December 23, 1878, he entered into partnership with the complainant in the oil business under the firm name of Harold R. Lewis, but that said firm was dissolved about the middle of the year 1880, and a new firm formed, composed of the complainant and the defendant and one S. F. Lewis, under the firm name of H. R. & S. F. Lewis, which firm was dissolved about the middle of the year 1881, and the firm of Harold R. Lewis & Co. formed, as above stated.

Defendant further answers that he has never seen a statement of the account upon which complainant claims that he is indebted to him in the sum of \$46,364.77, but he is informed and believes that in arriving at said sum the complainant has charged the defendant with losses alleged to have been incurred by said firm formed about December 23, 1878, as above stated, and by said firm of H. R. & S. F. Lewis, formed about the middle of the year 1880, as above stated.

Defendant further answers that the contract of partnership between the complainant and defendant formed about December 23, 1878, and the contract of partnership between complainant and defendant and said S. F. Lewis, formed about the middle of the year 1880, were not in writing, and that more than six years have elapsed since the dissolution of both said firms, and that, therefore, any liability of complainant to defendant arising out of either of said partnerships is barred by the statute of limitations.

Further answering, the defendant says that by the contract of partnership aforesaid entered into December 23, 1878, and by the contract of partnership aforesaid entered into about the middle of 1880, between the complainant and defendant and said S. F.

Lewis, the complainant agreed to furnish all the necessary capital for the business of said firms, and that he failed to do so, by reason whereof said firms were obliged to borrow large sums of money, and to pay interest thereon, which interest defendant has good reason to believe, and does believe, has been included in the account upon which complainant claims said sum of \$46,364.77 from defendant, all of which interest ought to be charged against the complainant.

The defendant further avers that a like contract to furnish all necessary capital was made by complainant in the contract of partnership formed about the middle of 1881, but that complainant failed to furnish the same, by reason whereof said firm was obliged to borrow large sums of money, and to pay interest thereon, which interest, also, defendant is informed and believes has been included in the account upon which complainant claims \$46,364.77 from the defendant, whereas said interest ought to be charged against the complainant alone.

The defendant admits that on March 1, 1888, the complainant and defendant were, and since November 25, 1887, had been, partners under the firm name of Lewis & Loper, as stated in the bill, but avers that there were no losses of said firm during the time of its continuance, and that prior to the formation of said firm the complainant had, since July 2, 1885, been carrying on the same business for which said partnership was formed, and that on November 25, 1887, he owed a large amount of money, and interest thereon, borrowed by him in the conduct of said business since July 2, 1885, and that the contract of partnership between him and the defendant of November 25, 1887, contained a provision that the defendant should be entitled to three-eighths interest in the profits, after charging the business with all debts and losses incurred, and with interest on loans made for the purpose of establishing and carrying it on from its commencement, to wit, July 2, 1885, until the termination of the agreement, and should be liable for three eighths of the debts and losses, and the complainant should be entitled to the remaining five-eighths interest therein.

The defendant further avers that he is charged in the complainant's statement of account with three eighths of the debts and losses of said business incurred prior to November 25, 1887, whereas he was by said contract chargeable only with three eighths of the losses after November 25, 1887.

Further answering, the defendant says that the greater part of the debt incurred by complainant in the conduct of the business prior to November 25, 1887, was owing to Samuel G. Lewis, his father, and that before defendant entered said partnership the complainant, to induce him to make said contract, willfully and knowingly represented falsely to him that said Lewis had promised and agreed not to press the collection of the money due him, but to wait five years for the same, and that the defendant could safely make said contract with the expectation that the business of the firm would continue for five years; and that, relying upon said representations, he entered into said contract, which

was made by complainant for the purpose of endeavoring to unload upon him a part of the losses and debts previously incurred in said business.

He further avers that, although the partnership was formed November 25, 1887, to continue five years, said Samuel G. Lewis, in the month of February, 1888, demanded payment of the money due him as aforesaid, with interest, and insisted that the firm should be dissolved, and go into liquidation. Complainant thereupon notified defendant that the firm must be dissolved, to which the defendant objected, whereupon complainant informed him that said Samuel G. Lewis threatened to bring suit for his claim, and to apply for a receiver of the property of the partnership; and, the complainant still insisting upon a dissolution, defendant was by reason of the premises compelled to consent thereto, wherefore he claims that, even if by the terms of said contract he became liable for any part of the debts and losses incurred by complainant in the business prior to November 25, 1887, he is nevertheless not bound to pay any part thereof, because of said false representations of complainant, and the consequent dissolution of the partnership as above set forth.

Upon the complainant's motion, and by consent of the parties, a reference was made to a special master to state the account between the parties as shown by the books, and to take and report to the court the evidence in writing upon the issues, and also such evidence as either party might desire bearing upon the account. It is conceded that the master's report, which has been filed, states truly the account as it appears upon the books. The cause is now upon hearing upon the report and the evidence taken before the master. It appears from the books and the evidence that semi-annual settlements of the affairs of the firm of Harold R. Lewis & Co. and of the firm of Lewis & Loper were regularly made; the last prior to the dissolution having been made by defendant in June, 1887, during the absence of the complainant in Europe. The original memoranda for this settlement are produced in the defendant's handwriting. They were duly entered in the books, partly by the defendant and partly by the complainant after his return from Europe. So far as entered by the complainant, they were copied from the original pencil memoranda, in defendant's handwriting, which were produced in court. Under these circumstances, the rule relating to accounts stated applies, that they cannot be opened up without proof of fraud or mistake, and no evidence of either has been offered. The defendant had equal opportunities of knowledge, if there was any mistake; and, under the facts above stated, is not entitled to relief. *Belt v. Mehen*, 2 Cal. 159. There are two items, however, which do not fall within the rule above stated:

First. The Cincinnati mill was the property of Harold R. Lewis & Co., in which complainant and defendant were equal partners. William J. Munster, an examining accountant, called and examined as a witness on behalf of the defendant, testifies that subsequent to October 25, 1887, and as shown by the account on the books, the loss on the business of the Cincinnati mill was \$39,088.48. The complainant charged one half that loss to himself and

one half to defendant. The defendant insists that he should be charged with only three eighths of that loss, because the money and property covering it were advanced to Harold R. Lewis & Co. by Lewis & Loper, in which firm Loper had only a three-eighths interest. But it is admitted that the loss was made by the firm of Harold R. Lewis & Co., and it must therefore be treated as the loss of that firm, and borne by the partners equally, because their interests in the firm were equal.

Second. After the dissolution the complainant was obliged to borrow money for liquidating purposes, and to pay interest thereon, and it is contended for the defendant that no credit should be allowed to the complainant for that interest. But when each partnership was formed the complainant and defendant were residents of the state of Pennsylvania, and the contract of partnership was there made, and the liquidation after dissolution was there conducted, and it is the settled law of Pennsylvania that a liquidating partner in that state has the power to borrow money when necessary for the purpose of liquidation. *Lloyd v. Thomas*, 79 Pa. St. 68; *Fulton v. Bank*, 92 Pa. St. 112; *Siegfried v. Ludwig*, 102 Pa. St. 547.

Referring briefly to other objections to the accounts as shown in the books, which might be passed because adjusted in the semi-annual settlements, it is claimed that the defendant is entitled to a credit for the sum of \$343.73, which was not entered in his favor upon the books of Harold R. Lewis & Co. That firm carried on business from December, 1878, to February, 1879. Its books were balanced, and its profits declared. It is in evidence that the defendant was then financially under a cloud, and therefore his name did not appear. Now, after 14 years, it is claimed that he was not credited with all his profits. To have credited him with profits would have shown that he was a partner, and for that reason the entire profits were credited to the complainant, who testifies that he paid over to the defendant his share. Independent of the presumption against this claim arising from the defendant's acquiescence in the settlement of the accounts and his long delay, the evidence adduced is not sufficient to establish it.

At one time it was necessary to make large advances to C. Lucien Jones, to enable him, as a factor, to buy resin to fill heavy contracts of H. R. & S. F. Lewis for a certain quality of resin which could only be obtained by purchasing lots which included other and less desirable grades, the resin of the grades not wanted being held by C. Lucien Jones, and subsequently sold for account of H. R. & S. F. Lewis. While they were so held, (and this was in 1879, more than 13 years ago,) the account of C. Lucien Jones necessarily stood debited with heavy balances. When the books were closed on the 31st of December, 1879, for the preceding six months, \$3,500 was transferred from merchandise account to resin account. The entry shows that resin to the amount of \$3,500 had therefore been charged to merchandise account, and in separating those accounts the entry above was duly made and posted. It remained unquestioned for 12 years, and it is now too late to challenge it.

From an early period money was borrowed by the firms from Samuel G. Lewis, and the amount credited to him, from time to time, on the firms' books. Interest was paid as it became due, and charged to expense account. The last payment of interest prior to the dissolution was made by the defendant, and the entry of its payment is in his own handwriting on the partnership books. The profit and loss statement for the last settlement prior to the dissolution, which includes interest paid to Samuel G. Lewis as an expense of the firm, is in the handwriting of the defendant. Harold R. Lewis, Frank Lewis, and Samuel G. Lewis himself testify to repeated acknowledgments by defendant of his obligation to Samuel G. Lewis for making the rate of interest only 5 per cent., and none of these conversations are contradicted by the defendant. The claim now made that this interest should have been charged to the complainant alone, upon the ground that the partnership agreement required him to advance the capital, is inadmissible. It is true that the complainant was to furnish the capital, but the testimony is clear that the amount to be furnished for the first firm was \$3,000, and that in March, 1879, when Frank Lewis was taken in, it was agreed that the capital should be increased to \$10,000, of which Frank Lewis should furnish \$5,000, and the complainant \$2,000 in addition to the \$3,000 which he had already contributed. That capital was paid in according to the agreement, and the money subsequently borrowed from Samuel G. Lewis was entered upon the books as a loan from him, and interest thereon charged regularly for 13 years as an expense of the firm. Moreover, it is set forth in the answer that when the partnership contract of November 25, 1887, was made, defendant knew of the indebtedness to Samuel G. Lewis, and that he was induced to enter into that contract by the false representation made to him by the complainant that Samuel G. Lewis had agreed to extend the loan five years. The agreement of the complainant to furnish the capital was limited in terms to the amount above stated, and did not apply to larger sums required in the transaction of the business of the partnership. Had the agreement been to furnish the capital of the firm, even without stating a limit, it would not have bound the party making it to advance as capital any sum that might be required upon an emergency, or to enable the partnership to embark upon a venture, not in contemplation when the contract was made. The \$10,000 contributed by the complainant and Frank Lewis was first credited to their joint accounts. When Frank Lewis retired, that account was closed, and one half of the \$10,000 credited to his account, the other half to complainant's account. Frank Lewis was charged with his share of the losses, and the balance was paid to him upon his withdrawal. Complainant was charged with his share of the losses, his balance struck, and his account continued regularly on to the end of the partnership.

The defendant admits, and the written contracts of partnership confirm the admission, that the indebtedness of H. R. & S. F. Lewis to Samuel G. Lewis was assumed by Harold R. Lewis & Co. when Frank Lewis withdrew from the firm. The written contracts

so stipulate, and leave no ground upon which to sustain the plea of the statute of limitations. From time to time, beginning 12 years ago, transfers were made from complainant's account to Samuel G. Lewis' account, in order to equalize the accounts of complainant and of defendant. The complainant testifies that these transfers were arranged and agreed upon between him and the defendant. The entries have stood on the books, and the amounts were included in the balance upon which the defendant himself calculated and paid interest to Samuel G. Lewis during complainant's absence in Europe. The entries state on their face the purpose for which they were made, and they cannot now be disturbed or set aside. The claim set up in the answer that the defendant was induced by false and fraudulent representations to enter into the partnership agreement of Lewis & Loper in November, 1887, is not only unsupported by testimony, but it is disproved by the express admissions of the defendant himself. As to the dissolution, the cause, as it appears in the testimony, was that during the first two or three months of the firm's existence it incurred losses so heavy that to meet the extraordinary advances required threatened financial disaster to Samuel G. Lewis himself, and he was unwilling and refused to make them. Under these circumstances, the alternative for the firm was dissolution or insolvency, and the written agreement of dissolution by mutual consent is appended to the partnership agreement of each firm, and signed by the complainant and the defendant. There is nothing, therefore, in that defense.

The only remaining question relates to the rights of the complainant, under a transfer to him by his father, Samuel G. Lewis, of the claim which he held against the firm, and this will now be considered. The trial balance October 3, 1890, from the books of Lewis & Loper, as appears by Exhibit E in the record, shows that the indebtedness of that firm to Samuel G. Lewis on loan account was \$15,803.56; and the trial balance of the same date from the books of Harold R. Lewis & Co. shows that the indebtedness of that firm to Samuel G. Lewis on loan account was \$56,109.98. The complainant testified that these amounts were transferred to him by his father, and charged on his books as an advancement. The precise date of that transfer does not appear, but the complainant, in his deposition taken on the 17th of October, 1892, testified that it was a "year or so ago." He further testified that he paid nothing for it. The special master finds that the amount of the loan account to Samuel G. Lewis, including interest to October 3, 1890, on the books of Lewis & Loper, is \$19,650.90, and upon the books of Harold R. Lewis & Co., with interest to the same date, \$62,726.73. He also finds that the balance against the complainant on the books of Lewis & Loper was \$4,873.05, and against the defendant \$14,777.85, aggregating precisely the amount of the indebtedness of the firm to Samuel G. Lewis on loan account. He further finds that the balance on the books of Harold R. Lewis & Co. against the complainant was, on the 3d of October, 1890, \$31,139.81, and against the defendant \$31,586.92, aggregating \$62,726.73, the

exact amount of the loan account of that firm in favor of Samuel G. Lewis.

The contention of counsel for the defendant is that the assignment to the complainant by Samuel G. Lewis of his claim above stated gave the complainant no right against the defendant for contribution at this time, for the reason that there must be an actual payment of a firm debt by one partner after dissolution before he can have contribution from the other.

The contention is, further, that the assignment of his claim by Samuel G. Lewis to the complainant inures to the benefit of the firms, and that every advantage or benefit obtained by complainant from that assignment must be shared with the defendant. The general rule applicable alike to partners, trustees, agents, and to all persons standing in a fiduciary relation, prohibits them from obtaining any private advantage at the expense of those whom they represent or for whom they act. In all transactions affecting a partnership every partner is bound to share with his copartners any benefit which he may have been able to obtain from others, and in which the firm is in honor and conscience entitled to participate. *Lindl. Partn.* p. *307, and cases cited. The same obligation exists before the partnership is actually formed between persons who have agreed to become partners, and it continues until complete liquidation. But the question here is whether the transaction between the complainant and his own father, whereby the father's claims against the two firms were given to the complainant as an advancement, falls within the rule. Was that a transaction in which the firms were in honor and conscience entitled to participate? If these claims had come to the complainant by inheritance before the dissolution, or pending the liquidation of the affairs of the partnerships after dissolution, it would hardly be contended that the inheritance inured to the benefit of the partnerships, or, in other words, that the claims were extinguished, for that would be the result. But an advancement is only giving a portion of the inheritance in anticipation, and involves no different principle. Counsel for the defendant urge that in this case it was not a gift because by the terms of the assignment the complainant was to be charged with it, so that charging it to him against his share of his father's estate was merely a substitution of his individual obligation, payable, without interest, at his father's death, for those of the firms; or, in other words, a postponement of the time of the payment of the debt, and a waiver of interest in the mean time. It is not a gift, they say, because, if it were, it could not, at the death of Samuel G. Lewis, be charged against the complainant as an advancement. The difficulty with this proposition is that it ignores the definition of an advancement, which is a gift by anticipation from a parent to a child of the whole or a part of what it is supposed such child will inherit on the death of the parent. 1 *Bouv.* p. 126. It does not, in any event, impose the slightest obligation upon the recipient. As a gift it is irrevocable. Upon the death of the parent, if he leave no estate for distribution, the gift by way of advancement is in no wise affected. If

there be an estate for distribution, the amount of the advancement is added to the amount of the estate to be distributed, and each heir receives his share of the total. In this way the child having received the advancement is charged with it. But, after all, he shares equally with his coheirs in the entire estate. So far, however, from the advancement costing him anything, he is even in that event the gainer, by having had the use of the amount without interest. It is stated by Lindley, on star page 325 of his treatise on Partnership, that if an advantage which has been obtained by a partner is wholly unconnected with the partnership affairs, or, being connected with them, has been conferred upon him with a view to his own personal benefit, he cannot be called upon to account for it to the partnership. The case of *Campbell v. Mullett*, 2 Swanst. 551, is in point. There a ship belonging to a Frenchman and two Americans as partners was captured by a British cruiser, and compensation was made to the Americans only, the Frenchman being expressly excluded, because he was an alien enemy to England, and it was held that the sum awarded to the Americans belonged to them alone, and that the Frenchman had no interest in it. Counsel for the defendant undertake to distinguish that case from the present by saying that the court drew a distinction between the case of property of a partnership seized and confiscated, and afterwards returned in whole or in part, (in which case it was conceded that the property would continue to belong to the firm,) and the case where property having been seized and condemned and sold or disposed of, certain amounts were afterwards allowed under a treaty for the interests of certain members of the partnership, excluding the other member; and call attention to the fact that the court said that by the seizure and confiscation of the property all interest of the firm had ceased, and no such firm property existed any longer, either for the benefit of the partners or the creditors of the firm. All this is correctly stated. But the property of the firm had been taken, and the claim for it survived, and the court was dealing with that claim, which took the place of the property; and the court held that the sums awarded by the commissioners were not a matter of right, but simply a bounty from England to American citizens, and that the commissioners had the power, final and absolute, to grant or refuse relief to any individual, and in any circumstances, as they might see fit. So it is here. In the intimate relation of a father to his son, bound one to the other by the closest tie of consanguinity, Samuel G. Lewis transferred his claim against the firm to the complainant, not merely as a gift, but also in part anticipation of his inheritance; and I am unable to see that the complainant was under the slightest obligation in honor or conscience to share this bounty with the defendant for the mere reason that he was his partner, and that the claims assigned were claims against the firms of which they were both members.

In *Burnand v. Rodocanachi*, L. R. 7 App. Cas. 333, the respondents were insured by valued policies on a cargo which was destroyed by the Alabama, a Confederate cruiser, and the underwriters paid to the

respondents, as on actual total loss, the valued amounts, which were less than the real value. The United States, out of a compensation fund created after the loss, and distributed under an act of congress passed subsequently to the loss, paid to the respondents the difference between their real total loss and the sum received from the underwriters. Under the act no claim was allowed for any loss for which compensation had been made by an insurer, but, if such compensation was not equal to the loss actually suffered, allowance might be made for the difference. The complainant sued on behalf of himself and all others the underwriters upon the policies issued to the respondents. The claim was that the insurers, having paid the total loss as agreed between them and the respondents, were subrogated to all their rights. The court below sustained the claim, but the decision was reversed on appeal. Lord Chancellor Selborne pointed out that the fallacy of the reasoning of the learned judges below was that they took the valuation of the policies as conclusive, and as operating by way of estoppel beyond the purposes of the contract of insurance; whereas, for purposes collateral to that contract, the insured could show that their loss was in fact greater than that which was covered by the policies. He then proceeded to express the opinion that the act of congress was an act of pure gift from the American government, which, having absolute power of disposition over the fund to which it applied, declared that it should be given, not in respect to the loss which had been indemnified as between the assurers and the assured, but in respect of the loss which the assured had suffered beyond that amount, and said that he was entirely unable, for any practical purpose, to distinguish the case from the case of a voluntary gift by an individual on the same terms. Referring to the admission in the argument that if a member of the family of the shipowner who had suffered the loss, or of the owner of the cargo, had, after the insurers had paid the loss, given by will a fund over which he had absolute control, for the purpose of indemnifying his relative for that portion of the loss not covered by the insurance, the insurers could not have claimed the gift, he said there was no distinction, in a legal sense, between such a case and the case before the court. Now, although the facts of that case differ from the facts in this case, the principle seems to me to be the same. In *Insurance Co. v. Church*, 21 Ohio St. 492, the application is made a little more closely. Church brought suit against the insurance company to recover compensation for his services as its agent. The company added to its answer a counterclaim that by the terms of the contract of agency it was entitled to his entire time, skill, and services, and that during the time of the agency the plaintiff had rendered services in insurance matters to other companies, for which he had been paid, and that he must account to the defendant for the amount so paid. The fact was, as it appeared in evidence, that Church had rendered no service directly to other insurance companies, but that they, having derived incidental benefits from services rendered by him to his own company, had paid to him, in token of their appreciation of those services, certain sums, aggregating \$458.07. It was held that the sums so paid to and re-

ceived by the agent were not profits made by him in the course of the business of his agency for which he was accountable to his principal, but gratuities to which, had they been paid to the principal, the agent would have had no claim; nor could the principal call the agent to account because it was his good fortune to be the donee. The court said that such gratuities were not properly earnings or profits made by the agent in the course of the business of the principal, but were gifts, prompted by the liberality of the donors, and belonged to the donee. In like manner, in this case, the advancement to the complainant was made, not at all because of his relation to the partnership, but by reason of the relationship between him and the donor, and solely with a view to his own personal benefit. *Cassels v. Stewart*, L. R. 6 App. Cas. 64, is also strongly in point. Complainant and defendant were partners in a firm under articles containing a provision that upon the retirement of a partner the remaining partners should have power to buy his interest at the amount standing to his credit at the last balance. Reid, who was also a partner, transferred his interest to the defendant, his nephew, under an arrangement by which he in substance and effect made his nephew a present of some £25,000. The suit was brought to hold the defendant, as a trustee for the firm, for the interest so acquired. The court of sessions in Scotland, and the privy council on appeal, held that the suit could not be maintained. Lord Chancellor Selborne said, (page 75:)

"I apprehend, my lords, that you will, under these circumstances, hold that in this case there is no principle which justifies any claim on the part of the appellant to participate in the profits of this transaction. I can find no ground for saying that there is any breach of the duty of a partner in a transaction like this between an uncle and a nephew by way of bounty to a very great extent on the part of the uncle to the nephew,—a transaction involving no object or purpose against the good faith of the partnership agreement, and neither alleged nor proved to have had such an effect."

Upon principle, and upon the authority of the cases above cited, the complainant had the right to receive and hold for his own benefit the claims assigned to him by Samuel G. Lewis a year after all the affairs of the partnership had been settled. I am wholly unable to perceive on what the defendant's supposed equity rests. The propositions urged for the defendant that only the present value of the claims can, in any event, be allowed, and that contribution cannot be enforced until the consideration for the assignment is made, have no application. The assumption that the extent to which the complainant's share in the estate to be left by his father upon his death may be diminished by reason of the advancement is to be taken as a measure whereby to determine the cost to him of the advancement, grew out of the failure to recognize that the complainant took the advancement not by way of purchase but as a gift in anticipation of a portion of the inheritance, and that under no contingency can the question of cost or consideration arise; and hence the present value of the claim is precisely what it would be if the assignment had not been made. The only difference is that the defendant's liability is limited to his proportion of the indebtedness arising upon it. The decree will be, accordingly, for the complainant.

HERBERT et al. v. RAINEY.

(Circuit Court, W. D. Pennsylvania. December 14, 1892.)

No. 30.

1. DEDICATION—DESCRIPTION IN DEED—NUISANCES.

The owner of a tract of land laid it out in lots and streets, and conveyed to D. (whose title passed to the plaintiffs) two of the lots, described in the deed as lots of the plan, and as abutting on a street, and then conveyed the tract, as a whole, to the defendant; the deed to him reciting the previous deeds to D., and excepting the land thereby conveyed. The defendant commenced to erect coke ovens within the lines of the street directly in front of the plaintiffs' lots and close to their dwelling house. *Held*, (a) that by the conveyance to D. the street called for as a boundary was irrevocably dedicated as a public way for the use of the owners of said two lots, and that the defendant was affected with notice, and could not interfere with the plaintiffs' use thereof; (b) that the contemplated coking operations would be a hurtful and dangerous nuisance to the plaintiffs' property; and on both grounds the plaintiffs were entitled to equitable relief.

2. CIRCUIT COURTS—JURISDICTIONAL AMOUNT.

The plaintiffs' allegation contained in the bill, as to the amount of the threatened damage to their property, is here the criterion of jurisdiction; it appearing that the claim made is not colorable, nor so extravagant as to be beyond a reasonable expectation of its allowance by a judicial tribunal.

3. SAME.

Where life tenants and remainder-men join as plaintiffs in a bill seeking a preventive remedy against threatened injury to, and destruction of, the corpus of the estate, their case falls within the principle that if several persons have a common, undivided interest, although separable as between themselves, the amount of their joint interest is the test of jurisdiction.

In Equity. Bill by George W. and Thomas Herbert and others against W. J. Rainey to enjoin the erection and maintenance of a nuisance. Decree for complainants.

Edward Campbell and J. M. Garrison, for the motion.
George Shiras, Jr., and George Shiras, 3d, opposed.

ACHESON, Circuit Judge. The Youghiogheny River Oil Company, being the owner of a tract of land containing 34 acres, in or shortly before the year 1872, laid out the land into lots and streets, and called the place the town of Sedgwick. The streets were marked on the ground by stakes, and a draft or plan of the town was made by the company, and exhibited by its agent. This plan, it would seem, has been lost or mislaid.

By deed dated March 5, 1872, and duly recorded on October 29th of the same year, the company conveyed to Elizabeth Dean one of the town lots, described in the deed as "all that lot or piece of ground situate in the new town of Sedgwick, Tyrone township, Fayette county, state of Pennsylvania, numbered in the plot of said town No. one, (1,) containing, on Front street, fifty-four feet six inches, and running back along Sedgwick street, two hundred feet, to Second street;" and by deed dated September 16, 1873, and duly recorded, said company conveyed to said Elizabeth another of the town lots described in the deed as lot numbered 2 in the plan of

the town of Sedgwick, containing, on Front street, 54 feet 6 inches, and running back, between lots numbered 1 and 3, 200 feet, to Second street. Shortly after her purchase of these lots of ground, Elizabeth Dean erected thereon a frame dwelling house located at the corner of Front and Sedgwick streets; the house fronting on Front street, and running back along Sedgwick street.

By deed dated September 16, 1873, and duly recorded, the said company conveyed to Margaret Herbert lots numbered 7 and 8, in said town plan, each containing 54 feet 6 inches on Front street, and running back 200 feet to Second street.

By deed dated December 11, 1879, the Youghiogheny River Oil Company conveyed to the defendant, W. J. Rainey, all the residue of the said land. This deed, in its premises, recites:

"And whereas the said the Youghiogheny River Oil Company did convey at sundry times part of the same premises, to wit, a small piece or parcel of land containing fifty-four feet six inches front, (fronting toward the Pittsburgh and Connellsville railroad,) and extending back the same width a distance of two hundred feet, to Elizabeth Dean, deed dated March 5th, A. D. 1872. Also a small piece or parcel of land adjoining the above-described piece of land, containing fifty-four feet six inches frontage extending back the same width a distance of two hundred feet, to Elizabeth Dean, by deed dated September 16th, 1873."

Then ensues a similar recital of the conveyance to Margaret Herbert, with a like reference to the deed to her. The deed to the defendant then proceeds to convey to him the tract of land by a general description, but with the following exception clause:

"Exempting, however, therefrom the several pieces or lots of land hereinbefore mentioned as having been granted and conveyed by the said the Youghiogheny River Oil Company unto Elizabeth Dean and Mrs. Margaret Herbert."

About the year 1885 George W. Herbert and Thomas Herbert, two of the plaintiffs, purchased the said two lots numbered 1 and 2 in the plan of the town of Sedgwick, and on November 30, 1885, by deed of that date from one Cochran, and under certain prior conveyances, they acquired the title, and succeeded to the rights, of Elizabeth Dean under the above-recited deeds from the Youghiogheny River Oil Company to her. George and Thomas then granted to their parents, Henry and Margaret Herbert, the other two plaintiffs, an estate for their lives, and the life of the survivor of them, in and to said two lots; and the latter are in possession thereof, living in the dwelling house already mentioned. Shortly before the bringing of this suit the defendant located, and he was then proceeding to erect, a number of coke ovens upon and along Front street, immediately in front of the plaintiffs' said lots, and their dwelling house thereon, for the purpose of continuously burning coal therein, and manufacturing coke. The bill charges that the erection and operation of these coke ovens, as proposed by the defendant, would be a permanent and continual trespass upon the plaintiffs' lots, and injury to their dwelling house, a permanent obstruction to their ingress and egress into and out of their said premises, and a nuisance thereto, by producing smoke, flame, and heat continuously so near to said premises as to render the same uninhabitable; and the bill

prays for an injunction. A preliminary injunction was granted by Judge Reed, and the case is now before the court upon plenary proofs for final disposition.

The truth of the above-recited allegations of the bill is indisputably established by the evidence. Not only is the location of the proposed coke ovens within the lines of Front street, as laid out in the plan of the town of Sedgwick, but the ovens would be not over two feet from the plaintiffs' house. If erected, they would cut off the plaintiffs from access to, and egress from, their house by way of Front street, while the operation of the ovens would not only expose the house to constant danger from the flames, but the smoke, gases, and heat therefrom would make the house totally unfit for occupancy, would also kill the fruit trees on the premises, and render the whole property nearly, if not altogether, valueless.

The legal principles applicable to the facts of the case are plain, and need little discussion. A conveyance of a lot of ground bounded by a public street gives to the grantee title in the soil to the middle of the street, if the grantor had title, (*Paul v. Carver*, 26 Pa. St. 223; *Transue v. Sell*, 105 Pa. St. 604;) but, even where the fee in the street called for as a boundary is not thus conveyed, a right of way over it passés with the lot, as an appurtenance necessary to its enjoyment, (*Ott v. Kreiter*, 110 Pa. St. 370, 1 Atl. Rep. 724.) Where, upon the sale of a lot, the deed refers to a plan, it becomes a material and essential part of the conveyance, and is to have the same effect as though copied into the deed, (*Birmingham v. Anderson*, 48 Pa. St. 253;) and a call in the deed for streets in the plan amounts to a dedication of them to the use of the purchaser as public ways, (*Ferguson's Appeal*, 117 Pa. St. 426, 11 Atl. Rep. 885;) and this is so even if the streets are not yet opened, (*Id.*) For when the proprietor of a body of land sells and conveys the same in lots according to a plan which shows the lots to be on streets, he must be held to have impressed upon them the irrevocable character of public streets; and not only can the purchasers of the abutting lots assert this character, but so can all other lot owners in the general plan. *In re Opening of Pearl Street*, 111 Pa. St. 565, 5 Atl. Rep. 430.

The reference in the Youghiogeny River Oil Company's deed to the defendant to the earlier deeds from that company to Elizabeth Dean was positive notice to the defendant of those prior deeds, and full knowledge of the provisions thereof is imputable to him when he took title. *Bellas v. Lloyd*, 2 Watts, 401; *Steckel v. Desh*, 12 Wkly. Notes Cas. 130; *Birmingham v. Anderson*, supra; *McKee v. Parchment*, 69 Pa. St. 342, 350. The defendant thus stands affected with notice of his grantor's plan of the town of Sedgwick, of the existence of Front street as laid down thereon, and the relation of lots numbered 1 and 2 in the plan to that street. The defendant, therefore, can no more question the plaintiffs' right to the free and unobstructed use of Front street, or interfere with their exercise of that right, than could the Youghiogeny River Oil Company itself. Now, a court of equity will protect a party entitled to a right of way in its enjoyment, by restraining the erection of permanent obstructions on the roadway or street, (*Appeal of Hacke & Hugus*,

101 Pa. St. 245; *Ferguson's Appeal*, supra; *Shipley v. Caples*, 17 Md. 179;) and we think the plaintiffs' legal right is sufficiently clear to bring them within the principle of these authorities. It is true that, in the absence of the town plan, there may be some question as to the exact width of Front street, although the evidence now before us would justify the conclusion that it is 60 feet wide. But the line of the street, on the side next the plaintiffs' house, is clearly fixed, and whatever may be its true width, undoubtedly, the site selected by the defendant for his coke ovens is part of the street, and, if built as located, their proximity to the plaintiffs' house will cut it off from the street.

But, independently of this encroachment on Front street, the proofs show that the plaintiffs are menaced with a permanent and most hurtful nuisance, against which they are entitled to equitable relief. Any business, however lawful in itself, which, as to a dwelling house, near which it is carried on, causes annoyances which materially interfere with the ordinary physical comfort of human existence, is a nuisance which should be restrained. *Rodenhausen v. Craven*, 141 Pa. St. 546, 21 Atl. Rep. 774; *Ross v. Butler*, 19 N. J. Eq. 294; *Cleveland v. Gaslight Co.*, 20 N. J. Eq. 201; *Pennsylvania Lead Company's Appeal*, 96 Pa. St. 116. Not only are such evils incident to the threatened coking operations, but the contemplated business will be dangerous and destructive to the plaintiffs' property, and the injury of a continuing character, for which the common-law forms of action furnish no adequate remedy. The plaintiffs' rights are clear, and therefore a previous trial at law is not a prerequisite to equitable interference. *Id.*; *Wood*, Nuis. 777.

The jurisdiction of the court, however, is challenged upon the ground that the sum or value of the matter in dispute is below our jurisdictional limit. But no such cause of objection appears upon the face of the bill; for it is alleged therein that if the defendant should erect his coke ovens on Front street, and operate the same, as contemplated by him, the damage to the plaintiffs' house and lots would be more than \$2,500. Now, in actions *ex delicto*, where the law does not fix the amount recoverable, the plaintiffs' claim is the criterion of jurisdiction, unless it appears to the satisfaction of the court that the amount of damages stated is colorable, and has been laid beyond the amount of a reasonable expectation of recovery. *Wilson v. Daniel*, 3 Dall. 401; *Barry v. Edmunds*, 116 U. S. 550, 561, 6 Sup. Ct. Rep. 501; *Gorman v. Havird*, 141 U. S. 206, 11 Sup. Ct. Rep. 943. But the evidence before us is convincing that the above-recited allegation of the bill was made in perfect good faith. There is abundant evidence tending to sustain the truth of the averment. The proofs entirely satisfy us that there was here no purpose to create or state a case colorably within our jurisdiction. The plaintiffs' ante litem valuation of their property was \$2,500, and we think this estimate was honestly made. A number of witnesses fix that sum as a fair valuation. Most certainly the plaintiffs' claim is not so extravagant as to be inconsistent with good faith, or beyond a reasonable expectation of its allowance by a judicial tribunal. True, the witnesses on the one side greatly differ from the witnesses

on the other side in their estimates, as is not uncommon where the value of real estate is concerned. But upon the whole evidence a jury or a master might well find the plaintiffs' property to be worth over \$2,000. We are then of the opinion that this suit does "really and substantially involve a dispute or controversy properly within the jurisdiction" of the court, even if we confine our attention exclusively to the question of the value of the plaintiffs' property, which the bill seeks to preserve from a destructive nuisance.

But the defendant, in an affidavit on file in the cause, has stated that the continuance of the injunction would damage him "many thousands of dollars." Now, in *Railroad Co. v. Ward*, 2 Black, 485, 492, a suit in equity to abate a nuisance, it was ruled that the want of a sufficient amount of damages suffered by the plaintiff to give the court jurisdiction would not defeat the suit, if the value of the object to be attained, namely, the removal of the nuisance, was up to the jurisdictional sum. And in *Market Co. v. Hoffman*, 101 U. S. 112, the value of the right, the exercise of which was enjoined, was held to be a test of jurisdiction. Whether, then, regard be had to the plaintiffs' property, the preservation of which is here involved, or to the defendant's use of his projected coking plant, sought to be restrained, in either view the matter in dispute exceeds the sum or value of \$2,000, exclusive of interest and costs.

We have only to add that the defendant's further objection to our cognizance of this case, based upon a supposed aggregation of distinct interests existing in the life tenants and remainder-men in order to give the jurisdictional amount, is unfounded. The plaintiffs are not here suing for damages to their respective estates, but they seek a preventive remedy against the injury and destruction of property in which they have a common interest. Perhaps either the life tenants or the remainder-men, acting alone, might have maintained this bill for the preservation of the corpus of the estate, but their joinder as co-owners was proper. *Adams*, Eq. *315. As the plaintiffs have a common interest, and seek a common object, their case falls within the principle that if several persons have a common and undivided interest, though separable as between themselves, the amount of their joint interest will be the test of jurisdiction. *Shields v. Thomas*, 17 How. 3; *Rodd v. Heartt*, 17 Wall. 354; *Clay v. Field*, 138 U. S. 464, 11 Sup. Ct. Rep. 419; *Railway Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 364. A decree will be entered in favor of the plaintiffs.

NORTHERN PAC. R. CO. v. CANNON et al.

(Circuit Court of Appeals, Ninth Circuit. January 23, 1893.)

No. 52.

1. PUBLIC LANDS—NORTHERN PACIFIC GRANT—MINERAL LANDS.

By Act July 2, 1864, (13 St. p. 365,) § 6, granting lands to the Northern Pacific Railroad Company, odd-numbered sections of agricultural land within the limits of the grant, which were not reserved, granted, or sold,

and were free from pre-emption or other claims, were withdrawn from sale, pre-emption, or entry when the general or preliminary route was fixed by the filing of its map in the general land office. Section 3 excluded mineral lands from the operation of the act. *Held*, that mineral lands were not withdrawn from sale at any time, if at all, prior to the definite fixing of the line of the railroad and the filing of a plat in the general land office.

2. SAME—PATENT—VALIDITY—EQUITY.

The Northern Pacific Railroad Company cannot maintain a suit in equity to quiet its title to certain lands within the limits of its grant, when patents have been issued to individuals for the lands as "mineral lands," before the line of road was definitely fixed.

3. SAME—APPLICATION FOR MINERAL PATENT—NOTICE.

As mineral lands are excluded from the grant, the railroad company is not entitled to any notice of an application for a mineral patent to lands lying within the boundaries of the grant, other than the general notice prescribed by Rev. St. § 2325, to all persons who may claim an interest in the land; except that, in case it initiates a contest under Rev. St. § 2335, to determine the character of the land, it is then entitled to personal notice of all subsequent proceedings; and, if it fail to initiate such contest, the question whether the lands are mineral or agricultural becomes a matter solely between the patentee and the government.

Appeal from the Circuit Court of the United States for the District of Montana.

In Equity. Suit by the Northern Pacific Railroad Company against Charles W. Cannon and others to quiet complainant's title to certain lands. A demurrer to the bill was sustained. 46 Fed. Rep. 237. Complainant appeals. Affirmed.

Fred M. Dudley, for appellant.

Edwin W. Toole, (Toole & Wallace, Massena Bullard, and McConnell & Clayberg, on the brief,) for appellees.

Before GILBERT, Circuit Judge, and ROSS and HAWLEY, District Judges.

HAWLEY, District Judge. This is an appeal from a decree of the circuit court of the district of Montana sustaining a demurrer to complainant's bill. The bill, after stating certain facts showing that the land in controversy, to wit, the N. W. $\frac{1}{4}$ of section 25, in township 10 N. of range 4 W. of principal meridian, Montana, had been granted to it under the act of July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," (13 U. S. St. p. 365,) and that it had complied with the provisions of the act, and had the title to said land, if "not mineral" and "not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claim or rights," alleges, in substance, that in 1868 the United States surveyor general made return of his official plat of survey, and returned said land as agricultural, and not mineral, in character; that complainant's map showing the general route of its railroad was filed in the office of the secretary of the interior on the 21st day of February, 1872; that the line of its railroad was definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office on the 6th of July, 1882; that complainant is in the actual pos-

session of the whole of said land; that the defendants C. W., C. B., and Henry Cannon, intending and contriving to defraud complainant of said land, and wrongfully and fraudulently to acquire title thereto from the United States, on the 28th of August, 1878, applied to the local land office of the United States at Helena, Mont., to purchase said land "as mineral land," falsely and fraudulently claiming that said land was mineral land containing precious metals in such quantities as that it would pay to work the same as mineral land, and that the same was more valuable for mineral than agricultural or other purposes; that defendants well knew at that time that the land was not mineral land, but was agricultural; that defendants caused certain affidavits to be filed, and made proofs as to the amount of work by them performed upon said land, showing that they had complied with the mining laws of the United States and of the territory of Montana, for the purpose of imposing upon the officers of the land department of the United States; that said officers were thereby deceived as to the truth of the facts concerning the character of the land; that defendants, seeking to deceive complainant and conceal from it all knowledge of their fraudulent claim, did not serve upon complainant any notice of their fraudulent claim, and did not institute any contest whereby the true character of said land might be determined, and complainant had no knowledge of the proceedings taken by defendants in the land office until long after the making of said application by said defendants; that the register and receiver, being imposed upon and deceived by the fraudulent affidavits, on the 28th of August, 1878, wrongfully permitted the defendants to pay for said land, and executed and delivered to them a receipt for the purchase price of the same as placer mining claims, and on the 17th of August, 1879, the defendants, upon presenting said receipt, obtained from the land department of the United States a mineral patent, purporting to convey to them the said land; that said patent was issued negligently, wrongfully, and without authority of law, and was procured by the wrongful and fraudulent acts of the defendants; that said patent constitutes a cloud upon the title of complainant to said land; that said defendants have caused said lands to be surveyed into town lots as an addition to the city of Helena, and said city claims to have some title to a portion of said land; that complainant has no speedy or adequate remedy at law for its grievances; and it prays for a decree declaring that it has a full and perfect title to said land, that the patent to defendants be declared null and void, and that all of said defendants be enjoined and restrained from asserting any claim whatever to said land adverse to complainant.

Did the court err in sustaining a demurrer to this bill? Is complainant, by its own showing, entitled to any relief in this suit? In *Railroad Co. v. Sanders*, this court held that the act of July 2, 1864, granting lands to appellant in aid of the construction of its railroad, did not prevent persons from taking up and locating mining claims in the reserved lands at any time before the line of the railroad was definitely fixed, and that the fact that land not

mineral was so taken up, located, and claimed as mineral land prior to that time was of no avail to the railroad company claiming the same under its grant. The court, after discussing the questions involved at considerable length, and reviewing numerous authorities, said "that the land in controversy was, at the time the grant ceased to be a float, affected by something more than a mere pretended claim existing in the mind of an individual. It was for the time being actually segregated from the body of the public domain, by claims apparently genuine and lawful, appearing of record, and recognized by the officers of the government, and, as to the actual validity thereof, dependent only upon issues of fact to be thereafter determined by competent authorities. By an unbroken line of decisions of the supreme court from the case of Wilcox v. Jackson, 13 Pet. 498, to the case of St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 11 Sup. Ct. Rep. 389, the title to land so affected does not pass by a grant of public land." 49 Fed. Rep. 129, 1 C. C. A. 192. It is conceded by appellant's counsel that the decision in that case, if sustained, is conclusive in favor of the ruling of the circuit court in this case. But he insists that it is the duty of this court "to review its conclusions, after fuller argument, and in the light of later authorities; of endeavoring to restate with greater clearness certain propositions which it is now evident were misunderstood by the court in the hearing in the Sanders case." That case speaks for itself, and furnishes ample evidence that no points therein discussed were misunderstood by the court. We decline to review or disturb that opinion. The case has been appealed to the supreme court of the United States. If there deemed to be erroneous, it will be reversed. If its conclusions are correct, it will be affirmed. The case now before us will, however, be considered with reference to its particular facts, and be determined upon the principles of law applicable thereto.

In this case a patent was issued by the government of the United States to defendants for the land in controversy as mineral land, prior to the time of the filing of the map of the definite location of appellant's railroad. Appellant claims to be seised of a fee simple to the land, and upon this ground bases its right to have defendants' patent set aside, and the cloud created thereby removed from its legal title. It denies that defendants have any title whatever, and claims that their patent was obtained by fraud, and is absolutely null and void. It is not a case where equitable relief is sought against a party holding the legal title. The sixth section of the act of July 2, 1864, withdrew the agricultural lands from sale, pre-emption, or entry of the odd-numbered sections granted to the railroad company which were not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, when the general or preliminary route of said railroad was fixed by the filing of its map in the office of the commissioner of the general land office February 21, 1872. Denny v. Dodson, 32 Fed. Rep. 909; U. S. v. Northern Pac. R. Co., 41 Fed. Rep. 847; Railroad Co. v. Barden, 46 Fed. Rep. 604; Railroad Co. v. Sanders, 49 Fed. Rep. 136, 1 C. C. A. 192; Buttz v. Railroad Co., 119 U. S. 72, 7 Sup. Ct. Rep.

100; *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 18, 11 Sup. Ct. Rep. 389. The mineral lands, however, were not withdrawn from sale at that time, or at any time, if at all, prior to the 6th of July, 1882, when the line of appellant's railroad was definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office. 13 U. S. St. p. 367, § 3.

How is the question to be determined whether the land, at the time the patent was issued to defendants, was mineral or agricultural land? We answer that it is, primarily at least, to be determined by the land department of the government. The statutes of the United States and the decisions of the courts so declare. The statute of the United States provides that—

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has or have complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat, previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant, at the time of filing this application, or at any time thereafter within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct; with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." Rev. St. U. S. § 2325.

This provision relates to lode claims. But the proceedings therein set forth, notwithstanding the differences between the rights of the lode and placer claimant, as to the quantity of land, the price per acre, conformity to public surveys, and other minor matters, applies to applications for a placer patent. Section 2329 provides that—

"Claims usually called 'placers,' including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

The only direct allegation in the bill tending to show that the defendants had failed to comply with the mining laws is as follows:

"That in truth and in fact the said defendants had not worked upon said premises in conformity with the mining laws of the United States or of Montana territory, or with the rules and customs of miners, or at all, and had not discovered upon said premises mines of any character whatsoever, or upon any part thereof, and had not expended the sum of five hundred dollars in labor or improvements upon said lands, or at all."

The other steps taken in conformity with the statute are alleged to have been fraudulently taken and performed for the purpose of deceiving and defrauding the government and appellant. This matter will be noticed hereafter.

Appellant claims that no notice was given personally to it. The law does not require any such notice to be given. The notice required by section 2325 is a general notice to all persons who might from any cause claim any interest in the land. Under section 2335, Rev. St. U. S., provision is made in case of a contest as to the land, whether agricultural or mineral, and, if appellant had desired to contest that question, it had the opportunity to do so, and, after initiating a contest, it would have been entitled to personal notice of all the proceedings thereafter taken, and to have participated therein, and offered such proofs as it might have been able to procure as to the character of the land. Not having initiated any such contest, it is not in a position to complain that it was not personally served with notice of the proceedings, and it is precluded from objecting to the issuance of the patent. *Eureka Con. Min. Co. v. Richmond Min. Co.*, 4 Sawy. 302. The fact, as alleged in the bill, that appellant "had a claim thereto of record in the said United States district land office, * * * of which defendants had then and there full knowledge," is immaterial. Appellant's claim was for agricultural land included in the grant. The defendants' application was for mineral land excluded from the grant, and open to exploration, location, and purchase, independent of the grant. When appellant accepted the grant, and at all times thereafter, it knew that the mineral lands were excluded from its grant, and the law charged it with notice that mining locations and applications for patents might be made and patents obtained therefor by persons claiming the lands to be mineral. The government of the United States performed its duty to appellant when it provided a mode and a tribunal for determining the character of the land. Under the provisions of the statute we have quoted and referred to appellant was charged with knowledge of the notice which the mineral applicant was required to give by general publication and by the posting of notices upon the claim, and of the notices required to be given by the land department, and, having failed to file any contest against defendants' application, the question thereafter—as to the character of the land, whether mineral or not—became a matter between the defendants and the government of the United States. That question is one which required the exercise of judicial power and discretion upon the part of the officers of the land department, and their judgment thereon is not open to review in an action of the character made out

by appellant's bill. As illustrative of this principle, we here refer to the following authorities: *French v. Fyan*, 93 U. S. 169; *Vance v. Burbank*, 101 U. S. 514; *Smelting Co. v. Kemp*, 104 U. S. 636; *Quinby v. Conlan*, Id. 420; *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Gale v. Best*, 78 Cal. 235, 20 Pac. Rep. 550; *Aurora Hill Con. Min. Co. v. 85 Min. Co.*, 34 Fed. Rep. 519.

But appellant alleges in its bill that no mine was ever discovered by the defendants, and that they obtained the patent by a fraud committed upon the officers of the government; that the patent is void, and that the land belongs to it by virtue of the grant, it being agricultural land. The question as to whether a patent is void or voidable, and the extent of the power of the land department to pass upon and decide jurisdictional facts, have been frequently discussed and decided by the supreme court of the United States under a great variety of circumstances. The authorities upon this subject are to the effect that, if the officers of the government acted without authority of law, if the lands conveyed by the patent were never within their control, or had been withdrawn from their control before the patent issued, then their acts were void for want of power to issue the patent. *Polk's Lessee v. Wendal*, 9 Cranch, 87; *New Orleans v. U. S.*, 10 Pet. 662, 730; *Wilcox v. Jackson*, 13 Pet. 498, 509; *Stoddard v. Chambers*, 2 How. 284, 317; *Easton v. Salisbury*, 21 How. 428; *Reichart v. Felps*, 6 Wall. 160; *Best v. Polk*, 18 Wall. 117; *Leavenworth R. Co. v. U. S.*, 92 U. S. 733; *Newhall v. Sanger*, Id. 761; *Sherman v. Buick*, 93 U. S. 209; *Smelting Co. v. Kemp*, 104 U. S. 636; *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Railroad Co. v. Dunmeyer*, 113 U. S. 629, 642, 5 Sup. Ct. Rep. 566; *Reynolds v. Mining Co.*, 116 U. S. 687, 6 Sup. Ct. Rep. 601; *Doolan v. Carr*, 125 U. S. 624, 8 Sup. Ct. Rep. 1228; *Railway Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. Rep. 112; *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 18, 11 Sup. Ct. Rep. 389. Most of these cases were in relation to agricultural lands. The supreme court of the state of Nevada, in *Rose v. Mining Co.*, 17 Nev. 25,¹ held that a patent issued for a lode or vein claim at a time of a pending contest between the claimants in the state court to determine the right of possession to the identical lode for which the patent was issued was absolutely null and void, because it was issued without authority of law. This decision was affirmed in *Mining Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055. In *Lakin v. Dolly*, 53 Fed. Rep. 333, the circuit court for the northern district of California decided that a patent issued for a mining lode or vein for more than 300 feet in width of surface ground was null and void as to the excess over 300 feet. Now, in these cases, as well as those in relation to agricultural lands, the fact was apparent by the provisions of the law that the officers of the government had no authority to issue any patent in the *Richmond Case*, and no patent exceeding 300 feet of surface ground in width in the *Lakin Case*. But the question at issue in this case is of a different character. Here the mineral lands within the odd sections of appellant's grant were excluded from the operation of

¹ 27 Pac. Rep. 1105.

the grant, and the officers of the government had authority under the law to issue a patent for such lands, and the patent cannot, therefore, be said to be void, although it may be voidable.

The patent issued to defendants is *prima facie* evidence that a discovery of mineral was made; that the land was properly located as mineral land; that the application for the patent, the notices given by the defendants, and all other steps required by the law, had been regularly taken; and is a deed of the assurance of the defendants' title. Mr. Justice Field, in *Eureka Con. Min. Co. v. Richmond Min. Co.*, 4 Sawy. 319, said:

"A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is ironclad against all mere speculative inferences."

The fraud alleged in the bill was committed, if at all, upon the officers of the government of the United States, and the question can be determined in a controversy between the United States and the defendants, or the government could authorize a suit to be brought by any person having or claiming to have an interest to be affected thereby. A bill in equity to set aside a patent obtained by fraud or mistake can, ordinarily, only be maintained between the sovereignty making the grant and the grantee under the patent. *Field v. Seabury*, 19 How. 324; *Hughes v. U. S.*, 4 Wall. 232; *Mowry v. Whitney*, 14 Wall. 434.

Mining Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. Rep. 765, is, in our opinion, the strongest case relied upon by appellant's counsel, as being in opposition to the views we have expressed. That case, however, was in reference to conflicting rights to a "placer" and a "lode" claim, and only involved the determination of the question as to how the fact of the existence of a vein or lode in a placer claim, as mentioned in section 2333, Rev. St. U. S., could be proven, and whether the provisions of sections 2325 and 2326 had any application with reference to that question. The patent under which the Iron Silver Mining Company claimed the land was issued to William Moyer on the 13th of November, 1878, for 56 acres of placer mining land. The patent under which Campbell claimed was issued for a vein or lode deposit which ran under the surface of the ground covered by the patent of the Iron Silver Mining Company. The supreme court held "that the circuit court, in refusing to consider the testimony found in the case in regard to the known existence of the vein of the Sierra Nevada claim at the time of the application for the Moyer patent, was in error;" and also "that it was erroneous to hold that, on the face of the patent for the Sierra Nevada mine, the existence of this vein and the knowledge of its existence were to be conclusively presumed in this action." Mr. Justice Brewer and the chief justice dissented. The court expressly distinguished the case in its facts from some of the previous decisions to which we have referred. In the course of the opinion of the court it is said:

"We are not ignorant of the many decisions by which it has been held that the rulings of the land officers in regard to the facts on which patents for land

are issued are decisive in actions at law, and that such patents can only be impeached in regard to those facts by a suit in chancery, brought to set the grant aside. But those are cases in which no prior patent had been issued for the same land, and where the party contesting the patent had no evidence of a superior legal title, but was compelled to rely on the equity growing out of frauds and mistakes in issuing the patent to his opponent."

Here is a plain recognition of the principle that, in a case like the one under consideration, the patent cannot be impeached except by a suit in equity, brought to annul the patent for fraud. But the strongest reason in support of the proposition that that case was not intended to conflict with those we have cited and referred to as applicable to this case is found by a reference therein to the case of *French v. Fyan*, 93 U. S. 169, which, it is said, "as shown by a careful reading of it, is not in conflict with this decision." The same learned justice wrote both opinions.

In *French v. Fyan*, a patent to the land there in controversy had been issued by the United States to the state of Missouri, under an act of congress, in 1850, familiarly known as the "Swamp-Land Grant." Subsequently, in 1852, congress granted certain lands in said state to the Missouri Pacific Railroad Company. The land, in 1854, was certified to said railroad company as part of the land granted by the act of 1852. The plaintiff, French, was vested with the title of the railroad company. The defendant held title under the swamp-land act of 1850. The question was whether, in an action at law, where the evidence of the respective titles came in conflict, parol evidence could be received to show that the land was never swamp land, and whether for that reason the patent issued to the state was void. With reference to that question, the court, after quoting with approval the doctrines announced in *Johnson v. Towsley*, 13 Wall. 72, that the action of the land department "in issuing a patent for any of the public land subject to sale by pre-emption or otherwise is conclusive of the legal title," said:

"We see nothing in the case before us to take it out of the operation of that rule; and we are of opinion that, in this action at law, it would be a departure from sound principle; and contrary to well-considered judgments in this court, and in others of high authority, to permit the validity of the patent to the state to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey."

In *Steel v. Refining Co.*, supra, Mr. Justice Field, in an elaborate and carefully prepared opinion, in which all the justices concurred, among other things, said that—

"Whenever mines are found in lands belonging to the United States, they may be worked, providing existing rights of others, from prior occupation, are not interfered with. Whether there are rights thus interfered with which should preclude the location of the miner, and the issue of a patent to him or his successor in interest, is, when not subjected under the law of congress to the local tribunals, a matter properly cognizable by the land department, when application is made to it for a patent; and the inquiry thus presented must necessarily involve a consideration of the character of the land to which title is sought, whether it be mineral, for which a patent may issue, or agricultural, for which a patent should be withheld. * * * We

have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions. * * * Though the various matters of fraud, perjury, and subornation of perjury alleged as a defense are to be taken as true for the purpose of this decision, they are not to be taken as true for any other purpose. What we decide is that, if true, they are not available in this form of action, and that any relief against the patent founded upon them must be sought in another way, and by a direct proceeding."

The judgment of the circuit court is affirmed.

ROSS, District Judge, (concurring.) The bill in this case shows upon its face that the line of the Northern Pacific Railroad was not definitely located and a plat thereof filed in the office of the commissioner of the general land office until July 6, 1882. Until that time the grant to that company did not attach to any particular tract or tracts of land. Long before that date, according to the averments of the bill, the particular tract of land here in controversy was located by the defendants as mining ground, and under an application made by them on the 28th of August, 1872, to the proper local land office, they were, on the 28th of August, 1878, permitted to enter and pay for it under the laws of the United States relating to mineral lands, and subsequently, to wit, August 17, 1879, received from the government a patent purporting to convey to them the premises as such mineral land. The grant to the Northern Pacific Railroad Company in express terms excepted from its operation all mineral lands. 13 St. p. 365. It is true that the sixth section of the act made it the duty of the president to cause the lands to be surveyed for 40 miles in width on both sides of the entire line of the road "after the general route shall be fixed, and as fast as may be required by the construction of said railroad," and it was declared that the odd sections of land granted should "not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act." But there is in this provision no prohibition against the discovery by the officers of the land department of the government, or by anybody else, of the true character of the land embraced within the surveyed limits of 40 miles in width on both sides of the general route of the road. If, in making such surveys or otherwise, prior to the attaching of the grant to any particular lands, it be ascertained that any lands that would otherwise fall within the grant are mineral in character, it is obvious that they would not be embraced by the grant, for the reason that by its very terms mineral lands are excepted from it.

The bill in this case shows that many years prior to the attaching of the grant to any particular lands the tract in controversy was located as mining ground, was ascertained by the land department to be mineral in character, and was patented as such to the defendants under the laws of the United States relating to the disposal of mineral lands. True, the bill alleges that the evidence upon which those proceedings were had was false and fraudulent, and that the officers of the land department were thereby deceived as to the true character of the land. If so, the patent can be annulled at the suit of the government; but as long as the government is content to let its patent stand, by which it, in effect, solemnly declares that, after due investigation of the facts by the officers to whom under the law such investigation is committed, the land was, at and prior to the time when the grant to the railroad company became effective, mineral land, and subject to disposal under the laws relating to mineral lands, the company, which claims only under a grant which in terms excepts from its operation mineral lands, is not in a position to call in question the facts upon which the mineral patent is based. Those facts, including the question of the character of the land, which lay at the foundation of the proceedings, were open to contest in the land department on the part of any and every person claiming an adverse interest therein, and an opportunity to make such contest was afforded by the published notice required by the statute referred to in the principal opinion. For these reasons I agree that the judgment of the circuit court be affirmed.

COLORADO CENT. CONSOLIDATED MIN. CO. v. TUROK.

(Circuit Court of Appeals, Eighth Circuit. February 6, 1893.)

No. 42.

1. APPEAL—REVIEW—MATTERS NOT APPARENT ON THE RECORD.

In an action of ejectment a reviewing court cannot consider or make computations upon a map which is merely introduced by counsel in argument, but is not made a part of the record.

2. SAME—MINING CLAIMS.

In an action of ejectment to recover certain mining grounds as between the owners of adjoining claims one of the issues made by the pleadings was as to the point at which the vein passed out of the side line of one claim and into the other, but at the trial this issue was not pressed, and the court, with the acquiescence of counsel, charged the jury that plaintiff claimed 600 feet along the vein, and that the parties had apparently submitted that the case should be determined upon the point whether there was not one broad vein, having an outcrop in both locations. A recovery was had of the 600 feet. *Held*, that defendant was estopped from claiming on writ of error that the recovery was for more than was warranted by the evidence relating to the exact point at which the vein crossed the boundary line between the claims.

3. MINES AND MINING—ADJOINING CLAIMS.

It appearing in such case that the vein in its dip passed through the side lines of plaintiff's claim into defendant's claim, the fact that the jury failed to find the exact depth at which the vein crossed the line was no ground for reversal, since the question of ownership and possession, which was the only one in issue, depended entirely upon the location and width of the apex of the vein.

4. SAME.

When the apex of a vein passes out of the side line of a claim into an adjoining claim, the latter, though junior in date, gives to its owner the right to follow the vein in its dip underneath the senior claim.

In Error to the Circuit Court of the United States for the District of Colorado.

Action by John Turck against the Colorado Central Consolidated Mining Company to recover possession of a lode or vein known as the "Aliunde Tunnel Lode No. 2," situated in the Argentine mining district, Clear Creek county, Colo. There was a verdict and judgment for plaintiff, and defendant sued out a writ of error. The judgment was heretofore affirmed, (50 Fed. Rep. 888, 2 C. C. A. 67,) and defendant now petitions for a rehearing. Denied.

Charles J. Hughes, Jr., and R. S. Morrison, for plaintiff in error.

Willard Teller, for defendant in error.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge. The contention of counsel that the trial court awarded the defendant in error 15 feet more territory than he was entitled to under admissions contained in the pleadings, rests wholly upon the assumption that the record before us shows the exact location of the Harris shaft with reference to the point fixed by the lower court as the place where the apex of the Colorado Central lode crosses into the Aliunde claim. We have made a careful examination of the printed record, and we are unable to find any testimony which would enable us to say that the point of departure of the lode, as fixed by the trial court, is less than 150 feet southwestwardly from the Harris shaft. On the argument of the case in this court a map was produced, for the purpose of illustration, as we understand, which purports to be drawn on a given scale. By reference thereto, and assuming it to be in all respects accurate, we might perhaps ascertain the approximate distance from the Harris shaft southwestwardly to the point of departure in question. But there is nothing to identify the map as a part of the record evidence in the case, even if we felt justified in relying upon computations of distances which we might make with the aid of such map. With their superior knowledge of the testimony produced in the trial court, (much of which has not been incorporated into the printed record,) counsel may be able to say with great confidence that the Harris shaft is only 135 feet to the northeast of the point fixed by the trial court as the place where the Colorado Central lode crosses into the Aliunde claim, but such fact is not apparent from the record lodged in this court. Furthermore, we do not think that the plaintiff in error is in a position to urge successfully in this court that the verdict and judgment are excessive in the respect claimed in the petition for a rehearing. In the course of its charge, the trial court used the following language:

"And now, with reference to the territory claimed by plaintiff, of course it is only in so far as he holds the top and outcrop of the lode, or of that which he claims as exhibited in his own works, and extended down from the

Aliunde workings to the lowest levels. You must be of that opinion in order to find for him that he has this top and apex distinctly in his territory, and the extent of it towards the eastward is a question for your consideration. Formerly it was made quite a point,—the place where it comes into the location of the Aliunde No. 2; that is to say, the witnesses were given their opinion making some estimates and calculations as to the exact place in which it came. In this trial we have not had anything of that. The extent to which the plaintiff claims is, I believe, 600 feet from the west end of the Colorado Central location, going eastward along the line of the two locations 600 feet, which is not far from the Johnson upraise,—perhaps a little east of that upraise. That is correct? Mr. Teller: East, your honor. The Court: I do not see that the parties have drawn this question much in issue in this trial, and apparently they submit that you shall determine the case upon the point which they have contested, whether this which the plaintiff has in his territory is the top and apex of a distinct lode, or only part of the general top and apex of a broad lode extended far beyond that to the north."

It appears, therefore, that the jury were advised, in substance, that the exact point where the Colorado Central vein or lode crossed into the Aliunde claim had not been treated as a material point then in controversy; that both parties had apparently consented or agreed that, in lieu of fixing the exact point of departure of the vein claimed by the defendant in error, the jury should rather consider and determine the more important question whether the whole space between the porphyry walls was not in fact so broken up and permeated throughout with vein matter as to constitute it a single lode, with its apex lying partly within the limits of both claims. No exception was taken to this portion of the charge, nor is it embraced in either of the assignments of error. The jury must have understood what was thus said by the court as a direction to find in favor of the defendant in error to the full extent, or substantially to the full extent, claimed in the complaint, if they found in his favor on the other more important issue as to the width of the lode, which the parties had apparently made the vital issue on which the verdict should depend. We think, therefore, that the plaintiff in error is in no position to attack the verdict or judgment on the ground that they are excessive, even though it be true that the defendant in error has recovered a few feet, more or less, along the lode than his proof of an apex would seem to warrant. A timely exception should have been taken to the charge of the trial court if it erred in assuming that there was no material controversy between the parties as to the extent of the recovery.

Neither are we able to attach much importance to the suggestion of counsel that the judgment should have been reversed because the jury failed to fix the depth beneath the surface at which the alleged Aliunde vein passes underneath the side lines of the Colorado Central claim. According to the view entertained by this court, that is a question which will only become material, if at all, when there shall be an accounting between the parties as to the amount of ore extracted from the alleged vein. The suit at bar is an action to recover a mining lode on the ground that the lode has its true apex or outcrop within the Aliunde side lines. Whether in its descent the lode passes outside of those side lines at a depth "of about three hundred feet beneath the surface," as alleged in the complaint, or at a depth of only 150 feet, as the evi-

dence tended to show, is, in our opinion, a question which the trial court was under no obligation to submit to the determination of the jury. The question of ownership and right of possession, which was the sole question before the jury, depended upon the location and width of the apex of the alleged vein, and in no sense upon the depth at which it passed underneath the Colorado Central side lines. Although it is alleged in the complaint that the lode sued for has a pitch of about 60 degrees to the northwest, and at a depth of about 300 feet beneath the surface enters the Colorado Central claim, yet we do not regard these allegations as so far material that they must be proven precisely as laid. Whether, in an accounting suit, to be hereafter brought, the defendant in error will be estopped by this allegation, and by the verdict and judgment, from claiming any ores which lie at a depth of less than 300 feet below the surface, is a question which we do not care to discuss at this time. It is sufficient to say at present that the plaintiff in error was not prejudiced, so far as we can see, by the failure of the jury to fix the exact depth beneath the surface at which the vein in controversy enters its territory.

We are furthermore asked to grant a rehearing with respect to the question whether the jury was not entitled to determine as to the existence or nonexistence of independent veins which in their descent became united within the side lines of the Colorado Central claim. In support of this request the petition for a rehearing calls to our attention and quotes certain testimony, which unfortunately is not found in the printed record on which the case was submitted. Counsel have apparently overlooked the fact that in making up the record for this court some of the testimony produced in the lower court was by agreement suppressed or merely summarized. With reference to the contention that the trial court improperly withdrew the last-mentioned issue from the consideration of the jury, we deem it sufficient to say that the point was considered at some length in our previous decision, and on further reflection we find no occasion for receding from the views then expressed. As we formerly remarked, the evidence to establish the existence of an independent vein within the side lines of the Colorado Central (if its single or broad lode theory was rejected) depended wholly on developments in the Herrick and O'Mally raises, and the shaft sunk in the Jim Hall tunnel, the precise location of which latter shaft is not disclosed by the present record. If we concede that the thread of vein matter followed in the Herrick raise was followed practically to the slide or wash, and that the outcrop was within the side lines of the Colorado Central, and if we furthermore concede that the perpendicular raise in the O'Mally workings, disclosed vein matter practically to the surface of the country rock, and was also within the Colorado Central territory, yet there was no evidence to establish the continuity or extent of the vein between these points. Not only was there no evidence to establish the continuity of the alleged vein, (which fact, under certain circumstances, might, no doubt, have been established by inference,) but the developments lower down, particularly in the

Benny cross-cut, in our judgment, demonstrated that no connection whatever existed between the two threads or seams of vein matter which had been followed to the slide in the Herrick and O'Mally raises. We must also again call attention to the fact that the seam of vein matter found in the O'Mally raise had not been followed downward below the second level to establish its connection with any of the lower workings. To these suggestions the reply is made that the evidence to establish the existence and outcrop of the vein on which the Aliunde location rests was equally vague and unsatisfactory. We are compelled, however, to dissent from that view, and for the following reasons: The apex of the Aliunde vein was established with reasonable certainty at three or four points within the limits of that claim, as counsel for the plaintiff in error fully concede. There was also considerable testimony which, in our opinion, showed the continuity and identity of the Aliunde vein, and its general direction, within the side lines of the claim, between the several points where the vein had been traced to the surface of the country rock. The vein in question had also been followed downward to a great depth, and it seems to have maintained a well-defined pitch and strike throughout the several workings. We are of the opinion, therefore, that the finding of the jury in favor of the existence of the Aliunde vein rests upon much more satisfactory evidence than that which was offered and relied upon to establish the existence of a similar vein with an outcrop within the territory of the Colorado Central. The defendant company undoubtedly did much to discredit its contention that the developments in the Herrick and O'Mally raises were sufficient to establish the existence of a continuous and well-defined vein between those points, which had its apex within the side lines of the Colorado Central claim, by its persistent contention throughout the trial that there were no well-defined separate veins between the two porphyry walls, because the whole intervening space between those walls had been broken up, and was in fact a single lode, having a single, broad outcrop or apex. But, be this as it may, we think that upon the state of facts disclosed by the present record, together with all the legitimate inferences that might be drawn therefrom, the jury would not have been warranted in finding that the defendant company held the apex of an independent vein, which in its descent united with and became an integral part of the Aliunde vein. We are of the opinion that a finding of that nature, based upon the evidence which is before this court, would have rested upon no substantial foundation, and could not have been sustained. The trial court committed no error, therefore, in withholding that issue from the jury. *Marshall v. Hubbard*, 117 U. S. 415, 419, 6 Sup. Ct. Rep. 806, and citations.

Finally, we must correct the false impression which counsel seem to entertain, that we have misconceived or failed to consider the question intended to be presented by the twelfth and thirteenth instructions. We fully understood counsel to contend that the Colorado Central Company, by virtue of its prior location, could lawfully lay claim to all ores within its side lines and end lines, which formed

a part of the lode on which its location rested, even though the apex of such lode in the course of its strike to the southwest had eventually crossed into the Aliunde territory, and had been there discovered and located upon by the proprietor of the latter claim. We intended to overrule that contention, and we think we did so with sufficient certainty in our previous decision. It is true that we made some reference to the vein having "forked as it entered the disputed territory," but in using that expression we merely referred to a theory which was stated in the original brief filed by counsel for the plaintiff in error. In so far as the application of the rule of law which we announced is concerned, it is obviously immaterial whether the lode became divided as it entered the disputed territory or did not so divide. In either event, we think it follows that, as the Colorado Central claim had been laid rather obliquely to the general course of the outcrop, the owners of that claim lost the vein when they lost the outcrop. This view was distinctly enunciated in our previous decision, the authorities were cited on which we predicated our opinion, and we find nothing in the petition for a rehearing which is calculated to change our views. In conclusion, it may not be out of place to remark that the question whether a locator on the dip of a vein may be ousted by a subsequent locator on the apex, assuming both claims to be laid side by side and "along the vein or lode," does not seem to be presented by the record now before us, and we have expressed no opinion on that point. It follows from what has been said that no sufficient cause has been shown for further argument, and the petition for a rehearing is accordingly denied.

PRESS v. DAVIS et al.

(Circuit Court of Appeals, Seventh Circuit. February 18, 1893.)

No. 75.

APPEAL—REVIEW—WAIVER OF OBJECTION.

Rev. St. § 700, which declares that, when there is a special finding in a case in which a jury has been waived, the review of the judgment "may extend to the determination of the sufficiency of the facts found to support the judgment," does not authorize a reversal of a judgment for alleged errors in the findings, where no objection was taken or exception reserved in the trial court.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Assumpsit by Isaac Davis and others against Whiting G. Press. Plaintiffs obtained judgment. Defendant brings error. Affirmed.

Lewis H. Bisbee, for plaintiff in error.

John C. Black, for defendants in error.

Before WOODS, Circuit Judge, and BUNN and JENKINS, District Judges.

PER CURIAM. In this case the right of trial by jury was waived, and upon a special finding of facts the court gave judg-

ment for the plaintiffs in the sum of \$2,890.25. The motion for a new trial, which seems to have been made and overruled, is not in the record. The errors assigned are directed to the question whether the judgment is supported by the facts found. The particular objection made is that the judgment is for too large an amount; that it should have been for a sum less than \$2,000, and that for that reason the court lost jurisdiction, and should have dismissed the case. While we are satisfied of the sufficiency of the facts found to support the judgment, the record does not require a decision of the question. No objection was made nor exception taken when the judgment was entered, nor, so far as the record shows, was any suggestion offered that the judgment was not in all respects in conformity with the finding of facts. While it is true, under section 700 of the Revised Statutes, that "when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment," yet, in order to entitle a party to that review, he must have made the proper objection to the judgment as entered, or moved to modify it, and reserved an objection to the action of the court. That was the practice followed in the case of *Smith v. Sac County*, 11 Wall. 139, cited in appellant's behalf, and its propriety is manifest, as it gives the court an opportunity to supply any omission or correct an error in its findings.

The judgment is therefore affirmed, with costs.

ARNOLD v. WOOLSEY et al.

(Circuit Court of Appeals, Eighth Circuit. February 8, 1893.)

No. 144.

WRIT OF ERROR—DISMISSAL—NO REAL CONTROVERSY.

Where, pending proceedings in error, the same person, by means of purchase, has succeeded to the interests of both plaintiff and defendant, the writ of error should be dismissed, although some third person is interested in the question of costs. *Wood-Paper Co. v. Heft*, 8 Wall. 333, 336; *East Tennessee, V. & G. R. Co. v. Southern Tel. Co.*, 8 Sup. Ct. Rep. 1391, 125 U. S. 695; and *Little v. Bowers*, 10 Sup. Ct. Rep. 620, 134 U. S. 547, 557,—followed.

In Error to the Circuit Court of the United States for the District of Nebraska.

Action of ejectment brought by Weston Arnold against George L. Woolsey and others to recover blocks 1, 84, 182, and lots 1, 2, and 3, in block G, in Kearney. A jury was waived, and the case submitted to the court on an agreed statement of facts. Judgment was rendered for defendants, and plaintiff brings error. On motion to dismiss the writ of error. Granted.

John C. Watson and Edwin F. Warren, for the motion.
J. M. Woolworth, opposed.

Before SANBORN, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge. This is a motion to dismiss the writ of error. The motion proceeds upon the ground that the interests of all the parties to the litigation have become merged by a sale which has recently been made by the defendants in error of all their interest in the property which is in controversy. After an examination of the record in the case and the affidavits that were read on the hearing of the motion, we have reached the conclusion that the motion is well founded. As the case stands since the sale of the Nebraska City Distillery to the Distilling & Cattle Feeding Company, or to its representative, we are satisfied that there is no real controversy between any of the parties to the litigation. We have no doubt that a decision in favor of the plaintiff in error would inure to the benefit of the recent purchaser under the defendants in error, and it is obvious that a contrary decision would have the same effect. Under these circumstances it is of no importance that the defendants in error have given their vendee an indemnity against costs. Where the same person has practically become the plaintiff and the defendant, we will not further entertain the proceeding, although some third party is interested in the question of costs. In obedience to the following authorities: *Wood-Paper Co. v. Heft*, 8 Wall. 333, 336; *East Tennessee, V. & G. R. Co. v. Southern Tel. Co.*, 125 U. S. 695, 8 Sup. Ct. Rep. 1391; and *Little v. Bowers*, 134 U. S. 547, 557, 10 Sup. Ct. Rep. 620,—the writ of error should be dismissed, and it is so ordered.

LAMB et al. v. EWING.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 110.

1. FEDERAL COURTS—JURISDICTION—AUXILIARY PROCEEDINGS.

On the expiration of a stay bond the lands of the surety thereon were sold on execution to satisfy the judgment, as allowed by the Nebraska statute, but, in view of a threatened appeal by the surety, the judgment creditor was required as a prerequisite to obtaining the money to give a bond conditioned for repayment thereof "in case the order confirming the sale is reversed by the supreme court of the United States." No appeal, however, was taken, but the purchaser of the land brought ejectment to recover it of the stay bondsman, and the supreme court of the United States held that the Nebraska statute did not apply, and the sale was void. Thereupon the court ordered the judgment creditor to repay the money into court, and assigned the redelivery bond to the purchaser of the land. The order was not complied with, and thereafter the purchaser filed a petition on the bond in the same court. *Held*, that this proceeding was merely auxiliary to the former suit, and the federal court had jurisdiction, irrespective of the citizenship of the parties or the amount in controversy.

2. BONDS—CONDITION—BREACH.

The condition of the bond was broken when the supreme court declared the sale void, although that decision was rendered in an independent suit, and no appeal was taken from the judgment confirming the sale.

3. SAME—LIMITATION OF ACTIONS.

The fact that the sale was absolutely void did not operate as a breach of the condition of the bond as soon as it was given, so as to immediately set the statute of limitations running, but such breach only oc-

curred at the time the decision of the supreme court in the ejectment suit was rendered.

4. SAME—POWERS OF FEDERAL COURT.

As the court would have had power to order restitution when the sale was declared invalid if the proceeds thereof had remained in the court, it also had power to require the judgment creditor to give the bond for its repayment into court in the same contingency, and hence the purchaser whose money had been wrongfully appropriated to the satisfaction of the judgment could maintain a suit on the bond to recover the same.

In Error to the Circuit Court of the United States for the District of Nebraska.

Action by Thomas Ewing against Walter J. Lamb and Lorenzo W. Billingsley upon a bond given for the repayment of money into court. Judgment for plaintiff. Defendants bring error. Affirmed.

Statement by SHIRAS, District Judge:

On the trial of this case in the court below a jury was waived, and from the findings of fact made by the court the following statement is condensed, sufficient of the material facts being stated to show the applicability of the points made by counsel in support of the errors assigned:

On the 17th of November, 1875, Charles W. Seymore and William W. Wardell recovered judgment in an action at law against William P. Young for the sum of \$6,500 in the United States circuit court for the district of Nebraska. Upon the assumption that the provisions of the statutes of Nebraska authorizing a stay of execution upon giving security as therein provided could be availed of by a defendant in the United States courts in Nebraska, a stay bond was executed by William P. Young, with five sureties, including one Milton F. Lamaster, and filed with the clerk. Upon the expiration of the time of the stay of execution, as provided for by the statutes of the state, and in accordance with the provisions thereof, the clerk issued an execution against William P. Young and the several sureties on the stay bond, which writ was by the marshal levied upon certain realty belonging to Milton F. Lamaster, one of the sureties on the bond; and a sale of the property was had in due form, the same being purchased by Thomas Ewing for the sum of \$5,600. Upon a report made of this sale to the court, the same was confirmed, and a marshal's deed was executed and delivered to the purchaser, and an order was entered directing the marshal, upon the execution of a good and sufficient bond, to be approved by the judge or clerk, and conditioned for the repayment into court of the purchase money in case the order confirming the sale should be reversed by the supreme court, to pay to the several claimants the share due them of the money realized from the sale of the realty as stated. It further appears that by an assignment duly made by the plaintiffs in the judgment against William P. Young there had been assigned to S. W. Little and D. B. Alexander an interest therein to the amount of \$2,000. It further appears that the marshal paid over to the clerk of the court the money by him collected on the execution sale of the property of Lamaster, as above stated, and for the purpose of obtaining from the clerk the amount due them as assignees of part of said judgment against Young the following bond was executed by S. W. Little and D. B. Alexander, with Walter J. Lamb and Lorenzo W. Billingsley as sureties:

"In the Circuit Court of the United States for the District of Nebraska.

"Charles W. Seymore and William W. Wardell, Plaintiffs, vs. William P. Young, Defendant.

"Bond for the Repayment of Money into Court.

"Know all men by these presents that we, S. W. Little and D. B. Alexander, as principals, and W. J. Lamb and L. W. Billingsley, as sureties, of Lancaster county, state of Nebraska, are held and firmly bound unto Elmer D. Frank, clerk of the United States circuit court for the district of Nebraska, in the sum of thirty-four hundred dollars, good and lawful money of the United

States, to be paid to the said Elmer D. Frank, clerk of the United States court, as aforesaid, his executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, our executors, and administrators firmly by these presents. Sealed with our seals, and dated the 3rd day of May, A. D. 1884. The condition of the above obligation is such that whereas, on the 29th day of January, A. D. 1882, Hon. Elmer S. Dundy, judge of the circuit court of the United States for the district of Nebraska, made the following order in the above-entitled cause, then pending in said court, to wit:

“Seymore & Wardell v. Young. 138 C.

“It is ordered in the above case that upon giving a good and sufficient bond to the approval of the judge or clerk, conditioned for the repayment into court of the purchase money in case the order of confirmation in this case is reversed by the supreme court of the United States, the marshal pay to the said complainant from the purchase money received in said case to each one entitled thereto, as his or her interest may appear, bond to be given in double the amount of money to be paid to any person or party entitled to the same, and the marshal is further directed to make and deliver to the purchaser.

[Signed]

“Elmer S. Dundy, Judge.”

“And whereas, it appears from the records of said court in said cause that S. W. Little and D. B. Alexander are entitled to receive the sum of \$1,485 of said purchase money; and whereas, the United States marshal of said court has paid all of said purchase money into the hands of the clerk of said court, and by him placed in the registry of said court since said order was made; and whereas, the said Elmer D. Frank, clerk of said court, has this day paid to the said S. W. Little and D. B. Alexander out of said purchase money the said sum of fourteen hundred and eighty-five dollars upon the terms of the above and foregoing order of the said court: Now if the above S. W. Little and D. B. Alexander, as principals, and W. J. Lamb and L. W. Billingsley, as sureties, shall well and truly comply with the order of said court as hereinbefore set forth in relation to the said sum of fourteen hundred and eighty-five dollars, received as aforesaid by the said S. W. Little and D. B. Alexander, then this obligation to be void; otherwise to remain in full force and effect. All erasures and interlineations made before signing.”

Upon the filing and approval of this bond, the court made an order directing the clerk to pay to said Little and Alexander, out of the funds in the registry of the court, the proportionate share coming to them as owners of the interest assigned them in the original judgment, and in pursuance of this order the clerk paid them the sum of \$1,485.

On the 17th of July, 1882, Thomas Ewing, for the consideration of \$5,600, sold and conveyed the realty by him bought at the marshal's sale to John W. Keeler, warranting his title thereto. Thereupon Keeler brought an action of ejectment in the United States circuit court for the district of Nebraska against Lamaster, claiming title to the land through the proceedings hereinbefore recited, and in the circuit court obtained judgment in his favor. The case was carried by writ of error to the supreme court of the United States, and the judgment below was reversed, the court holding that the provisions of the state statute of Nebraska, adopted in 1875, in regard to a stay of execution, including the mode of extending the judgment against the sureties on the bond, and issuing execution against their property in case of default, not being in force when section 916 of the Revised Statutes of the United States was enacted, and never having been adopted by a rule of the federal court, did not, therefore, authorize the act of the clerk of the circuit court in extending the judgment against the sureties on the bond, and, as a consequence, the issuance of execution and the levy on the property of the surety, and the sale thereof, were wholly void, and conveyed no title to Ewing, the purchaser, or to his grantee, Keeler. See *Lamaster v. Keeler*, 123 U. S. 376, 8 Sup. Ct. Rep. 197. No direct action, by appeal to the supreme court or otherwise, was taken in the case of Charles W. Seymore and William W. Wardell to vacate or reverse the order confirming the sale made by the marshal.

Upon the rendition of the judgment of the supreme court, holding that the sale and deed of the realty to Ewing were wholly void, and conveyed to him no title therein, Ewing made a settlement in full with his grantee, Keeler, repaying him the sum due him under the covenants of warranty contained in the deed to him. After the mandate from the supreme court was filed in the circuit court in the case of *Lamaster v. Keeler*, a motion was made in the original case of *Charles W. Seymore and William W. Wardell v. William P. Young* for an order directing the repayment into court of the sum of \$1,485, being the amount paid out of the registry of the court to S. W. Little and D. B. Alexander; and the court, after reciting the facts at length, made an order directing that said sum should be paid into court by the parties executing the bond. It appearing to the court that Thomas Ewing was entitled, as a beneficiary, to enforce performance of the conditions of the bond hereinbefore set forth, the court made an order directing that said bond should be assigned and set over to said Ewing, which was accordingly done by the clerk of the court, under the seal thereof.

The parties to the bond having failed to pay into court the sum ordered, or any part thereof, thereupon, on the 19th of February, 1891, a petition was filed in said circuit court of the United States by Thomas Ewing, and against the principals and sureties in said bond, in which was recited at length the facts leading up to the execution of the bond, and the other facts herein stated, including the orders of the court made in the premises; and judgment was prayed against the parties to the bond in the sum of \$1,485, interest and costs. To this petition the sureties on the bond, Walter J. Lamb and Lorenzo W. Billingsley, entered their appearance, and filed an answer thereto, wherein they denied the jurisdiction of the court, pleaded the statute of limitations, averred that the bond by them executed was taken without authority of law, and was wholly void, and that, if valid, the condition thereof had not been broken, because the order of confirmation of sale had not been taken before the supreme court in any direct proceeding, nor had the same been reversed by the supreme court. The trial court found in favor of the petitioner, and gave judgment for the sum of \$1,485, interest and costs, against the sureties on the bond, to reverse which the case has been brought to this court by writ of error sued out by the sureties on the bond.

Walter J. Lamb and Lorenzo W. Billingsley, (J. R. Webster, on the brief,) for plaintiffs in error.

R. D. Stearns, (Stearns & Strode, on the brief,) for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge, (after stating the facts.) The objections taken to the jurisdiction of the circuit court are based upon the fact that the plaintiff and defendants below are all citizens of the state of Nebraska, and the amount in controversy is less than \$2,000. If this proceeding was an independent action, unconnected with any other case in the circuit court, and in which, therefore, the jurisdiction of the court would depend upon the diverse citizenship of the parties to the petition and the amount thereby put in controversy, the lack of jurisdiction of the circuit court would be made clearly apparent. The facts shown in the record, however, prove beyond question that this proceeding is one ancillary to the original action of *Charles W. Seymore and William W. Wardell v. William P. Young*, and the jurisdiction of the court over that case, which is unquestioned, supports the jurisdiction over the proceedings subsequently brought upon the bond given under the circumstances hereinbefore stated.

The rule is well settled that where a court rightfully takes jurisdiction over the parties and the subject-matter of a controversy it has the right not only to render judgment in the first instance, but also to secure to the prevailing party the fruits of such judgment, and the original jurisdiction is a continuing one for that purpose; and as corollaries to the general rule it is also equally well settled that, where third parties have rights in or claims to property taken into the possession of the court under process issued against the original parties, such third parties may intervene in the proceedings for the protection of their rights; and, further, that where the process of the court is wrongfully and illegally used to the injury of a third party, the latter may appeal to the court for proper redress. If the federal courts were deprived of the power to protect third parties against injuries resulting from the enforcement of process issuing from such courts by reason of the citizenship of the injured party, or because the amount of the injury was less than \$2,000, it would work great hardship upon the individual citizen, and be a most serious blot upon the system of federal jurisprudence. The power of the courts of the United States in these particulars is as ample as that of the courts of the states, and the technical question of jurisdiction is solved by the ruling that in all ancillary or auxiliary proceedings for the enforcement of judgments rendered, and in proceedings for the protection of the rights of third parties, the jurisdiction is supported by that of the original action or suit. *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Wiswall v. Sampson*, 14 How. 52; *Freeman v. Howe*, 24 How. 450; *Gumbel v. Pitkin*, 124 U. S. 146, 8 Sup. Ct. Rep. 379; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. Rep. 27; *Fuel Co. v. Brock*, 139 U. S. 216, 11 Sup. Ct. Rep. 523.

The next question presented by the errors assigned is that arising on the plea of the statute of limitations, the contention of the plaintiffs in error being that the right to sue upon the bond accrued as soon as it was executed, for the reason that it has been decided that the judgment upon which the land was sold was void, and not merely voidable. The purpose of the bond was to secure the repayment into court of the money received from the sale of the realty in case it should be determined by the supreme court that the sale could not stand. If the question of the validity of the sale had never been carried in any mode to the supreme court, and Ewing's claim to the land had never been questioned, certainly no ground for demanding the repayment of the money into court would then have existed, and it certainly would not have been in accordance with justice for the court to compel the repayment of the money into court, so long as Ewing's title to the land remained undisputed. So long, also, as the question of the validity of the sale of the realty to Ewing was in fact pending before the supreme court, no action could have been maintained on the bond, because, according to its terms, the court had no right to demand repayment unless the order of confirmation of the sale of the realty should be reversed by the supreme court. It was not, therefore, until that court decided the question of the invalidity of the sale of the realty that any right of action accrued on the bond given to secure the repayment into court of the money

v.54F.no.2—18

derived from the sale of the realty, and, as the petition against plaintiffs in error was filed and service thereon was had within the statutory period, dating from the rendition of the judgment of the supreme court, which settled the invalidity of the sale of the realty, it follows that the plea of the statute cannot be sustained.

A further defense is based upon the claim that the bond itself is void, and that its execution and delivery created no obligation against the parties signing the same. The contention of plaintiffs in error is that when an execution issues upon a judgment at law, and the officer, by an execution sale of real estate, collects a sum of money to be applied in satisfaction, in whole or in part, of the judgment, the court has not the power to require of the judgment creditor, as a condition of the payment of the money to him, the execution of a bond for the return of the money in case the judgment is reversed or is held void. Counsel for plaintiffs in error cite a number of authorities which sustain the proposition that at execution sales of realty the rule caveat emptor applies, and that in case of a failure of title the purchaser cannot look to the judgment creditor for reimbursement. These are cases wherein the judgment debtor had no interest in the property levied on, and therefore, in fact, the purchaser took nothing by his purchase. In the case now before us, the realty levied on and sold was in fact the property of the judgment debtor, Lamaster; and, if the judgment upon which the process issued had not been wholly void, the purchaser would have acquired title. The rule of caveat emptor, invoked by plaintiffs in error, is not applicable to a case like that now under consideration. It is well settled that if a judgment upon which an execution has issued and has been returned satisfied is subsequently reversed, the plaintiff therein will be compelled to account for the property or money which he may have received by reason of the judgment which is reversed. In such cases, there is not a failure of the title of the judgment debtor to the property levied on, but a failure in the right of the judgment creditor to demand anything by reason of his judgment, either by way of future satisfaction thereof or by way of retaining any money or property which he may have obtained in the past. The right to restitution in case of a reversal of the judgment cannot be gainsaid, the only question being as to the mode applicable to the facts of the particular case. *Bank of U. S. v. Bank of Washington*, 6 Pet. 8; *Fuel Co. v. Brock*, 139 U. S. 216, 11 Sup. Ct. Rep. 523.

If the money paid through the marshal into the registry of the court by the defendant in error was still in the registry, could there be any possible question of the duty of the court in the premises? The plaintiffs in error certainly could not claim it as judgment creditors, for their judgment is reversed, and adjudged to be wholly void. Lamaster could not claim it, for he never had any interest in it or right to it, nor does it represent his property. Clearly the only one to whom it could be rightfully paid would be the defendant in error, Ewing; and certainly, under the supposed circumstances, the court, upon motion or petition of Ewing, would order the money to be paid to him. It is said by the supreme court in

Fuel Co. v. Brock, *supra*, that "the power is inherent in every court, whilst the subject of controversy is in its custody, and the parties are before it, to undo what it had no authority to do originally, and in which it therefore acted erroneously, and to restore, as far as possible, the parties to their former position. Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal." Therefore, when the supreme court held that the circuit court had no jurisdiction to extend the judgment in the case of Charles W. Seymore and William W. Wardell v. William P. Young against Lamaster, nor to issue execution against his property, it became the duty of the circuit court to restore the parties, if possible, to their former position, and undo all that had been wrongfully done in the attempted enforcement of the void judgment. If the circuit court had exacted from the judgment creditors a bond which bound them in terms to return the money collected on their judgment in case the title of Lamaster failed to the land sold to Ewing, then the authorities cited on behalf of plaintiffs in error would be applicable, because then the question would be whether the judgment creditors could be compelled to return the money paid by the purchaser; and, if no such obligation would rest upon the judgment creditors in the absence of a bond to that effect, it may be that the exaction of a bond would be held to be nugatory, and the bond itself to be void. We, however, are not called upon to determine this question, as it is not presented by the record now before us. In the present case the judgment to satisfy which the money was paid into court, and by the court to the judgment creditors, has been held to be wholly void. It thus appears that they have received, by means of the process of the court, issued without authority, a sum of money to which they are not entitled. It is their duty to make restitution of the money thus wrongfully received by them.

The terms of the bond, read in the light of its attending circumstances, do not impose upon the principals in the bond any duty or obligation greater than that which would exist against them in the absence of the bond. In fact, when the judgment creditors, S. W. Little and D. B. Alexander, received from the registry of the court the money collected on the judgment extended against Lamaster, the law imposed upon them the duty and implied obligation to repay the money in case the judgment in their favor should prove to be invalid and void. These parties were nonresidents of the state of Nebraska. It was known to the circuit court, and then appeared upon its records, that the validity of the judgment against Lamaster was denied, and steps were being taken to carry the question to the supreme court. When, under these circumstances, the court was asked to pay out the money in its hands, it was at once apparent that by so doing the court, in the event the judgment was held void, would be deprived of the power to cause restitution to be made to the proper parties, because both the fund and the parties might be beyond its control. To avoid this, the court required the parties to execute the bond in question, whereby they

became bound to repay the money in case the judgment against Lamaster should be held to be void, and thus the court continued its power to compel restitution to be made in case the right thereto should arise. We find nothing in the action of the circuit court in this particular which was illegal in itself, or which imposed upon the judgment creditors burdens of such a nature as to render the bond of no effect.

As a further and final defense it is claimed by plaintiffs in error that the condition of the bond has not been broken; that, as sureties, they are entitled to stand upon the very letter of the obligation signed by them, and cannot be called upon for the repayment into court of the purchase money, unless it is shown that the order of confirmation of the sale of the realty to Ewing has been reversed by the supreme court, which it is claimed has not been done. It is a settled rule that the liability of a surety is not, by implication or by a strained construction of the terms of the contract of suretyship, to be extended unfairly. The surety has the right to stand upon the terms of the contract entered into by him. In determining, however, the true intent and meaning of the contract of suretyship, the same general rules of construction are applicable that obtain in construing other written instruments. As is said in Brandt, Sur. § 80:

"The rules for construing the contract of a surety or a guarantor should by no means be confounded with the rule that sureties and guarantors are favorites of the law, and have a right to stand upon the strict terms of their obligations. There is no legal prohibition against entering into a contract of suretyship or guaranty. For any contract which it is legal to make it is legal that a surety or guarantor shall become responsible. In the construction of the contract of a surety or guarantor, as well as of every other contract, the true question is, what was the intention of the parties, as disclosed by the instrument, read in the light of the surrounding circumstances? The contract of the surety or guarantor being just as legal as that of the principal, there is no good reason for holding that, in arriving at the intention of the parties, one set of rules shall govern when the principal and another when the surety or guarantor is concerned."

In *Benjamin v. Hillard*, 23 How. 149, 164, it is said:

"The general rule is to attribute to the obligation of the surety the same extent as that of the principal. Unless from the terms of the contract an intention appears to reduce his liability within more narrow bounds, a restriction will not be imposed by construction contrary to the nature of the engagement. If the terms of his engagement are general and unrestricted, and embrace the entire subject, (*omnem causam*.) his liability will be measured by that of the principal, and embrace the same accessories and consequences, (*connexoram et dependentium*.) It will be presumed that he had in view the guaranty of the obligations his principal had assumed."

In *Read v. Bowman*, 2 Wall. 591, 603, the rule is stated as follows:

"Defendants are right in supposing that a surety may stand upon the very terms of his contract; that he will be discharged if any alteration is made in his agreement without his knowledge or consent, which prejudices him, or which amounts to the substitution of a new agreement for the one he executed. But sureties are as much bound by the true intent and meaning of their contracts which they voluntarily subscribe as principals. They are bound in the manner, to the extent, and under the circumstances as they existed when the contract was executed."

What, then, is the construction to be placed on the terms of the bond executed by plaintiffs in error, reading the same in the light thrown thereon by the circumstances existing when the bond was executed, and which in fact called it into existence. A fund was under the control of the court, realized from the sale of certain realty under process issued by the court. The validity of the sale was contested. The circuit court had sustained the sale, but the parties proposed to carry the question to the supreme court for final adjudication. If the circuit court had retained the money realized from the sale until the validity of the sale had been finally settled, it would then have been within the power of the court, and it clearly would have been its duty, to cause the money in the registry to be paid to the party entitled thereto. Instead, however, of retaining the money in the registry of the court, it was ordered that any claimant thereof might receive the share to which he was apparently entitled by giving a bond to the court, with sureties, conditioned to repay the sum by him received in case the order of confirmation should be reversed by the supreme court. It is entirely clear that the bond was intended to take the place of the money, and that it was the purpose thereof to enable the court to compel the repayment into court of the sum paid out in case the supreme court should reverse the decision of the circuit court upon the question of the validity of the sale. It is said in argument that the condition of the bond has not been broken, because the invalidity of the sale of the realty has not been adjudged in a direct appeal from the order of confirmation. This is not the requirement of the bond in express terms. The order of the court, which is recited in the bond, is to the effect that the bond shall be "conditioned for the repayment into court of the purchase money in case the order of confirmation in this case is reversed by the supreme court of the United States." No particular mode of carrying the question of the confirmation of the sale before the supreme court is named, nor was it a matter which was within the control of any of the parties to the bond. The mere method adopted was therefore wholly immaterial, so long as it compassed the purpose of submitting for decision to the supreme court the question upon which the duty of repayment of the money depended.

If the money was still in the registry of the circuit court, could it be successfully contended that it was not the duty of that court to order the repayment thereof to the defendant in error simply because the invalidity of the sale had been adjudged in the ejectment suit, and not in a direct appeal from the order of confirmation? This would certainly be sticking in the bark. By the decision of the supreme court in the ejectment proceedings based upon the supposed title created by the sale in question it was judicially and finally determined that the entire proceedings against Lamaster in the circuit court, including the sale of his property, were wholly void for want of jurisdiction. The issuance of the execution, the levy thereof, and the sale of the property and the order confirming the sale, were all held to be void acts; not voidable, but wholly void. Under such circumstances, it is useless to argue that to create a duty

to repay the money according to the terms of the bond it was necessary to enter a formal order reversing the confirmation of the sale. The decision and judgment of the supreme court in the ejectment suit had set aside and reversed the sale and the order confirming it by holding the same to be wholly void, and thereupon it became the duty of the circuit court to undo as far as possible all the wrong that had resulted from its mistaken action. It likewise became the duty of the principals in the bond to repay into court the sum of money which had been wrongfully paid them. The terms of the bond, fairly construed, bound them for this repayment. The obligation they had assumed in giving the bond was that, if the supreme court should reverse the confirmation of the sale of Lamaster's property, they would repay the money realized from such sale. The order of confirmation was most effectually reversed by the ruling of the supreme court that the whole proceeding against Lamaster was void and of no effect, and the obligation of the principals in the bond to repay into court the money wrongfully paid them became fixed according to the terms of the bond; and when the court called upon them for repayment of the amount by them received, as was done by the order entered December 22, 1890, and the principals in the bond failed to make such payment, then the condition of the bond was broken, and a right of action existed against the sureties for such default on part of their principals.

We have thus considered the substantial points made on behalf of the plaintiffs in error, and, finding them without merit, the judgment of the circuit court is affirmed.

BURROW v. KANSAS CITY, FT. S. & M. R. CO.

(Circuit Court, W. D. Tennessee. February 27, 1893.)

No. 3,114.

1. COSTS—TAXATION—WITNESS FEES.

A party in a federal court can only recover as costs the actual amount of fees paid each witness, and only to the extent of the amount legally due such witness; and where he has paid some witnesses more and some less than their legal fees, the legal fees of all cannot be grouped together to make the sum equal the amount paid to all.

2. SAME—MILEAGE.

Where a witness in a federal court, who lives in another state more than 100 miles away, and therefore cannot be served with subpoena, voluntarily attends in good faith on the request of a party who deemed his testimony material, such witness is entitled to the usual fees and to mileage for 100 miles, but not to mileage for any distance beyond 100 miles.

At Law. Action by Viola W. Burrow against the Kansas City, Ft. Scott & Memphis Railroad Company. Heard on motion to retax costs. Granted.

Statement by HAMMOND, J.:

This was an action at law against a foreign corporation for damages claimed by plaintiff from the defendant for negligently causing the death of her husband in Arkansas, and it resulted in a verdict in the defendant's favor with judgment for costs against the plaintiff and the surety on her \$250

prosecution bond in the case. The only items involved in the motion are the fees of four of the defendant's witnesses. The case was continued two or three times at plaintiff's instance, and the witnesses attended at each term until the call of the case for trial. Under the practice of the court these witnesses proved on oath before the clerk their per diem and mileage fees as follows:

John Cocker, first term, 3 days, 487 miles.....	\$ 53 20
G. L. Bowers, first term, 3 days, 287 miles.....	\$33 20
Idem, second term, 2 days, 287 miles.....	31 70
	<hr/>
	64 90
W. F. Caudle, first term, 3 days, 487 miles.....	\$53 20
Idem, second term, 2 days, 487 miles.....	51 70
Idem, third term, 2 days, 226 miles.....	25 60
	<hr/>
	130 50
J. P. Sullivan, first term, 3 days, 287 miles.....	\$33 20
Idem, second term, 2 days, 287 miles.....	31 70
Idem, third term, 3 days, 287 miles.....	33 20
	<hr/>
	98 10
	<hr/>
Total amount proven.....	\$346 70

These fees are computed at \$1.50 per diem for attendance and five cents a mile for the distance traveled each way. Plaintiff, in her motion, prays that "mileage be stricken out of the cost bill in this case," and insists in argument that, if any mileage be allowed, it should only be for 100 miles on each trip of the witnesses, which would make these fees as follows:

John Cocker, one trip, 3 days, 100 miles.....	\$ 14 50
G. L. Bowers, two trips, 5 days, 200 miles.....	27 50
W. F. Caudle, three trips, 7 days, 300 miles.....	40 50
J. P. Sullivan, three trips, 8 days, 300 miles.....	42 00
	<hr/>
	\$124 50

The fees, as proven by these witnesses, have all been respectively assigned by them to the defendant, and it has paid them the following sums in consideration of such assignment and as a compensation for the time lost by them as witnesses in this case, viz.:

John Cocker the sum of.....	\$17 31
G. L. Bowers the sum of.....	35 96
W. F. Caudle the sum of.....	75 50
J. P. Sullivan the sum of.....	29 41—or \$158 18

The defendant only claims in this behalf the amounts so actually expended by it in procuring the attendance of these witnesses, a sum considerably less than half the amount proven, and somewhat exceeding the taxation at 100 miles travel for each trip. None of these witnesses were subpoenaed, except Cocker, by the plaintiff, during the trial, while in voluntary attendance upon the court as a witness for defendant. Caudle and Bowers were not in fact examined as witnesses, the plaintiff's evidence being such as made their examination unnecessary; but they all attended the court in perfect good faith, and their attendance was procured "at the instance and request of defendant's counsel, and for the purpose of testifying in behalf of defendant," as the plaintiff alleges in her affidavit filed in support of this motion. The witness Cocker was an employee of the Pullman Palace Car Company, while Bowers and Sullivan were employees of the defendant railroad company, though Caudle was not.

J. J. Dupuy, for the motion.
Adams & Trimble, opposed.

HAMMOND, J., (after stating the facts.) Costs in the federal courts include, among other items, "the amount paid printers and

witnesses," (Rev. St. § 984,) and defendant can therefore recover here only the amount actually paid by it to each of these witnesses, (*O'Neil v. Railroad Co.*, 31 Fed. Rep. 663; *Beckwith v. Easton*, 4 Ben. 358; *The Highlander*, 19 How. Pr. 334.) And it cannot even recover the amount so paid if in any instance such amount exceed the legal fees due to the witness. Nor can these fees of the different witnesses be grouped together, in order to make the sum equal or exceed the entire amount paid to them all.

Section 848 of the Revised Statutes, prescribing the fees of witnesses in the federal courts, is as follows:

"For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing and five cents a mile for returning."

This provision is compiled from section 3 of the act of congress approved February 26, 1853, (10 St. at Large, p. 167,) the punctuation in the revision as quoted following that of the original act as published. The statutory provision relating to the issuance of subpoenas is the following:

"Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: provided, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same." Rev. St. U. S. § 876.

Under this provision defendant could not have procured the issuance and legal service of process of subpoena to procure the attendance of these witnesses on the trial of the case if they resided out of the state, and more than 100 miles from the place of holding court. And, even though they lived within the reach of process under the statute, if they were material witnesses for the defendant upon the trial of the issues involved in the suit, and their voluntary attendance was procured, without subpoena, in entire good faith on the part of defendant, through its counsel, of which there cannot be the slightest doubt, it would seem to be wholly immaterial to the plaintiff whether they were actually subpoenaed or not. The only office of the writ is to procure the attendance of the witnesses, and good faith is no less required in procuring their attendance by means of compulsory process than voluntarily. A party will no more be allowed to multiply costs unnecessarily by the procurement under process of immaterial witnesses or material ones in numbers largely in excess of the reasonable requirements of a case, than without process. Here these witnesses, no matter where their residences, might have been served with subpoena upon their arrival at the court, and, had writs issued for that purpose, plaintiff would now be liable to pay as costs the fees accruing thereunder in addition to what she must pay as it is; for by far the better opinion and the weight of authority are that the service of subpoena upon a witness is not a prerequisite to his right to fees from the party in whose behalf he in good faith attends the court, nor to the consequent liability of the losing party for the costs of such fees when paid by his adversary. *U. S. v. Sanborn*, 28 Fed. Rep. 299; *Cahn v. Monroe*, 29 Fed. Rep. 675;

Anderson v. Moe, 1 Abb. (U. S.) 299; U. S. v. Williams, 1 Cranch, C. C. 178; Cummings v. Akron, etc., Co., 6 Blatchf. 509; Dennis v. Eddy, 12 Blatchf. 195; The Syracuse, 36 Fed. Rep. 830; In re Williams, 37 Fed. Rep. 325; The Vernon, 36 Fed. Rep. 113; Eastman v. Sherry, 37 Fed. Rep. 844. And such has always been the practice in this district, as an examination of the records of the court show. Nor does it make any difference whether the witness was in fact called to testify, or whether he was sworn or not, provided always, of course, that his attendance was procured by the party to the suit in good faith, and that his testimony was deemed material to the issues involved. Clark v. American Dock & Imp. Co., 25 Fed. Rep. 641; Hathaway v. Roach, 2 Woodb. & M. 63.

The first question here, then, is one of fact as to the residence of these witnesses. They know where they reside, and have sworn to the facts before the clerk, and upon their oaths have proven the number of miles traveled by them respectively from their places of residence in Missouri to Memphis, Tenn., where the court is held in which the case was tried. Opposed to this is the affidavit of plaintiff that "she is informed and believes" that the witness Cocker is "a resident and citizen of the county of Shelby, and city of Memphis, and that he made his home in Memphis," running as a Pullman car porter between here and Springfield, Mo., and did not come to Memphis as a witness to testify on the trial, but, being here, simply remained at defendant's request. Counsel for defendant makes oath in this regard that said witness "made his home and headquarters at Kansas City, Mo.," and "that his attendance was procured at Memphis upon application to the superintendent of the Pullman Palace Car Company at Kansas City; and that said Cocker was sent here from Kansas City to Memphis for the purpose of testifying." The inevitable conclusion from this proof, therefore, is that Cocker's residence was Kansas City, as he himself swore, and plaintiff's information and belief cannot, of course, avail against his oath, nor against the positive affidavit of the defendant's counsel as to the manner in which his attendance as a witness was procured. The only evidence here as to the "place of residence" of the other three witnesses is the oath of each to the fact before the clerk. But plaintiff makes affidavit that they "are and were all employes of defendant, and run as train men on defendant's railroad from and to Memphis, Tenn., from and to Springfield and Kansas City, Mo.," and "supposes they were requested by defendant's solicitor to attend, and, coming to Memphis on their regular duty as trainmen on defendant's road, remained voluntarily over the days of trial to attend the court at the request or command of their employer or defendant's solicitor." The affidavit filed for defendant says "that the witness Caudle was not at that time an employe of the defendant," but admits that Bowers and Sullivan were its employes. Whether any of the witnesses were in the employ of either plaintiff or defendant is wholly immaterial. They have claimed their fees here under the statute, and substantiated their claims by their respective oaths. What plaintiff "supposes" cannot avail her, without more, and therefore the conclusion is that the place of residence of these three witnesses is as they have respectively sworn.

But because the amounts paid these witnesses (except one) respectively exceed the statutory fees to which they would be entitled had they come a distance of 100 miles or less, it becomes necessary to decide the question whether or not costs are taxable for full mileage of a witness who travels from his place of residence without the state, more than 100 miles distant from the court. So far as the practice of the court should control this question either way, if at all, it has been in favor of allowing such costs for mileage the entire distance actually traveled by the witness. I have requested the clerk to examine the records of the court in this respect, and, going back as far as 1883,—a period of 10 years,—he finds that this has been the invariable practice of the federal courts of this district, as shown by some 30 instances in civil suits during that period; and no case has been found where witnesses have been otherwise paid, or costs therefor otherwise taxed against the unsuccessful party. But this practice is now challenged, and it is urged that it should not be at variance with the statute, or a proper construction of it, if there be any doubt as to its meaning; and an examination of the reported cases shows, perhaps, a greater diversity of decision among the federal judges upon this question of costs than upon almost any other. In the first circuit the cases seem to be uniform, since Judge Story, that costs should be taxed for full mileage of the witness coming from beyond the district, no matter what the distance traveled. *Prouty v. Draper*, 2 Story, 199; *Whipple v. Cumberland, etc., Co.*, 3 Story, 84; *Hathaway v. Roach*, 2 Woodb. & M. 63, 73; *U. S. v. Sanborn*, 28 Fed. Rep. 299, per Gray, J., in 1886. In the second circuit the contrary rule is just as well established where costs for mileage fees of such witnesses are only taxed against the losing party for 100 miles, irrespective of the distances in excess of that which the witnesses, have actually traveled. *Anon.*, 5 Blatchf. 134; *Beckwith v. Easton*, 4 Ben. 358; *Steamship Leo*, 5 Ben. 486; *Buffalo Ins. Co. v. Providence, etc., Co.*, 29 Fed. Rep. 237; *The Syracuse*, 36 Fed. Rep. 830. And such is the well-settled rule in the ninth circuit. *Spaulding v. Tucker*, 2 Sawy. 50; *Haines v. McLaughlin*, 29 Fed. Rep. 70. In other circuits are the cases of *In re Williams*, (S. C.) 37 Fed. Rep. 325; *Eastman v. Sherry*, (Wis.) *Id.* 844; *Smith v. Railway Co.*, (Iowa,) 38 Fed. Rep. 321; *Sawyer v. Aultman, etc., Co.*, (Ill.) 5 Biss. 165, all to the same effect, though the last decision was based upon a rule of the court, of long standing, denying costs for the fees of any witness not regularly summoned, regardless of the distance traveled by him. In the seventh circuit in *Dreskill v. Parish*, 5 McLean, 213, 241, it was held that the fees of a witness not summoned could not be taxed as costs at all; and such were the rulings in this circuit in *Parker v. Bigler*, 1 Fish. Pat. Cas. 285, and *Woodruff v. Barney*, 1 Bond, 528, 2 Fish. Pat. Cas. 244, decided in 1862, though in the latter case the inference would seem to be that Judge Leavitt's ruling goes to the extent of allowing the taxation of full mileage if the witness be summoned; for he says in the opinion:

"If a witness whose residence is not at the place of holding court is summoned there, he is allowed mileage for returning to his home, but not for

coming to the court; and, by a liberal construction of the statute, return travel has been allowed even beyond the limits of the district for which the court is held."

In 1869, Judge Withey held in Michigan that a witness going voluntarily to a court in that state from his home in New York was "entitled to the per diem of \$1.50 and traveling fees from his place of residence and for returning, provided he actually traveled so far to reach the court," (*Anderson v. Moe*, 1 Abb. [U. S.] 299;) while Judge Brown, in the same state, as late as 1888, in the case of *The Vernon*, 36 Fed. Rep. 113, 115-117, in an exhaustive opinion, reviewing all the cases, ruled that the mileage fees of a non-resident witness could only be taxed as costs to the extent of 100 miles from the place of holding court.

As between the witness and the party at whose instance he attends the court, there is no doubt whatever as to the amount he should receive or could recover in a suit therefor. In case of a contract, it would, of course, be the amount agreed upon, and, in the absence of any contract, a quantum meruit, or reasonable sum for loss of time and necessary expenses. And in *Spaulding v. Tucker*, 2 Sawy. 50, Judge Sawyer, in ascertaining such sum, says:

"There being no special circumstances shown to call for a different measure, I know of no better mode of arriving at what is reasonable than to adopt the amount fixed by the act of congress as the compensation allowed witnesses who attend upon compulsory process."

And this amount, when ascertained, would be the measure of a recovery of costs in favor of the other party according to the weight of authority.

While it is true that in the courts of the United States, in cases at law, the oral testimony of witnesses has been the preferred and favored method of proof since the first judiciary act of 1789, and that section 861, Rev. St., taken therefrom, provides that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided," yet the same original act prescribed a method whereby "the testimony of any witness may be taken in any civil cause pending in a district or circuit court by deposition de bene esse when the witness lives at a greater distance from the place of trial than one hundred miles," etc. Rev. St. § 863. The undoubted object of this provision, or certainly one of its principal objects, was to reduce the expenses of litigation, and enable parties to obtain in a comparatively inexpensive mode the testimony of witnesses residing at great distances from the place of trial, and often the necessary expense of procuring their attendance in court would be an absolute denial of justice because of the inability of parties to incur such expense, and perhaps the ruin of unsuccessful litigants in answering judgments for enormous costs, where the other side was able to incur the expenditure.

Without reviewing the cases on this subject, and notwithstanding the practice which has obtained in the courts of this district, and which has hitherto been practically unchallenged, and in view of the later cases in this and nearly all the other circuits except the first, I am inclined to hold, though with some hesitation, that

costs can only be recovered for the fees of a witness in a civil suit within the limit of his compulsory attendance under a writ of subpoena. It need not, of course, be further said that even such fees cannot be recovered as costs where the successful party has actually settled with the witness for a less sum, when, of course, only the amount paid, or perhaps agreed to be paid, would be the measure of the recovery. Let the costs for the fees of these four witnesses, therefore, be taxed according to the principles of this opinion, and it is accordingly so ordered.

TYLER MINING CO. v. SWEENEY et al.

(Circuit Court of Appeals, Ninth Circuit. January 16, 1893.)

No. 62.

1. JUDGMENT—RES JUDICATA—CONFLICTING MINING CLAIMS.

The Tyler M. Co. applied for a patent to the Tyler mining claim. The Last Chance M. Co. protested against such application, and brought suit to determine the right of possession to so much of the surface ground as was included in the conflicting locations of the Tyler and Last Chance claims, as shown upon the diagram in the opinion of the court. The Tyler M. Co., after appearing and making a defense to said suit, withdrew its answer in open court, and judgment was entered for the Last Chance M. Co., reciting the priority of its claim. Subsequently the Tyler M. Co. left out from its original location a certain portion thereof, including the portion described in said judgment, and thereafter brought an ejectment suit against the Last Chance M. Co. for the ground not embraced in said judgment. *Held*, that the judgment in the prior suit was not res adjudicata as to the priority of the Last Chance location, and that it was conclusive only as to the right of possession to the triangular piece of ground involved in that suit.

2. SAME—PARALLELISM—RIGHT TO FOLLOW DIP—ABANDONMENT OF PART OF CLAIM.

The fact that the Tyler withdrew its answer in the prior suit, and allowed the Last Chance to obtain judgment therein by default, did not have the effect of changing the Tyler location to a five-sided figure, so as to destroy the parallelism of the location, as required by section 2320, Rev. St.; or to prevent the Tyler company from thereafter claiming its end line to be at a point which left out the ground in dispute in the former suit; or to deprive it of the right to follow the dip of its lode beyond its side lines, as provided by section 2322, Rev. St. A locator of a mining claim may abandon a portion of his original location without forfeiting any rights he may have to the balance of the claim.

3. SAME—LODE CROSSING SIDE LINES.

Under Rev. St. §§ 2320, 2322, the owner of a mining claim located approximately lengthwise of a lode, and having parallel end lines, may, if the apex passes out of the claim across a side line thereof, follow the dip beyond the side line, the same as if one original end line had been drawn at such crossing parallel to the other end line. *King v. Mining Co.*, (Mont.) 24 Pac. Rep. 200, approved.

SAME—LOCATION OF CLAIM ACROSS THE LODE.

Where a mining claim is located so that the lode crosses the side lines nearly at right angles, the location is a valid one, but the side lines should be taken as end lines, and the owner has no right to follow the dip beyond them. *Argentine Min. Co. v. Terrible Min. Co.*, 7 Sup. Ct. Rep. 1356, 122 U. S. 478, followed.

5. SAME—PRIORITY.

When a claim is located along a lode, and its owner's right to follow the dip beyond the lateral lines conflicts with the right of an owner of a claim

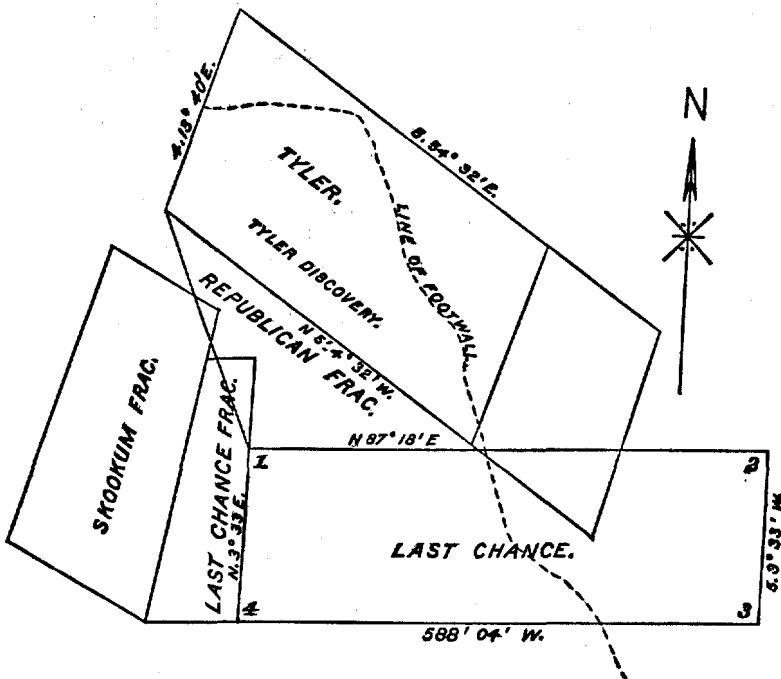
located across the lode to the portion thereof actually within his lines, the claim having priority of location should prevail.

In Error to the Circuit Court of the United States for the District of Idaho. Reversed.

John R. McBride and Albert Allen, for plaintiff in error.
W. B. Heyburn, for defendants in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an action of ejectment to recover the possession of certain mining ground situated in Yreka mining district, Shoshone county, Idaho, and for damages. It was brought against several defendants, corporations and individuals. The writ of error to this court, however, only involves questions in dispute between the Tyler Mining Company, plaintiff in the court below, and plaintiff in error here, and the Last Chance Mining Company, defendant. There are 43 specific assignments of error, consisting of exceptions taken to the rulings of the court in admitting or rejecting testimony, and to the giving and refusing to give certain instructions. A proper determination of certain legal principles applicable to the questions presented will settle all the points in controversy. The following diagram will explain the location and situation of the respective mining claims:



From the record it appears that the Tyler location was made on the 20th day of September, 1885, in the form of a parallelogram, as required by the statute of the United States, claiming 1,500 feet in length and 600 feet in width of the Tyler lode; that on the 19th day of April, 1887, the Tyler Company made application for a patent to said ground; that the Last Chance Company protested against said application, and in due time brought suit in the territorial court to determine the right of possession to such portion of the surface ground as is designated within the lines of the triangle on the diagram in the southeast corner of the Tyler location, including about one acre of ground; that in that suit the Last Chance Company alleged, among other things, that the Last Chance claim was located prior to the Tyler claim; that after two trials of said case without any agreement being reached by the jury, the Tyler Company withdrew its answer in open court, and appeared no further in the case; that thereafter the Last Chance Company proved up its claim, and obtained judgment for the triangular piece of ground without costs, the judgment reciting the facts "that the Last Chance Mining Company * * * is the owner of, and by virtue of a valid location of a mining claim called the 'Last Chance,' made on the 17th day of September, A. D. 1885, * * * is entitled to the possession and right of possession of," the triangular piece of ground; that, after the Tyler Company withdrew its answer, it left out from its description of its mining location the 428 feet 6 inches at the eastern end of its location; and, there being no other contest to its application for a patent, it entered the remainder of its claim, and received from the receiver of the land office a duplicate receipt showing the entry.

The Tyler claim, as described in the complaint in this action, is for the ground thus entered, to wit, for 1,071 feet 6 inches in length and 600 feet in width, containing an area of 14.77 acres. The complaint alleges "that a large vein, lode, or ledge of quartz rock in place, bearing silver and lead, is found in said Tyler lode mining claim so owned by the plaintiff. That the same, in its longitudinal course or strike, passes into the said Tyler lode mining claim through the southeasterly end line thereof, and extends through the said mining claim in a northwesterly direction, and lengthwise of said claim, and passes out of said claim through the northwest end line thereof; and that the top or apex of said vein, lode, or ledge lies throughout the entire length of said claim, inside of the surface lines thereof, as aforesaid, extended downward vertically. That said vein, lode, or ledge in its downward course departs from a perpendicular at an angle of about forty degrees from the horizontal * * * in a southerly direction, and that the general strike or course of said lode is nearly or quite coincident with the surface lines of said claim; and that by reason of the foregoing the plaintiff is now, and at all times hereafter mentioned has been, the owner of and entitled to the exclusive possession of said vein, and so much of said vein, lode, or ledge as the top or apex whereof lies inside of said surface boundaries as aforesaid, throughout its entire depth;" and that defendants have unlawfully taken possession of said vein, lode, or ledge in its downward course, and have been unlawfully extracting and removing the ores

therefrom, etc. The defendants claim that the lode upon which they are working is theirs; that the apex thereof is within their location, and that they have lawfully followed it on its dip into the earth.

1. Was the judgment in the territorial court conclusive between the parties as to the date of the location of the Last Chance claim? This question is presented in various forms. The court admitted the judgment in evidence against the objection of plaintiff. The plaintiff thereafter in the course of the trial, offered to prove (1) that at the time said judgment was rendered it was agreed between the respective parties thereto that the Tyler Company should withdraw its answer in open court; that the judgment was to be simply in favor of the Last Chance Company for the triangular piece of ground, and that the Tyler Company would abandon all right to it; (2) that the notice of the Last Chance claim was not posted upon the ground until the 22d day of September, 1885, two days after the location of the Tyler claim; (3) that there was no discovery of any kind of rock in place bearing any precious metals, upon the Last Chance claim, or within its boundaries, until long after the location of the Tyler claim; (4) that the boundary stakes of the Last Chance claim, instead of being as marked out on the map, stood some 1,380 feet further to the east, and that there never was any amended location of that claim, or change made in its boundaries until the survey of the Tyler claim in 1889. These offers, with others of similar import, were refused by the court, and plaintiff duly excepted to each ruling. The court, of its own motion, upon this point instructed the jury as follows:

"Plaintiff shows by evidence undisputed that its Tyler claim was located on the 20th day of September, 1885, and the defendant Last Chance Company shows by the evidence of a judgment, which cannot be disputed in this action, that its Last Chance claim was located on the 17th day of September, 1885, from which it follows that the Last Chance claim is the older. Now, upon that point I repeat to you that, so far as this trial is concerned, and so far as you have any consideration of the matter, the dates of those two claims are fixed by evidence you cannot consider further."

Were these rulings of the court erroneous? The general principle that a judgment of a court of competent jurisdiction between the same parties, and upon the same issues, is, as a plea, a bar, or, as evidence, conclusive, is well settled. Whenever a cause has been once fairly tried and finally determined, the same questions, as between the same parties, certainly ought not to be tried again. In a proper case this rule should be strictly adhered to. *McLeod v. Lee*, 17 Nev. 112.¹ But when the second suit is upon a different cause of action, and there is a dispute as to what was involved in the first suit, inquiry should always be made as to the real question actually litigated and determined in the first suit, and it is only upon that question that the judgment can be held conclusive in the second suit. It must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. *Cromwell v. County of Sac*, 94 U. S. 353; *Russell v. Place*, Id. 608; *Riverside*

Co. v. Townshend, 120 Ill. 18, 9 N. E. Rep. 65; City of Chicago v. Cameron, 120 Ill. 459, 11 N. E. Rep. 899; Hymes v. Estey, 116 N. Y. 509, 22 N. E. Rep. 1087; Legrand v. Rixey's Adm'r, 83 Va. 862, 3 S. E. Rep. 864; Foye v. Patch, 132 Mass. 110; Solly v. Clayton, 12 Colo. 30, 20 Pac. Rep. 351; Hickerson v. City of Mexico, 58 Mo. 62; Campbell v. Rankin, 99 U. S. 261.

The prior suit necessarily involved the question as to which company had the better right to the triangular piece of ground. No part of that ground is involved in the present suit. If the prior suit had been contested, it might or might not have involved the issue as to the dates of the respective locations; but, the judgment having been entered after the issues raised by the answer of the Tyler Company were withdrawn, the question as to the dates of the respective locations cannot be said to have been necessarily, or at all, adjudicated. Finnegan v. Campbell, 74 Iowa, 158, 37 N. W. Rep. 127. As between the Tyler and the Last Chance Company there was no longer any issue as to their respective rights to the triangular piece of ground; but the Last Chance was required to prove its right of possession to that ground in order to establish its rights thereto as against the United States, and in doing this it was necessary for it to show that it had a valid mining location. The date when such location was made was immaterial. All that was necessary to prove was that it was made at any time prior to the commencement of that action. It is true that the judgment recites the fact that the Last Chance location was prior to the Tyler, but the judgment is conclusive only in respect to the facts necessary to uphold it, and, if the fact of priority was immaterial to the issues upon which the case was tried, and the controversy did not turn upon it, the judgment will not conclude the parties in reference to such fact. People v. Johnson, 38 N. Y. 63. In Hughes v. U. S., the court said:

"In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties, or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit * * * was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." 4 Wall. 237.

When the Tyler Company withdrew its answer, it thereby abandoned its right to the ground in dispute, and thereafter the question as to when the Last Chance was located became wholly immaterial to any further issue in the case as between the Tyler and the Last Chance. The right of the Tyler to abandon this portion of its original location cannot be questioned. A person locating a quartz mining lode or claim under the laws of the United States is entitled to locate 1,500 feet in length upon the lode, if the apex of the same is within the surface boundaries marked out by him. He cannot claim any more; but, if any controversies arise as to any portion of the ground, he may abandon his rights to such portion of the claim as may be in dispute without forfeiting any rights he may have to the balance of his claim. Litigation is expensive. Compromises are favored. Agreements to withdraw from litigation to save expense should be sanctioned and encouraged. A litigant

has the right to "buy his peace." In *Cromwell v. County of Sac*, supra, the court said:

"Various considerations other than the actual merits may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand; such as the smallness of the amount, or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction. A judgment by default only admits, for the purpose of the action, the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim."

The Tyler Company had the undoubted right to sell the eastern 417 feet of the Tyler location to the Last Chance for any nominal sum it pleased, to avoid the litigation as to the triangular piece of ground, without endangering its title to the other portion of its claim. What difference does it make whether it sold the ground or abandoned it? None whatever, so far as the principle that is involved in this branch of the case is concerned. In either event the Tyler Company would have the right to show that at the time the judgment was rendered it had withdrawn its answer, and had no right, title, or interest in or to the particular piece of ground involved in that controversy. The judgment was conclusive only as to the right of possession to the triangular piece of ground involved in that suit, no portion of which is in controversy in this suit. The rulings of the court at variance with the views we have expressed were erroneous, and are of such a character as entitles the plaintiff to a new trial.

2. The questions presented upon the other branch of the assignment of errors relate to the rights of a locator under the mining laws of the United States to follow his lode in its depth beyond the side lines of his location. Defendant contends that the claim of the Tyler Company is a five-sided figure, and that it has no parallel end lines, and hence has no extra lateral rights to follow its lode or vein on its dip outside of its surface lines; that the Tyler Company must follow the lines of the original location, leaving out the triangular piece of ground; that the parallel end line drawn on the diagram at the point where the lode leaves the southerly side line of the Tyler cannot be considered as the easterly end line of the Tyler claim; and that, under the principles announced in *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177; *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 7 Sup. Ct. Rep. 1356; and *Montana Co. v. Clark*, 42 Fed. Rep. 626,—the Tyler Company is not entitled to follow the lode in its downward course beyond the side lines of its location. The plaintiff, on the other hand, among other things, contends that, as the Tyler Company covered the apex of its vein by a proper location along the general course of the lode, it could not be deprived of the benefit of its right to pursue its vein on its dip beyond the surface side lines "because a prior locator has taken possession of an adjoining section of the vein, and has covered the portion of

which the apex is in the former's location by his surface lines." This contention is perhaps made clearer by a further quotation from plaintiff's brief:

"Assuming that the Last Chance is the older location, its discovery is on the cropping of the vein adjoining our own, instead of locating along the vein, as our claim is located; it located across the lode, and seeks to cut us out of the vein that we may have located properly according to law, by extending its side lines over ground which is underneath the apex in ours."

These contentions of the respective counsel, as above stated, are at variance with the instructions given by the court of its own motion. We are therefore called upon to determine what construction should be given to the statutes of the United States upon these questions. This demands, at our hand, a careful consideration, not only of the express provisions of the statutes in question, but also of the various decisions bearing more or less upon the points at issue in this case.

The mining laws of the United States were passed upon the theory that the lodes and veins of mineral-bearing rock in their general course could be readily ascertained by the locators, and that, by locating a claim in the form of a parallelogram 1,500 feet in length and 600 feet in width, there would be no difficulty of including the lode within the surface ground so located. But the facts are that the lodes or veins in the mineral regions do not always crop out upon the surface of the ground, and it frequently happens that when the apex of the lodes does appear upon the surface that it is only for a short distance, and in such cases it is often impossible to determine the general course of the lode for months, and sometimes years, after the location is made. When the course of the lode is ascertained at the point of discovery, it is by no means certain that the same course will be maintained for the distance of 1,500 feet. It is liable to so deviate in its course as to pass through the side lines of the location before reaching either of the end lines, if the point of discovery was near the center of the location; and where the course of the lode is not easily ascertained the location is liable to be made in the wrong direction, and future developments prove that the lode in its course passes through the side lines at almost right angles with the side lines. It will thus be seen that great difficulty may often arise in making locations under the law so as to secure the lode for 1,500 feet in length, within a surface width of 600 feet, which is in all cases the principal object sought to be accomplished by the locator. Hence it follows in some instances that the locator makes his location where the lode crops out upon the surface in various shapes and forms, varying from a plain parallelogram, which is required by law, to an isosceles triangle, as in *Montana Co. v. Clark*, 42 Fed. Rep. 626, or a curve, in the shape of a horseshoe, as in *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177. Where the location is properly made along the course of the lode in the form of a parallelogram, and the lode extends within the side lines from one end line to the other, the law declares in plain terms what the rights of the locator are, and there is nothing left for the courts to construe.

After making the location and marking the lines, as required by the statute of the United States, the locator's rights are to be determined by the lines of his surface location, and these lines cannot be changed so as to interfere with the rights of other persons. The locators have "the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges." Rev. St. U. S. § 2322. Where the location is made in the form of an octagon, or a curved figure in the shape of a horseshoe, it will readily be seen that the rights of the locators are different. The same principles of the law, and the construction of the statutes of the United States as applied to locations made in the form of a parallelogram, cannot be extended to such irregular and peculiarly shaped locations. No general rule can be stated that will be directly applicable to every imaginable form of location that may be made. In *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, 118 U. S. 208, 6 Sup. Ct. Rep. 1177, the court said:

"Under the act of 1866, (14 St. p. 251,) parallelism in the end lines of a surface location was not required, but where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. His lateral right, by the statute, is confined to such portion of the vein as lies between such planes drawn through the end lines, and extended in their own direction; that is, between parallel vertical planes. It can embrace no other portion."

It is upon this general language that defendant relies in support of his contention. The language of the opinion of the court in that case must be considered with reference to the particular facts of the case and to the questions presented to the court for its decision. The exterior lines of the Stone claim formed a figure resembling a horseshoe. As a matter of fact the owners claimed that the location had end lines, and an examination of the diagram on page 203, 118 U. S., and page 1181, 6 Sup. Ct. Rep., shows lines that are parallel in their general direction; but the court said that the end lines "marked on the plat as end lines are not such," and, by reason of the peculiar surface of the Stone claim, held that the defendant in that case could not follow the lode existing therein in its downward course beyond the surface lines of the claim. The facts of that case were entirely dissimilar from the case at bar. Here the location of the Tyler was properly made in the form of a parallelogram along the course of the lode or vein. The lode extends from the northwesterly end line for a distance of nearly 1,100 feet within the side lines of the surface location, and then so

changes its course as to cross the southerly side line into the Last Chance location. The learned justice who wrote the opinion in the horseshoe case, when he said that the parallelism of the end lines "is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines," did not mean that it was essential to such right that the lode should extend in its length from one end line to the other of the location. If the lode in question, instead of extending into the Last Chance location, had abruptly broken off within the surface lines of the Tyler near the point where in fact it crossed the line, there could certainly be no question as to the right of the Tyler to follow the lode or vein in its downward course for its entire depth outside of the vertical planes drawn through the side lines. The fact that it continued its course and crossed the side line does not in any manner change this principle. In either case the locator is entitled to the same rights. In such cases the end lines are not necessarily those which are marked on the ground as such. An end line may be drawn at the point where the lode abruptly terminates within the surface lines, or at the point where the apex of the lode crosses the side line of the surface location. This, upon principle, justice, and authority, it seems to us, is the only reasonable construction that can be given to the statute. Whenever, and in whatever manner, this point has been presented by any similar facts, the rulings of the courts have been substantially in accordance with the views we have expressed. *Golden Fleece G. & S. M. Co. v. Cable Con. G. & S. M. Co.*, 12 Nev. 313; *Doe v. Sanger*, 83 Cal. 203, 23 Pac. Rep. 365; *Kahn v. Telegraph M. Co.*, 2 Utah, 174; *King v. Amy, etc., Min. Co.*, 9 Mont. 543, 24 Pac. Rep. 200. In the case last cited the lode crossed the surface lines without reaching either end line as marked on the surface, and the court held that, where a lode or vein crosses the side line of a location, the strike is terminated by the plane of such side line, and the right to follow the vein on its dip is determined by a vertical plane, parallel to the end lines, drawn downward, and which takes effect at the point where the apex intersects the side line. The court, in its opinion, after reviewing the *Flagstaff Case*, 98 U. S. 463, the *Argentine Case*, 122 U. S. 478, 7 Sup. Ct. Rep. 1356, and the *Horseshoe Case*, 118 U. S. 208, 6 Sup. Ct. Rep. 1177, and pointing out the differences existing between them and the *Amy Case*, and stating the various contentions of counsel, said:

"The law intends that the plane of the end line shall operate as a boundary to the dip, and so operate at the point where the strike is ended. If the strike reached the original end line as in a regular location, the bounding plane would there operate upon the dip. If the strike, by reason of its going out of a side line, falls short of reaching the original end-line plane, that plane must take effect where the strike in fact ends,—that is, at a point on the side line; * * * and, if it takes effect there, its parallelism must not be destroyed. We therefore have the bounding plane operating at the point where the apex leaves the north side line, and operating parallel to the east end line, and retaining its parallelism as originally marked on the ground. It is not a new line or plane, or one judicially constructed. It is determined by the location lines on the surface. There is never any readjustment according to subsequent developments. The parallelism of the end-line planes is fixed by location, and never varies. The point of departure of the strike from the

surface lines fixes the point where the end-line plane is to perform its functions, whether that departure be at an end line, as contemplated by the statute, or whether accident has fixed it at a point on a side line." *King v. Mining Co.*, 9 Mont. 575, 24 Pac. Rep. 200.

In *Doe v. Sanger*, *supra*, the location was not of exact width, and the end lines, as originally marked on the surface, were not precisely parallel with each other. The court, after reviewing the case of *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, held that a substantial compliance with section 2320 of the Revised Statutes of the United States, requiring the end lines of each claim located upon a vein or lode to be parallel, is all that is required; that the object of the statute is sufficiently met to sustain that right if the location is made lengthwise of the lode or vein in a quadrangular shape, notwithstanding the fact that the end lines are not exactly parallel, and that the locator has the right to make the end lines parallel, where such change does not interfere with the rights of other persons; and in the course of the opinion it is said that "any different rule would be a disgrace to justice, and an impeachment of the common sense of lawmakers." The fact that the Tyler Company did not contest its rights to the triangular piece of ground mentioned in the first branch of this case, and thereby allowed the Last Chance to take that portion of its original location, did not have the effect of depriving the Tyler Company of its right to draw its end line so as to leave out the triangular piece of ground at or near the point where the lode actually crosses its southerly side line, as shown in the diagram. This would be its right independent of the former controversy, and having, to all intents and purposes, abandoned the eastern or south-eastern portion of its original surface location, as hereinbefore stated, it lost no rights to the other portion of its ground, including the course of the lode within its surface boundaries. This change did not in any manner interfere with the property rights of the owners of the Last Chance claim, or of any other of the locations involved in this suit.

From the views we have expressed and the conclusions we have reached it follows that the contention of the defendants' counsel cannot be sustained. The contention of plaintiff's counsel is equally untenable. In the *Flagstaff Case* the court, after referring to the statutes of 1866 (14 U. S. St. p. 251) and of 1872, (17 U. S. St. p. 91,) said:

"We think that the intent of both statutes is that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode, and extend perpendicularly downwards, and to be continued in their own direction, either way, horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly

located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to."

In such cases "the side lines of the location are really the end lines of the claim, considering the direction or course of the lode at the surface." *Mining Co. v. Tarbet*, 98 U. S. 467. This decision is quoted with approval and followed in *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 7 Sup. Ct. Rep. 1356.

From the diagram in this case it appears that the lode in its course lengthwise crosses the side lines of the Last Chance location at nearly right angles, and, under the rules laid down in the decisions of the supreme court of the United States, the side lines of the location of the Last Chance as marked on the surface of the ground are to be treated as its end lines, and the owners thereof would have the exclusive right of possession and enjoyment of such portion of the lode throughout its entire depth, the top or apex of which is inside of the surface lines of the location, as lies between vertical planes drawn downward through such end lines. It therefore appears that both locations were made in such form and shape as has been recognized by the adjudicated cases upon these questions to entitle them to certain fixed and definite rights to follow the lode in its downward course, and the rights of the Tyler Company and of the Last Chance Company in this respect depend upon the question of their priority. The court below, in its fourth instruction given to the jury of its own motion, after clearly stating the manner in which locations should be made under the law to entitle the owners to follow the lode in its downward course beyond the side lines of the surface location, said:

"The plaintiff claims that its Tyler location is located substantially according to such provisions and contemplation of the law, and it results that it may thus follow its ledge downward. The burden rests upon plaintiff to show such facts, and, when shown, it would follow that the plaintiff would be entitled to so pursue its ledge, unless it comes in conflict with some prior locator who had also located a claim in such manner as the law will justify."

The entire instruction was correct, and the instructions requested by plaintiff in opposition to the last clause of the instruction above quoted were properly refused. The sixth instruction given by the court, defining the rights of a location made where the lode runs at right angles across the location, instead of along it, as in the case of the Last Chance, is directly in accordance with the views we have expressed; and it follows, therefore, that the instructions asked by plaintiff in opposition thereto were properly refused. Each company must, of course, prove that its location is a valid one, and that it was made in substantial compliance with all the essential provisions of the law, in order to entitle it to the rights given by the law; and, among other things applicable to the controversy between the parties, it must be shown either that the apex of the lode is found within the surface boundaries of the respective locations, or that the lode was discovered therein prior to the rights acquired by the other party. The statute expressly

provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Rev. St. U. S. § 2320.

In cases of controversy where the right exists under each valid location to follow the lode in its downward course it necessarily follows that both locations cannot rightfully occupy the same space of ground, and in all cases where a controversy of this kind arises the prior locator must prevail, precisely as in cases of like controversy between locations overlapping each other lengthwise on the course of the lode. This is the rule as announced by the court below upon this branch of the case, and it is, in our opinion, sound, logical, and just, and is sustained by authority. Mr. Justice Field, in *Argentine Min. Co. v. Terrible Min. Co.*, supra, in reviewing an instruction given by the circuit court, said:

"If there was an apex or outcropping of the same vein within the surface of the boundaries of the claims of the defendant, that company could not extend its workings under the Adelaide location; that being of earlier date. Assuming that on the same vein there were surface outcroppings within the boundaries of both claims, the one first located necessarily carried the right to work the vein."

For the errors in the rulings of the court with reference to the conclusiveness of the judgment in the territorial court as to the priority of the Last Chance location the judgment of the circuit court is reversed, and the cause remanded for a new trial.

BRITTAIN et al. v. CROWTHER et al.

(Circuit Court of Appeals, Eighth Circuit. February 6, 1893.)

No. 173.

1. FRAUDULENT CONVEYANCES—EVIDENCE—ADMISSIBILITY.

To establish fraud in a transfer of goods, it is competent to prove every fact and circumstance tending to show a fraudulent purpose, including the debtor's acts, statements, and correspondence, in so far as they indicate fraud or want of consideration; also the kind, quantity, and value of the goods purchased preceding the transfer; the statements made to creditors as to his financial condition at the time of purchasing the goods; the amount and kind of property he owned before his failure, and what disposition he made of it; and the debts he owed after his failure, and when and for what they were contracted, and whether he paid any of these debts after disposing of his property.

2. SAME—KNOWLEDGE OF TRANSFEREE.

A purchaser from a debtor selling to defraud his creditors is bound by such knowledge as would put a prudent man upon inquiry.

3. SAME—CLAIMS OF WIFE.

Where a husband tells his wife that certain land of his shall be considered hers, but afterwards the husband sells the land, and invests the proceeds in business, the wife cannot claim, as against the husband's creditors, that the said proceeds are hers.

4. HUSBAND AND WIFE—WIFE'S PROPERTY—EARNINGS.

Under *Cobbey*, Consol. St. Neb. 1891, §§ 1411-1414, the earnings of the wife, made while she is living with her husband, and engaged in no separate business, are the property of the husband, and liable to the claims of his creditors.

In Error to the Circuit Court of the United States for the District of Nebraska. Reversed.

Statement by CALDWELL, Circuit Judge.

On the 24th day of April, 1891, the plaintiffs in error, Brittain, Smith & Co., brought suit by attachment in the circuit court of the United States for the district of Nebraska, against Daniel S. Lohr, to recover the sum of \$2,334.75, for goods, wares and merchandise sold and delivered by the plaintiffs in error to the defendant between the 31st day of July and the 10th day of September, 1890. On April 25, 1891, the order of attachment was levied upon a stock of general merchandise at Broken Bow, Neb., as the property of the defendant Lohr. On May 4, 1891, Harriet E. Lohr, the wife of Daniel S. Lohr, the defendant in the principal action, and Frank Crowther, her brother, filed a petition of intervention alleging that they were associated together as partners under the firm name of Crowther & Co., and that the goods levied upon were their partnership property, and of the value of \$6,000, and prayed that the same might be delivered to them upon the execution of a bond agreeably to the law and practice in that state in such cases, which was done. On May 26, 1892, the plaintiffs obtained judgment against Daniel S. Lohr in the attachment suit for \$2,387 and costs. The plaintiffs filed an answer to Crowther & Co.'s intervening petition, denying that the interveners owned the goods attached, and alleging that they were the property of Lohr, who had transferred the same, together with a large amount of other property and money, to Crowther & Co., for the purpose of defrauding his creditors; that Crowther & Co. never paid for the goods, and had knowledge of Lohr's fraudulent purpose at the time they acquired the same. A reply was filed to this answer, and the issues thus made up were tried before a jury, and there was a verdict and judgment in favor of the interveners, and the plaintiffs sued out this writ of error.

Edson Rich, for plaintiffs in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge, (after stating the facts.) The issue to be tried was whether the transfer of the stock of goods by Lohr to his wife and brother-in-law was made in good faith to pay bona fide debts which he owed them, or whether it was a fraudulent device to hinder, delay, and defraud his creditors. Upon the trial of such an issue, it was competent to prove every fact and circumstance tending to show that Lohr made the transfer of the goods for the purpose of defrauding, hindering, or delaying his creditors, or that he transferred them to his wife without any sufficient consideration. The plaintiffs had a right to show Lohr's acts, statements, and correspondence, in so far as they had any tendency to prove that he was acting fraudulently, or had transferred the goods without consideration. They had a right to show the kind, quality, and value of the goods which he purchased in the spring and fall preceding the transfer of the stock of goods to Crowther & Co.; to show the statements he made to his creditors at the time he purchased the goods, or at any time thereafter, as to his financial condition and business prospects; to show the amount and kind of property he owned before his failure, and what disposition he made of the same; to show the amount of debts he owed after his failure, and when and for what they were contracted, and the explanations, if any, he gave for his failure, and whether or not he paid any of his debts after disposing of his prop-

erty. At one time Lohr owned and operated two stores at Broken Bow, and later, and about July, 1890, he had three stocks of goods in as many separate storehouses. He purchased the goods in these three stores mainly on a credit. These three stocks of goods, together with an old stock valued at \$1,800, which Lohr had traded for at Ceresco, were disposed of in the following manner: One stock, and the principal one, was turned over to his wife and his brother-in-law, the interveners in this case. It is claimed that Lohr owed his wife \$2,200 for services, and his brother-in-law, Crowther, \$400 for clerk hire, and in August, 1890, this stock of goods—which invoiced \$3,400, according to the testimony of the interveners, but which plaintiffs claim was worth much more—was turned over to Mrs. Lohr and Crowther in payment of Lohr's indebtedness to them, they executing a note to Lohr for the difference between the indebtedness to them and the invoiced value of the goods, viz. \$1,296. There was also turned over to Mrs. Lohr and Crowther, at the same time, the old stock of goods, which Lohr had traded for at Ceresco, valued at \$1,800; and the plaintiffs claim, and the evidence tends to show, that a considerable amount of goods was taken from Lohr's other stores, and placed in the store conducted in the name of Crowther & Co., of which no invoice was taken. Another one of these three stocks of goods Lohr removed to Lead City, S. D., the last of October, 1890, and about the 1st of December following, he sold this stock, which invoiced \$5,000 or more, to Emil Faust, for \$3,220; and on the 8th day of the same month B. S. Lilly placed on record a bill of sale from Lohr for the remaining stock of goods in Broken Bow, and took possession of the same. Having divested himself, in the manner stated, of all his visible and tangible property, Lohr, on the 9th day of December, 1890, one day after the bill of sale for the last stock of goods was placed on record, wrote the following letter to one of his creditors:

"Broken Bow, Neb., Dec. 9, 1890.

"L. Simon & Co., Chicago, Ills.: I suppose, ere this, you have been informed of my condition. Till just a few days ago, I thought I could pull through, but it is impossible. I am short \$8,000.00 and cannot account for it in but one way,—a direct steal.

"Resp.,

D. S. Lohr."

He owed a large amount of debts at the time of his failure, none of which he paid. His shortage largely exceeded \$8,000 and was undoubtedly, as he states in his letter, the result of "a direct steal;" but there is not a scintilla of evidence in the record indicating that any goods or money had been stolen from him. When he sold the stock of goods which he had taken to Lead City, he telegraphed to his wife: "Pay nothing. Will start home to-morrow." Very much of the evidence tending to prove the foregoing facts was excluded by the court. The statements of Lohr to his creditors and others, tending to prove his fraudulent practices and purposes, were excluded "for the reason," as stated in the bill of exceptions, "that said conversations were not held in the presence of any member of the firm of Crowther & Co.;" and the letter of Lohr to Simon & Co., which we have quoted, and other letters of like character, as well as Lohr's

telegram to his wife, were excluded upon the ground that they were irrelevant. But all this testimony was competent and relevant. The plaintiffs were not required to prove their whole case at once, or by one witness. To support the issue on their part, it was necessary to prove that Lohr turned the goods over to Crowther & Co. for the purpose of defrauding his creditors, and that Crowther & Co. did not pay value for the goods, or that, if they did pay for the goods, they did so with knowledge of the fraudulent purpose of Lohr in making the sale, or, which is the same thing, with such knowledge as would put a prudent man upon inquiry. It is very rare that a fraudulent purpose can be proved by direct and positive evidence. Hence, proof of every fact and circumstance having a tendency to show the fraudulent purpose on the part of Lohr was admissible. Proof of the fraudulent purpose on his part was not of itself sufficient to make out the plaintiff's case, but it was a necessary step in that direction. After establishing the fraudulent purpose on the part of Lohr, it was open to the plaintiffs to prove every fact and circumstance tending to show that Mrs. Lohr and Crowther either knew of this fraudulent purpose on the part of Lohr, or that they had good reason to suspect it. An actual agreement or contract between Lohr and Crowther & Co. that the latter would aid the former to defraud his creditors does not have to be shown. It is sufficient to avoid the transfer of the goods, if the facts and circumstances within the knowledge of Crowther & Co., or either of them, were such as fairly to induce the belief that they knew of the fraudulent purpose of Lohr, or that, having good reason to suspect it, they purposely refused to make inquiry, and remained willfully ignorant. In other words, actual knowledge of the fraudulent purpose of Lohr does not have to be brought home to Crowther & Co. If they purchased the goods under circumstances which would have put a man of common honesty and sagacity upon inquiry, they were bound to inquire; and, if they neglected to do so, then they are chargeable with all the facts due inquiry would have developed. *Singer v. Jacobs*, 11 Fed. Rep. 559; *Walker v. Collins*, 4 U. S. App. 406, 1 C. C. A. 642, 50 Fed. Rep. 737. A full consideration, paid in cash, will not protect a purchaser who has notice, actual or constructive, that the vendor is selling to defraud, hinder, or delay his creditors; and the reason is, that by aiding the debtor to convert his visible and tangible property, which cannot readily be concealed from his creditors, into money or negotiable securities, which it is easy to put beyond their reach, the purchaser thereby assists the debtor to carry out his fraudulent purpose. *Clements v. Moore*, 6 Wall. 299, 311; *Singer v. Jacobs*, supra; *Walker v. Collins*, supra.

As the case must go back for a new trial, it is proper to notice the basis of Mrs. Lohr's claim against her husband, which constituted the chief consideration for the transfer of this stock of goods. She claims that at the time of her marriage with Lohr, in 1873, she loaned him a sum of money, the exact amount of which she has forgotten, but it was about \$200 or \$300, and that in 1885 her husband paid her \$300 in satisfaction of this loan, and this sum she invested in the purchase of what is known as the "Sill Land." In 1890 the

Sill land, and a quarter section owned by Lohr, were traded by Lohr to Meeker for an old stock of goods, known as the "Ceresco Stock," valued at \$1,800. The land which Lohr contributed towards the purchase of this stock of goods was worth about as much as the Sill land, put in by Mrs. Lohr. Assuming that Mrs. Lohr had an interest in the Ceresco stock proportioned to the value of the Sill land which went into the purchase, she would own about one half of that stock. The whole of this stock went into the store of Crowther & Co., and was not invoiced, or in any way accounted for; the whole of it being treated as her property. Her right to the remainder of the Ceresco stock of goods, and to the principal stock turned over by Lohr, is attempted to be supported upon the following grounds: Lohr pre-empted a piece of land, proved up his pre-emption, and obtained a patent for the land. He lived upon the land with his family. After the patent was issued to Lohr for the land, Mrs. Lohr says, "I told him I thought I had earned the place, in holding it, and I thought it was right it should be mine, and he said it should be." This was all that was said or done about this land. The land was afterwards sold by Lohr, and the proceeds used in his business, and Mrs. Lohr now claims that the proceeds of the sale belonged to her, and constituted a debt against her husband, because he had told her the land should be hers. The law will not sanction this claim, as against Lohr's creditors. *Backer v. Meyer*, 43 Fed. Rep. 702; *Peters v. Construction Co.*, (Iowa,) 34 N. W. Rep. 190; *Humes v. Scruggs*, 94 U. S. 22.

The remaining ground upon which Mrs. Lohr claims she was a creditor of her husband, as stated by herself, is that she and her husband moved from Bennett, Neb., to Merna, Custer county, in 1882 or 1883, and that prior to leaving Bennett she made an agreement with her husband that if she would go to Custer county, and assist him in his business, he would give her one half of the profits, or \$50 per month, as she might elect; that she was opposed to moving to Custer county, and this agreement was made in order to get her to go; that she did go, and assisted her husband in his business for three or four years, and elected to take \$50 per month for her services, and that no part of this sum was ever paid to her until she and Crowther purchased the stock of goods in question from her husband.

Upon Mrs. Lohr's own statement of the facts, the claim she sets up against her husband for the money arising from the sale of his land, and for wages for services performed for her husband, are of no validity, as against the claims of his creditors. Mrs. Lohr had no separate property, save the Sill land, which went towards the purchase of the old stock of goods at Ceresco. She never carried on any business, trade, or labor on her separate account, nor performed any service or labor for any person except her husband, and was not his partner in business. The married women's act of Nebraska contains the provisions commonly found in such acts. Chapter 13, §§ 1411-1414, *Cobbey*, Consol. St. Neb. 1891. By the terms of the act, the wife cannot hold as her separate property, as against her husband's creditors, property which is the gift of her husband.

Property acquired by the husband during coverture, under this statute, is not, as it is under the civil law, community property, but belongs to the husband. The authorities are not quite uniform upon the question whether, under a statute like that in Nebraska, the husband is entitled to his wife's earnings for labor performed for others. Kelly, Cont. Mar. Wom. c. 6, § 5, p. 152, and cases cited. In *Seitz v. Mitchell*, 94 U. S. 580, 584, after citing many cases, Mr. Justice Strong, speaking for the supreme court, says:

"Many of these cases relate to the ownership of the wife's earnings; and nowhere, so far as we are informed, has it been adjudged that her earnings, or the product of them, made while she is living with her husband, and engaged in no separate business, are not the property of the husband, when the rights of his creditors have been asserted against them."

While the cases may not be entirely harmonious upon the question of the husband's right, under these modern statutes, to the earnings of his wife for labor performed by her for third persons, the authorities are uniform that such statutes do not operate to give the wife a legal claim upon her husband, or his estate, for wages, for performing her domestic duties as a wife, or for aiding and assisting him, by her labor, in any business pursuit he may be engaged in, and any promise of the husband to pay his wife for such services is without consideration, and void, as against the claims of his creditors; and property transferred to the wife by the husband to pay for such services, long after they were rendered, and after he has become insolvent, or is largely in debt, may be seized and appropriated to the payment of the husband's debts. Kelly, Cont. Mar. Wom. p. 152, and cases cited; *Seitz v. Mitchell*, 94 U. S. 580, 584, 1 MacArthur, 480; *McAnally v. O'Neal*, 56 Ala. 299; *Manufacturing Co. v. Hummell*, 25 N. J. Eq. 45; *Cramer v. Reford*, 17 N. J. Eq. 367, 382; *Humes v. Scruggs*, supra; *Hamill v. Henry*, 69 Iowa, 752, 28 N. W. Rep. 32; *Triplett v. Graham*, 58 Iowa, 135, 12 N. W. Rep. 143.

Mrs. Lohr's own testimony brings this case directly within the operation of this rule. The services for which she charges her husband were performed years before the transfer of the goods, which did not take place until her husband was largely in debt, and on the eve of a disastrous failure. Upon the undisputed facts of the case, therefore, the jury should have been instructed that the sale of the goods to Mrs. Lohr upon such a consideration was void, as against her husband's creditors. The transfer of property by an insolvent husband to his wife, under these circumstances, cannot be regarded otherwise than as a gift, and is constructively fraudulent and void, as against the husband's creditors, no matter how pure the motive which induced it. *Belford v. Crane*, 16 N. J. Eq. 265; *McAnally v. O'Neal*, supra.

Crowther stands in no better position than Mrs. Lohr. He admits he knew the character of Mrs. Lohr's claim against her husband, which was accepted in payment for the goods. He is therefore chargeable with notice of the want of consideration for the alleged purchase. The judgment of the court below is reversed, and the cause remanded, with instructions to grant a new trial.

HORN v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1893.)

1. RAILWAY COMPANIES — ACCIDENTS AT GRADE CROSSINGS — CONTRIBUTORY NEGLIGENCE.

Rev. St. Ohio, §§ 3336, 3337, as amended May 13, 1886, (83 Ohio Laws, 153,) provide that a locomotive approaching a grade crossing must sound the whistle and ring the bell, and that a failure to do so shall render the company liable to any person injured by such neglect. *Held*, that the statute did not confer a right of action upon the injured person unless the omission of the signals caused the injury, and that such person, if guilty of contributory negligence, could not recover. *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66, followed.

2. SAME.

A man 71 years of age approached a railroad crossing, riding in a close, covered wagon, so that he was unable to see on either side. He was familiar with that crossing, and should have known that a train was due about that time, for a freight train was awaiting it on a side track at that point; but he did not stop, or look or listen, before reaching the track, and was struck and killed. In an action by his administratrix, some of the plaintiff's witnesses testified that the statutory signals were given by the engineer, but others heard no signals. *Held*, that the deceased was guilty of contributory negligence, and plaintiff could not recover.

3. SAME—SIGNALS—CONFLICT OF EVIDENCE.

The testimony of some credible witnesses that they heard the whistle and bell of the engine is not in conflict with the testimony of others, who heard nothing; for the observation of the fact by some is entirely consistent with the failure of others to observe, or their forgetfulness of its occurrence. *Stitt v. Huidekopers*, 17 Wall. 393, followed.

4. SAME—BURDEN OF PROOF.

Although the burden of proving contributory negligence is upon defendant, the defense may be founded upon facts shown by plaintiff's evidence alone.

5. SAME—INSTRUCTIONS—DIRECTION OF VERDICT FOR DEFENDANT.

In an action for death by wrongful act, where the only legal inference that can be drawn from the evidence is that deceased was guilty of contributory negligence, an instruction to find for defendant is not error. *Pleasants v. Fant*, 22 Wall. 120, followed.

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio. Affirmed.

S. M. Hunter, for plaintiff in error.

Kibler & Kibler and J. H. Collins, for defendant in error.

Before JACKSON and TAFT, Circuit Judges, and SWAN, District Judge.

SWAN, District Judge. The plaintiff in error as administratrix of the estate of James S. Horn, deceased, brought this action in the court of common pleas for the county of Licking, in the state of Ohio, to recover damages for the death of her intestate, who was killed at the Maple street crossing in the village of Utica by the cars of the defendant in error, in the evening of September 4, 1890. The case was seasonably removed to the circuit court of the United States for the southern district of Ohio upon the petition of the railroad company, alleging the diverse citizenship of the parties, and it was there tried before Judge Sage and a jury. . At the close

of the plaintiff's evidence the circuit court directed a verdict for the defendant on the ground that the deceased's negligence precluded the plaintiff's recovery.

The time and locality of the accident are not in dispute, nor is there any essential difference in the relations of the circumstances given by the various witnesses. Decedent was 71 years of age, and was engaged in vending washing machines. He had resided in Utica for 4 years, and in its vicinity for 10 or 12 years, and was familiar with the railroad crossings in that village. At the time of his death, he was riding in a close, covered wagon, drawn by a single horse. The cover extended the whole length of the vehicle, and equally shut out his view of objects on either hand, and hid him from the sight of persons on each side. The evidence is conflicting as to the condition of his hearing, but, under the view taken of the case, that fact is immaterial.

The railroad, from its entrance, in the upper limits of the village, runs in a north and south line, parallel with Main street, as far south as North street, which it intersects at a right angle; thence it carries an easy curve through the village to the southeast, intersecting somewhat obliquely, and on the same level, Maple street, 300 feet south of North street. The course of North and Maple streets is east and west. The main track from about North street southward is flanked on each side by side tracks. On the night in question the east side track was occupied by a north-bound freight train, which extended from the switch on North street to a point below Maple street, but had been divided at the latter crossing to permit the passage of vehicles over the tracks. This train was awaiting the passage of the south-bound express train, due at Utica about 8 o'clock P. M., but that night 10 or 15 minutes late. On the south side of Maple street, about 15 feet from the track, stood a grocery, in front of which sat three persons who witnessed the accident. Two of these testified to its circumstances. Their testimony agrees, substantially, that they heard the whistle of the approaching train about the same time that the deceased (whom they did not see, but whom they recognized by his wagon) came from the eastward along Maple street until about opposite the grocery, where the horse seemed to halt momentarily, but was urged on, by the slapping of the reins, towards the crossing. The horse again seemed to halt when he reached the side track, but was apparently urged on as before, when the horse and wagon were almost instantly struck by the train, and Horn was killed. There is no evidence that the bell of the locomotive was rung. Several witnesses testified positively that the whistle was sounded, while there is a negative testimony from others that they did not hear it. The view of the coming train was somewhat obstructed to an observer on Maple street by the position of the freight train, and there is evidence that a lumber yard on the north side of Maple street, and an orchard north of North street, interfered with the sight of the track. There is no evidence, however, that the decedent made any attempt to look or listen for the train, beyond the slackening of the horse's pace in front of the grocery, and as he came upon the side track. There was no stop by the deceased

from the time he was first seen at the grocery until the collision, nor anything to indicate any effort to listen for danger. The train was running at a speed of 45 or 50 miles per hour, and did not regularly stop at Utica.

The charges of negligence upon which this action is based are (1) that "said passenger train was then and there negligently operated up to and over the crossing, by running at an excessively high, careless, negligent, and dangerous rate of speed;" and (2) "negligently and carelessly gave no signal of warning of its approach to said crossing."

But little stress is laid upon the first charge, except as it may be connected with the failure to give the statutory signals when approaching the crossing. It has been held that high speed is not per se evidence of negligence. *McKonkey v. Railroad Co.*, 40 Iowa, 206; *Klanowski v. Railroad Co.*, 64 Mich. 287, 31 N. W. Rep. 275. It is not claimed that the statutes of Ohio limit the rate of speed at which railroad trains shall be run in approaching highway crossings, or that it is restricted by any ordinance of the village of Utica. The examination of this question is, however, unnecessary, as the case does not call for its decision.

2. The ground of recovery most strongly pressed is founded on the alleged breach of the statute of Ohio. By section 3336, Rev. St. Ohio, as amended May 13, 1886, (83 Ohio Laws, 153,) it is provided:

"Every company shall have attached to each locomotive engine passing on its road a bell of the ordinary size in use on such engines, and a steam whistle, and the engineer in charge of an engine in motion, and approaching a turnpike, highway, or town crossing, upon the same level therewith, and in like manner when the road crosses any other traveled place, by bridge or otherwise, shall sound such whistle at a distance of at least eighty, and not further than one hundred, rods from the place of such crossing, and ring such bell continuously until the engine passes such road crossing. * * *"

Section 3337 imposes a penalty upon the "engineer or person in charge of any such engine who fails to comply with the provisions of the preceding section," and further provides that "the company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to any person or company injured in person or property by such neglect or act of such engineer or person." While this statute subjects railroad companies to liability for the damages occasioned by its violation, it does not confer a right of action upon the person injured, unless the omission of the signals caused the disaster. It does not absolve a plaintiff from the consequences of his own negligence. This statute, or its equivalent, has been construed by the supreme court of Ohio in *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66. It is there said:

"It is evident from this language [of the statute] that the failure to give signals must have occasioned the accident,—that is, must have been the proximate cause of it,—before a recovery can be had. The injury must happen by 'negligence of the engineer.' If it occurred from some other cause, liability cannot arise therefor, under that statute. Indeed, this statutory duty is not different, in the responsibility it imposes upon a railroad company, from that

arising under the common law. . . . Before, therefore, the plaintiff can recover because the signals were not given, he must cause it to appear that this failure of duty brought about the disaster; for, if his own imprudence was the moving cause, he cannot maintain his action, although the company may not have observed the provisions of the statute."

To the same effect are the cases of *Railroad Co. v. Elliott*, 28 Ohio St. 346; *Railroad Co. v. Whitacre*, 35 Ohio St. 627, 630.

This ruling in no degree conflicts with the rule of the federal courts that the onus of showing contributory negligence is upon the defendant. That defense may be, and often is, founded upon the facts shown by the plaintiff's evidence alone. While there was clearly an infraction of the statute, which is evidence of negligence on the part of the train hands, in the failure to ring the bell, because the statute requires both ringing of the bell and the sounding of the whistle within the prescribed limits, the action must fail if it appears that the decedent contributed to his own death by his negligence. If but one inference can be legally drawn from the facts, and it would have become the duty of the court to set aside a verdict for the plaintiff, had the issue been submitted to them, then the instruction was clearly correct. *Improvement Co. v. Munson*, 14 Wall. 448; *Pleasants v. Fant*, 22 Wall. 120; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125.

That it is the duty of a traveler upon a highway, when approaching a railroad crossing, to make vigilant use of his eyes and ears, is a proposition upon which the federal and state courts are in entire harmony. The traveler must look and listen before venturing to cross the track at any time. It has been well said that a railroad track is itself notice of danger. The necessity of this vigilance, which is the dictate of common prudence, is the more imperative when the traveler is familiar with the crossing, when its dangers are apparent from its surroundings, and when, from long residence in its vicinity, he may fairly be presumed to know, approximately at least, when a train may be expected. Under such circumstances, any relaxation from that degree of care which such knowledge requires is the omission of a duty which bars recovery. The object of the statute in enjoining the use of the bell and the whistle is not only the protection of the traveler, but also the safety of the train and its passengers, who are often endangered by such collisions. The act does not make the railroad company a guarantor of the effectiveness of these warnings to the end for which they were designed. If properly given, though unheeded by the traveler, because of his defective hearing, inattention, or any other cause not referable to any default of the railroad company, and a collision ensues, the statutory liability for the resultant injuries is not incurred. There is no evidence that the failure to ring the bell in any way contributed to this unfortunate accident, or that it might have been heard more distinctly, or further, than the whistle. On the contrary, the latter, as everybody knows, is audible at a far greater distance, and the evidence is that the whistle of this train was coarse and heavy, and seasonably sounded. While some witnesses testify they did not hear it, none denied that it was blown.

The witnesses Scott and Dennison, the only spectators of the col-

lision who testified, sat in front of the grocery, less than 50 feet from the track, and concur that the whistle was sounded at the water tank, which is 1,500 feet north of the Maple street crossing, and within the statutory limits for the signal, and that at that time the deceased was in front of the grocery, and about 50 feet from the track. Shaw, who drove across the Maple street crossing eastward, just escaping the train, heard the whistle, and located it near the water tank. Lampson, who was on the west side of Maple street, 250 feet from the track, heard it sounded when the train was, as he thought, 400 feet south of the water tank, and also at the Black Jack crossing, one quarter of a mile further north. Baughman, who was on Main street, testifies positively that it was sounded. Clark, who was at the depot, 75 feet south of Maple street, heard the rumble of the approaching train. These are the plaintiff's witnesses, and there is nothing in the record to discredit them. In the very nature of things, their affirmative testimony that the warning was given must be accepted as proof of that fact, notwithstanding an equal or greater number of witnesses failed to notice it, from whatever cause. There is in such cases no conflict of evidence as to the matter in question. The observation of the fact by some is entirely consistent with the failure of others to observe it, or their forgetfulness of its occurrence. *Stitt v. Huidekopers*, 17 Wall. 393; *Railroad Co. v. Elliott*, *supra*. Accepting therefore, as an established fact, that the whistle was sounded, and was heard by the deceased, and yet he persisted in attempting to cross the track ahead of the train, there can be no doubt that he should be held to be the author of his own misfortune. The same result must follow if he neglected the means of knowledge which would have informed him of his danger, and failed to use his faculties, through inattention or otherwise. Dennison, one of the only two witnesses who testified to the circumstances of the accident says that "Horn went across like any man that was driving across, supposing the track was all clear;" that his horse was walking when he passed the grocery, and when he went on the crossing. The latter fact is confirmed by Scott, the other spectator who was with Dennison. No one saw Horn look or listen. There was nothing in his conduct to indicate that he had any apprehension of the proximity of the train. It is true that his horse showed an inclination to halt in front of the grocery, 50 feet from the track, and again while on the side track, within five or six feet of the main line. These attempts, however, were manifestly not prompted by the caution of the driver, but by the instinct of the animal; for on each occasion the deceased urged him on. The only inference that can be drawn from these facts is that the deceased neither heard nor saw the coming train, nor did he make any attempt to do so. While it is true that his view of it was to some extent obstructed by the presence of the freight train on the east side track, and by other objects in the vicinity, the decedent carried with him, in the cover of his vehicle, and the position of his seat, the greatest obstruction to a view of the train. These conditions increased the dangers of the crossing, and should have stimulated his vigilance in approaching it, familiar as he was with the locality,

and knowing, as he presumably did, that the train would not stop at Utica, and that it was momentarily expected, as the position of the freight train, awaiting its passage, unmistakably denoted. It is undisputed that he could not see the train from his seat in the wagon, and equally certain that he made no effort to see it, or listen for its approach. From the time he reached the grocery until the collision, he was not seen to move from his seat, or change his position. While his conduct is persuasive that he did not hear the whistle, or the coming of the train, it is clear that, had he stopped and listened, he would have heard, at least, as others did, the warning of the whistle, if not the noise of the train. Assuming the correctness of the estimated speed at 50 miles per hour, it was evidently but 75 feet from the crossing when Horn's horse halted in his walk on the side track, not eight feet from the main track. It is incredible that the decedent, if his sense of hearing was not blunted, could have failed to notice the approach of the train; and it is obvious that, if he did hear it, he must have made a fatal miscalculation as to its proximity when he urged the horse over the crossing. There is no evidence that there was anything calculated to divert his attention, prevent his hearing, or lull him into security. In short, there is nothing to extenuate the recklessness of his approach to the crossing. *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Railroad Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125; *Haas v. Railroad Co.*, 47 Mich. 402, 11 N. W. Rep. 216. It is unnecessary to pass upon the omission of the plaintiff in the court below to give evidence of special damages.

The judgment of the circuit court must be affirmed, with costs.

SHEPPARD v. NEWHALL et al.

(Circuit Court of Appeals, Ninth Circuit. January 30, 1893.)

No. 41.

1. SALE—STOPPAGE IN TRANSITU—NATURE OF RIGHT.

The true nature and effect of the right of stoppage in transitu is not to rescind the sale, but to enable the seller to enforce his lien for the price, and to that end he is entitled to retake possession, by suit if necessary, and he must then hold the goods until the expiration of the credit, so as to be able to deliver them on payment of the price.

2. SAME—WHEN RIGHT OF STOPPAGE ENDS.

When goods sold have left the hands of the carrier, reached their destination, and the purchaser has disposed of them to one who gives a bond for the payment of the customs duties, and deposits them in his own name in a bonded warehouse, the seller's power to exercise the right of stoppage in transitu is gone.

3. SAME—BILL OF LADING—INDORSEMENT.

An ocean bill of lading was drawn to "E. H., or assigns." The drawee was a railroad agent at New York, who attended to the transshipment of goods, and he shipped the goods to San Francisco, and transmitted the bill of lading to the purchaser without indorsement. The purchaser indorsed the bills, and delivered them as security for advances. Before the arrival of the goods the purchaser became insolvent, and the shipper gave notice of stoppage in transitu. *Held*, that the shipper's right to retake possession of the goods was unaffected by the purchaser's indorsement and transfer of the bill of lading, as, "E. H." having failed to indorse them,

no title to the goods passed. 47 Fed. Rep. 468, reversed. *St. Paul Roller-Mill Co. v. Great Western Despatch Co.*, 27 Fed. Rep. 434, followed.

4. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

In an action to recover personal property, an objection that the complaint alleged that plaintiff was owner thereof, whereas the proof showed that he was entitled to possession under a vendor's lien, cannot be raised for the first time in the appellate court.

In Error to the Circuit Court of the United States for the Northern District of California.

Action by Winter Byard Sheppard, doing business under the firm style of Sheppard & Co., against Edwin W. Newhall and Walter S. Newhall, doing business under the firm style of Newhall's Sons & Co. to recover possession of personal property. Judgment for defendants. 47 Fed. Rep. 468. Plaintiff brings error. Reversed.

Statement by ROSS, District Judge:

This is an action brought to recover the possession of 12 cases of merchandise, consisting of woolen goods, etc., or their value, manufactured in and shipped from England by the plaintiff in error, who was also plaintiff in the court below, on an order given by Robert Gordon, a tailor doing business in the city of San Francisco, Cal., under the name of Gordon Bros. The goods were shipped in three lots,—six cases, numbered, respectively, 99 to 104, both inclusive, covered by one ocean bill of lading; two cases, numbered 105 and 106, respectively, covered by another ocean bill of lading; and four cases, numbered, respectively, 107 to 110, both inclusive, covered by a third ocean bill of lading. The goods were shipped by way of New York, and they were, by the bill of lading, made deliverable to E. Hawley, or assigns. Hawley was a railroad agent in New York, who attended to the transshipment of goods at that point. He received the goods in question from the ship at New York, and shipped them by rail to San Francisco, and, without indorsing the bills of lading, transmitted them to Gordon, at San Francisco, together with the annexed invoice of the goods, and the inland transportation entry and railroad receipt. On receipt of the bills of lading and accompanying papers, Gordon indorsed and delivered them to the defendants as security for certain moneys advanced to him at the time on the strength of such security, and also as security for other and larger advances that defendants in error had previously made to him, and which had not been repaid. All of the goods arrived in San Francisco, and those contained in cases 99 to 106 inclusive, were, prior to October 13, 1890, entered in the customhouse at San Francisco, and deposited in a bonded warehouse by the defendants in error, in their name, to await the payment of duties thereon. On October 13, 1890, Gordon became insolvent. On October 18, 1890, and before the cases numbered, respectively, 107 to 110, inclusive, had arrived in San Francisco, the plaintiff in error gave to the railroad company having the goods in transit notice of his claim and right of stoppage in transitu. On the arrival of these four cases in San Francisco, which was prior to October 30, 1890, the defendants in error paid the duty on them, and took them into their possession. On October 30, 1890, plaintiff in error also served on defendants in error a notice of his claim of right to stop the goods in transit. On November 8th following, plaintiff tendered to the defendants in error, in lawful money of the United States, \$3,536.47, which he then supposed was the amount, with interest, that they had advanced to Gordon, and paid out on the goods in question, at the same time offering to pay them the exact amount, with interest, that they had so paid, if the amount tendered was not correct; both of which offers were by the defendants in error refused; and they also refused to state the amounts they had advanced and paid out on the goods, and also refused the demand thereupon made upon them by the plaintiff in error for the possession of the property. The plaintiff then commenced the present suit to recover from the defendants possession of all of the goods, or their value, basing his right to do so solely upon the allegation that on November 8, 1890, he was the owner of the goods. The suit having resulted in a

judgment adverse to him in the court below, he brought the case here by writ of error.

The first assignment of error grows out of a motion made by the plaintiff in advance of the trial for an order on the defendants to give the plaintiff an inspection and copies of certain accounts and papers, which in its scope went beyond the matters bearing upon the issues in the case. The application was made pursuant to the provisions of section 1000 of the Code of Civil Procedure of the state of California, which reads as follows: "Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper, in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book or the document or paper from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness."

The court below granted the motion in so far as to allow the plaintiff an inspection and copies of (1) the original bills of lading covering the 12 cases of goods described in the complaint; (2) all accounts relating to moneys advanced upon the hypothecation of the 12 cases of goods; the court at the same time announcing that, should it appear at any time during the trial of the cause that the defendants were in possession of any books or papers material to the cause of the plaintiff, defendants would be required to produce them, and, if a production of such books or papers should make it proper to grant the plaintiff a postponement of the trial, such postponement would be ordered. In all other respects the motion was denied, to which ruling the plaintiff excepted. At the trial the defendants offered in evidence the three ocean bills of lading, with the accompanying papers, consisting of the invoice, inland transportation entry, and letter from Hawley, the consignee named in the bills of lading. To each of the bills of lading the plaintiff objected, on the ground that neither of them was indorsed by the consignee therein named. The court overruled the objection, and admitted the bills of lading in evidence, to which the plaintiff excepted. The ruling of the court in this particular is the basis of the 2d, 3d, 4th, and 5th assignments of error.

The witness E. W. Newhall, having testified, among other things, that the defendants, from and including August 20, to October 3, 1890, advanced to Gordon \$14,500 on the security of different goods and bills of lading, was asked by counsel for the plaintiff, "What became of the goods pledged to you for advances up to October 3d, amounting to \$14,500?" To this question counsel for defendants objected, on the ground that it was irrelevant, immaterial, and incompetent. The court sustained the objections, and the plaintiff reserved an exception. The witness was also asked by counsel for plaintiff, "On the 8th day of November, 1890, how much money was owing to you on these bills of lading covering the cases,—the subject-matter of this action?" Like objections of the defendants were sustained by the court, and the plaintiff excepted. These rulings are assigned for error in the sixth assignment.

Counsel for the plaintiff also moved the court to order the defendants to produce for his inspection their firm books, showing all transactions had with Robert Gordon, and the amounts realized from sales of pledged property, and the dates of the various receipts of money produced by such sales, for the purpose of ascertaining whether or not the advances theretofore made by the defendants to Robert Gordon, doing business as Gordon Bros., had not been repaid on or before the 8th day of November, 1890. This motion was denied by the court, and the plaintiff reserved an exception, and assigns the ruling for error in the eighth assignment.

Vincent Neale, for plaintiff in error.

Henry Ach, (Rothchild & Ach, on the brief,) for defendants in error.

Before McKENNA, Circuit Judge, and ROSS and KNOWLES, District Judges.

ROSS, District Judge, (after stating the case as above.) It is now well settled both in this country and in England that the true nature and effect of the right to stoppage in transitu is simply to restore the goods to the possession of the vendor, so as to enable him to exercise his rights as an unpaid vendor, not to rescind the sale. 2 Benj. Sales, (3d Ed.) pp. 1112-1115, and cases there cited. In California it is, in effect, so provided by statute. Civil Code Cal. § 3080. To enforce his rights, the vendor must be, and is, entitled to retake the possession of the property, and must hold it until the expiration of the credit, so as to be able to deliver it upon the payment of the price; for up to that time the vendee has the right to pay the price, and take the property. *Babcock v. Bonnell*, 80 N. Y. 244. If not paid at the time stipulated, in what way the vendor should proceed to enforce his lien it is not here necessary to decide. Courts of equity entertain jurisdiction for the enforcement of such liens, and there are also statutory provisions bearing on the subject. 2 Benj. Sales, (3d Ed.) pp. 1113, 1114, and cases there cited; Civil Code Cal. §§ 3076-3079, and cases cited in notes thereto. The right to retake possession of the property, where the right to stop it in transit exists, necessarily implies a right to maintain an action for its recovery, where resort to suit is necessary. In California the right to "resume possession" is given by statute. Section 3076 of the Civil Code reads:

"A seller or consignor of property, whose claim for its price or proceeds has not been extinguished, may, upon the insolvency of the buyer or consignee becoming known to him after parting with the property, stop it while on its transit to the buyer or consignee, and resume possession thereof."

In the present case it became necessary for the plaintiff to sue to regain possession of the property; and, in doing so, he alleged in his complaint, as amended, as the basis of his right to recover its possession, that he was the owner of the property on the 8th day of November, 1890, and that, the property having theretofore come into the possession of the defendants, plaintiff, on the day named, demanded its possession, which demand was refused by the defendants, who continued to withhold its possession from the plaintiff. The amended complaint contains no other allegation of the plaintiff's right to its possession than the allegation of ownership imports; and as the facts show that the plaintiff was not the owner of the property at the time stated in the complaint, or at the time of the institution of the suit, it is here urged for the defendants in error that the complaint, as amended, is insufficient to support a recovery by the plaintiff, even if a lien upon the goods in his favor exists. But this objection was not made in the court below, and it is not permissible to hold in ambush a point of variance that does not go to the merits of the controversy between the parties, and raise it for the first time in the appellate court. A presumption of the right to the immediate possession of property flows from its ownership, and therefore the allegation contained in the amended complaint in the

present case of ownership in the plaintiff of the property in question was attended with that presumption. If the proof showed only a special interest in the plaintiff, inconsistent with its ownership, the objection should have been taken in the trial court, where the plaintiff would have had an opportunity to amend his pleading to conform to the proof, and thus have attained the end to be desired in all judicial proceedings,—an adjudication upon the merits of the controversy. The objection comes too late when made for the first time here.

When the goods included in cases numbered, respectively, 99 to 106, both inclusive, arrived in San Francisco, Gordon, the purchaser of them, went in person to the customhouse to enter them. There was at the time a regulation in force that the entry should not be made without producing or accounting for the original bill of lading. Gordon accordingly took with him to the customhouse Newhall, the holder of the original bills of lading, covering cases 99 to 106, who there produced them, and thereupon the goods were entered in the name of Gordon. A bond was then given for the payment of the duties, and the goods placed in a bonded warehouse, and a warehouse receipt therefor issued to Newhall. All of this was prior to the attempt on the part of the plaintiff in error to exercise the right of stoppage in transitu. In respect to these goods, we have no difficulty in holding that the transit had ended before the attempt was made to stop them. The goods were sold to and intended for Gordon, doing business in San Francisco. They had left the hands of the carrier, and the place of their deposit was in no way connected with their transmission to the purchaser. They had reached their destination, and the purchaser had, by his personal and affirmative act, disposed of the goods, and his assignee had given bond for the payment of the duties upon them, and deposited them in his own name in a bonded warehouse, for which he held the warehouse receipt.

But in respect to the goods contained in cases numbered, respectively, 107 to 110, inclusive, the case is different. These were still in the hands of the carrier when the plaintiff in error gave notice of and asserted his right of stoppage in transitu, and it becomes necessary, therefore, to consider the objections presented by the fifth assignment of error to the introduction in evidence of the bill of lading covering those cases. The bill of lading was drawn, as has been said, to "E. Hawley, or assigns." It was not indorsed by Hawley. Consequently, it is urged by plaintiff in error, no title passed to defendants. It is provided by section 2127 of the Civil Code of California as follows:

"All the title to the freight which the first holder of a bill of lading had when he received it passes to every subsequent indorsee thereof, in good faith, and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange."

And by section 2128 it is declared:

"When a bill of lading is made 'to bearer,' or in equivalent terms, a simple transfer thereof by delivery conveys the same title as an indorsement."

These sections, read together, as they must be, plainly declare that the title to goods described in bills of lading drawn to order passes by indorsement, drawn to bearer by delivery. There are many cases which hold that the delivery of a negotiable or quasi negotiable instrument, like a bill of lading drawn to order, will vest title without indorsement, as against the person who made delivery without such indorsement; for he is justly held estopped from setting up his own mistake, omission, or fraud to defeat the effect of his own action. The case of *St. Paul Roller-Mill Co. v. Great Western Despatch Co.*, 27 Fed. Rep. 434, referred to in the opinion of the court below, was a case of that character. There the bill of lading was drawn to the order of the shipper, which drew its draft at 15 days' sight, against the flour mentioned in the bill of lading, upon one Whitcomb, of Boston, and forwarded the draft, with the bill of lading attached, unindorsed, to the Tremont National Bank of Boston, for acceptance and collection. Upon Whitcomb's acceptance of the draft, the bank delivered to him the bill of lading, without indorsement, and he afterwards indorsed and transferred the bill of lading to the National Bank of Redemption, for an antecedent debt due from him to that bank. Afterwards, and before the flour arrived in Boston, the shipper, being informed of the insolvency of Whitcomb, notified the carrier not to deliver the flour to him or his assigns; but upon its arrival it was delivered to Whitcomb's assignee, and the shipper thereupon sued the carrier for its conversion. It was urged for the plaintiff that the bill of lading, running to the order of the shipper, and delivered to Whitcomb, without indorsement, carried on its face notice that he held it subject to equities between prior parties; but the court said that it was of no importance that it was delivered unindorsed; that it was the intention of the shipper that its agent (the Tremont Bank) should deliver the bill of lading on acceptance of the draft. It would have been manifestly unjust to have permitted the shipper to take advantage of his own failure to indorse the bill of lading which he delivered, with the intention of carrying the right to the property covered by it. But that is by no means the present case. Here the bill of lading was not drawn to the order of the shipper, the plaintiff in error, but, in effect, to the order of E. Hawley, by whom it was delivered without indorsement, and the omission of which the plaintiff seeks to avail himself, in protection of his lien for the unpaid purchase price of the goods, is not his own omission, but that of Hawley. The right of the plaintiff in error to stop the goods in transitu upon discovering the insolvency of the vendee was perfect, not only as against the vendee, but as against all others, except a purchaser for value, taking by indorsement of the bill of lading, in the usual course of business, and without notice. *Civil Code Cal. § 2127, supra*; *Stanton v. Eager*, 16 Pick. 476; *Akerman v. Humphrey*, 1 Car. & P. 56. At least one of these conditions is wanting in the present case, namely, the indorsement by the party in whose favor the bill was drawn. We are therefore of the opinion that the right of the plaintiff in error to retake possession of cases numbered 107 to 110, inclusive, for the protection and enforcement of his vendor's lien, was unaffected by

the transfer of the bill of lading covering them to the defendants. From these views it becomes unnecessary to consider the remaining assignments of error. Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

THATCHER v. GOTTLIEB.

(Circuit Court, D. Colorado. February 18, 1893.)

STATUTORY NEW TRIAL—FOLLOWING FORMER DECISION ON WRIT OF ERROR.

Where, on a new trial to determine the title and right of possession of land, under a state statute giving a right to a new trial in such cases, the material facts, as disclosed by the evidence, are substantially the same as the facts on the former trial, and substantially as the facts before the circuit court of appeals on the review of such former trial, the case will be disposed of as indicated by the appellate court.

At Law. Action by Lewis C. Thatcher against Joseph Gottlieb to determine the title and right of possession of land. Plaintiff's motion for a new trial denied.

For decision of circuit court of appeals on writ of error on a judgment entered on a former trial, see 51 Fed. Rep. 373, 2 C. C. A. 278.

V. D. Markham and J. W. Mills, for plaintiff.

R. T. McNeal, for defendant.

RINER, District Judge. This case is before the court on motion for a new trial. The case has been three times tried in this court and once in the court of appeals. The first trial resulted in a finding in favor of the plaintiff, and the defendant took a new trial under the statute. On the second trial of the case, judgment having been entered in favor of the plaintiff, the defendant carried the case to the court of appeals, (51 Fed. Rep. 373, 2 C. C. A. 278,) where the judgment of the circuit court was reversed, with directions to enter a judgment for the defendant, which was done, and thereupon the plaintiff took a new trial under the statute, and the case came on again for trial before this court and a jury at the November, 1892, term. At the conclusion of the evidence the court directed the jury to return a verdict for the defendant, which action of the court is now assigned for error, and is made the basis for this motion.

Since the motion was argued, I have examined very carefully the transcript of the record before the court of appeals, and am satisfied that the material facts as disclosed by the evidence upon this trial are substantially the same as they were upon the former trial before this court, and substantially the same as the facts before the court of appeals. When that court held the facts sufficient as a basis for an opinion directing a verdict for the defendant, did it not, in effect, say that the same facts, when again offered in evidence, would be again held sufficient to sustain a like opinion? I think there can be but one answer to this question. In the concluding part of the opinion the court of appeals say:

"Even if it be true that the conveyance made by Annie C. McCormick to Lewis Thatcher terminated the right of the trustee to sell the property, as was held by the trial court,—a question upon which we express no opinion,—it is nevertheless entirely clear that Gottlieb relied upon the advice given him by counsel that the note secured by the trust deed could be lawfully levied upon and sold under execution, and believed that the purchase of the note gave him the right to subject the land to sale for the purpose of paying the debt evidenced thereby. In our judgment, the facts found justify but one conclusion, and that is that, in paying the taxes upon the land since 1879, Gottlieb was clearly acting under color of title obtained in good faith, and has thus become entitled to the land under the provisions of the statute of Colorado."

The facts being substantially the same upon this trial, I think it was clearly the duty of the court to direct a verdict for the defendant. The motion, for a new trial will be denied, a judgment entered upon the verdict, and the plaintiff allowed 60 days within which to prepare and present a bill of exceptions for allowance.

KINNEY v. UNITED STATES.

(Circuit Court, D. Connecticut. February 6, 1893.)

No. 385.

1. UNITED STATES MARSHALS—FEES—EVIDENCE—MEMORANDA.

Entries and memoranda made by a deceased United States marshal are admissible in evidence in favor of his administratrix in an action by her against the United States to recover for services and disbursements of the intestate in his lifetime.

2. SAME—EVIDENCE—ALLOWANCE BY COURT.

The approval of a United States marshal's account by a circuit court of the United States under Act Feb. 22, 1875, (18 St. p. 333,) is *prima facie* evidence of its correctness, and, in the absence of clear and unequivocal proof of mistake on the part of the court, is conclusive.

3. SAME—ATTENDANCE AT "HEARINGS."

A hearing on the question of admission to bail, or on motion to adjourn, or on arraignment or commitment, constitutes a "hearing and deciding," for the attendance upon which a United States marshal is entitled to a *per diem* fee.

4. SAME.

A United States marshal is not entitled to *per diem* compensation for attendance before the court where no certificate is filed showing that the court was open, and business transacted. *Marvin v. U. S.*, 44 Fed. Rep. 405, followed.

5. SAME—ARRESTS—EXPENSES.

A marshal is not entitled to expenses incurred in endeavoring to make an arrest, when he had no warrant, and could not have arrested the accused if found.

6. SAME.

A marshal is entitled to expenses incurred in making an arrest, although such arrest was not made by the deputy sent for that purpose, but was made in consequence of information acquired in traveling about for that purpose, under the direction of the district attorney; and the marshal is not restricted to the statutory allowance of two dollars per day.

7. SAME.

He is also entitled to the expenses of the deputy in thus traveling about under direction of the district attorney, it appearing that the arrest followed directly from information thus obtained.

8. SAME.

Such officer is entitled to mileage in serving writs where it appears that the railroad route traveled was the nearest practicable. *Fletcher v. U. S.*, 45 Fed. Rep. 213, followed.

9. SAME—RAILROAD TRAVEL.

Also to mileage for the distance proved to have been charged for by the railroad company, though the actual distance was a little less, and for the distance from the railway terminus to the destination.

10. SAME.

Also charges for actual travel, where the services and returns were in the same place, and there is proof that such charges had always theretofore been allowed and paid.

11. SAME—EXPENSES IN LIEU OF MILEAGE.

Also for actual traveling expenses charged in lieu of mileage.

12. SAME.

Also for travel for procuring witnesses from outside the district by direction of the district attorney.

13. SAME—TRAVEL TO ATTEND COURT.

The marshal is entitled to charges for travel to attend court on days which were consecutive. *Harmon v. U. S.*, 43 Fed. Rep. 560, followed.

14. SAME—CONVEYING PRISONER.

Also to expenses incurred in taking a prisoner from the jail in one city to the courthouse in another, such a case not falling within Rev. St. § 1030, providing that for bringing any prisoner into court without writ, and on the order of the court or district attorney, no fees shall be charged.

15. SAME.

Also for mileage for taking a prisoner to and from the commissioner and jail, by virtue of warrant and mittimus under the Connecticut practice, as in such case Rev. St. § 1030, has no application. *Harmon v. U. S.*, 43 Fed. Rep. 560, followed.

16. SAME—RELEASES ON BAIL BOND.

Also for releases on bail before the commissioner, where such release involves the taking of a bail bond.

17. SAME—CARRIAGE HIRE.

Also for the hire of carriages to transport prisoners, and serve process, where the services are of great value, and the charges include only amounts allowed for travel or actual expenses.

18. SAME—STATIONERY.

Also for stationery furnished by the marshal for the use of the court, proper vouchers for the cost of the same being duly produced.

19. SAME—PAYMENTS TO COURT OFFICERS.

Also for payments made by the marshal to court messengers, criers, and bailiffs in pursuance of statutory requirement.

At Law. Action by Sarah T. Kinney, as administratrix of John C. Kinney, under Act March 3, 1887, (24 St. p. 505,) to recover for services and disbursements of her intestate as a United States marshal. Judgment for plaintiff.

L. E. Stanton, for plaintiff.

George G. McLean, U. S. Atty.

TOWNSEND, District Judge. This is an action brought under the provisions of the act of March 3, 1887, (24 St. U. S. p. 505,) wherein the plaintiff, as administratrix of the late John C. Kinney, seeks to recover certain sums for services and disbursements of said John C. Kinney as United States marshal, in those of his accounts settled after June 15, 1885, and including matters which accrued up to August 4, 1886, when he retired from office. The items of

said accounts have all been presented to the United States. Some have been suspended, some have been allowed in whole or in part after having been disallowed, others have been disallowed altogether. The United States, through its district attorney, denied the plaintiff's right of recovery. A transcript from the books and records of the treasury department was furnished by the United States under order of court. The defenses to the plaintiff's claim appear in the "statements of differences" stated by the auditor, and these are repeated in the bill of particulars. Most of the objections to the account raise questions of law which will be separately considered. The questions of fact seem to me to be generally established in favor of the plaintiff, for the following reasons: First. The plaintiff being dead, and this being a suit by his administratrix, the entries and memoranda of the deceased relevant to the issue are admissible in his favor. Gen. St. Conn. 1888, § 1094. These entries, consisting of entries of the warrants against and accounts in favor of the plaintiff's decedent, were introduced and identified by the plaintiff, and show a balance, as claimed by her, in favor of the late marshal. Second. The settlement by decedent of his accounts with the United States was made in accordance with the provisions of the act of February 22, 1875, 18 St. at Large, p. 333. Under this law the marshal, as appears by the certificate of this court, "rendered to this court an account of his fees and expenses from the 1st day of January, 1885, to the 30th day of June, 1885, with the vouchers and items thereof, and, in the presence of Lewis E. Stanton, United States attorney, has proved on oath to the satisfaction of the court that his services and travel charged therein were actually and necessarily performed, and that the expenses were necessarily incurred;" and said account was duly proved. Further accounts for each subsequent six months, and covering the entire matter in this suit, were rendered and proved in the same manner. If any objection is made to such an account, the burden is on the United States of establishing the validity of the objection. "A sufficient answer to this objection is furnished in the findings of the court below that the account of the commissioner for the fees charged for the services in question was verified by oath and presented to the United States court, of which he was a commissioner, in open court, in the presence of the district attorney, approved by the court, and an order approving the same as being in accordance with law, and just, was entered upon the record of the court. The approval of a commissioner's account by a circuit court of the United States, under the act of February 22, 1875, (18 St. p. 333,) is prima facie evidence of the correctness of the items of that account; and, in the absence of clear and unequivocal proof of mistake on the part of the court, it should be conclusive." U. S. v. Jones, 134 U. S. 488, 10 Sup. Ct. Rep. 615; Harmon v. U. S., 43 Fed. Rep. 560.

The plaintiff introduced, by way of further proof, a number of witnesses, who were deputies under said Kinney during his term as marshal, and who testified as to the services rendered and moneys disbursed by them under the orders of said marshal, or of the court, or of the district attorney. I therefore find (with certain

exceptions, to be hereafter noticed) that the services were rendered and moneys disbursed as stated in the accounts of said Kinney with the United States. As these items are scattered through the various divisions of the summary of a part of the bill of particulars on which my opinion is based, I shall, in passing upon them, merely state that they are allowed. The reasons for such allowance are expressed in the above general statement. The total amount of the bill of particulars is \$2,087.69, but the real demand is only \$1,134.53. This latter sum is the excess of the charges made by the marshal against the government for the period above named over the amount of warrants chargeable against him for the same period. It relates to two accounts,—one the account for marshal's fees and expenses, and the other the account for miscellaneous expenses of courts,—and a small item, undisputed, for support of prisoners for year 1886. Of this latter sum \$887.69 has been disallowed or suspended, and it is this amount which is embraced in a summary of a part of the bill of particulars. This summary is filed in the cause as an amendment of said bill of particulars. The difference between the amount thus suspended or disallowed and the whole sum demanded by the plaintiff is simply an amount allowed by the auditor, but not paid. It is not paid, because in June, 1889, the late marshal handed back to the United States substantially all the funds in his hands, and had nothing left with which to pay any balance which may be found due to his estate.

The items suspended and disallowed appearing in this long bill of particulars, are summarized under 15 heads as follows:

Item 1. Per Diems before Commissioners and Courts, \$198. Of this amount \$98 relates to per diems before commissioners. The auditor claims that no hearing on the question of admission to bail, or on motion to adjourn, or on arraignment or commitment constitutes a "hearing and deciding" within the law; in other words, he says that per diems can only be charged for a day on which a trial of the accused is had. I do not so understand the law. In *U. S. v. Jones*, *supra*, Mr. Justice Lamar says, (page 487, 134 U. S., and page 616, 10 Sup. Ct. Rep.):

"The decision upon a motion for bail and the sufficiency thereof is a judicial determination of the very matter which the statutes authorize and require him to hear and decide, to wit, whether a party arrested for a crime against the United States, when brought before him for examination, shall be discharged or committed on bail for trial, and, in default thereof, imprisoned. With respect to motions for continuance, the granting or refusing of them is unquestionably a necessary incident and a part of the hearing and determination of criminal charges."

The charge of \$98 for per diems before commissioners is allowed.

The balance of the item, being \$100, is for per diems before the court; disallowed by the auditor because no certificates were filed by the marshal to show that courts were open and business was transacted. Of said amount \$80 have since been allowed upon explanation. As to the rest, counsel for plaintiff claims that, as the services herein referred to were rendered prior to the passage of the appropriation bill of August 4, 1886, whereby officers were obliged to show the transaction of business in order to recover, these charges

should be allowed. He contends that by the rendition of the service the fee is earned, and that thereby a contract arises to pay said fee. I feel obliged on this point to follow the decision in *Marvin v. U. S.*, 44 Fed. Rep. 405, in which Judge Shipman, disallowing a similar item, says, (page 408:)

"The appropriation bill of August 4, 1886, (24 St. p. 253,) provided that no part of the money appropriated by the act should be used in the payment of per diem compensation to a clerk or marshal for attendance in court except for days when business was actually transacted in court. This means business which belongs to the court, and is transacted by the judge; and places upon the clerk the burden of showing that business of the court was actually transacted on those days. The minutes simply show that the court was opened and adjourned, and, although the petitioner says that doubtless business of the court was transacted, he does not show what it was, within the proper meaning of that language, and I am therefore compelled to disallow the item."

This disallowance only affects the \$20, the balance having already been admitted by the United States. Upon item 1 the amount allowed is \$178.

Item 2. Expenses of Arrest. The two items of \$1.30 each for expenses in endeavoring to make arrest are disallowed. I do not find any authority for such expense, within the district, where, as in this case, the officer had no warrant, and therefore could not have made the arrest even if he had found the accused. The item of \$8.76, expenses of arrest, was disallowed on the ground that the statutory charge of \$2 per day included all such expenses. It appeared from the testimony of the deputy marshal that these expenses were incurred under the direction of the United States district attorney. The accused was not found at the place where the deputy marshal first went, but, by traveling about in New York and Massachusetts under the direction of the district attorney, he finally secured information which led to the arrest of the accused. The witness further testified that all the expenses of arrest were incurred in the service and on behalf of the United States. The auditor claims as matter of law that, no matter how meritorious the service, the officer can only receive two dollars per day, even though he may have expended several times that sum. But it seems to me that this construction of the law is not in accordance with the decisions. Thus, in *Fletcher v. U. S.*, 45 Fed. Rep. 214, the court allows such charges where the arrest was actually made outside the district, on the ground that by such services expense is saved to the United States. It seems to me that, where such expenses are incurred under direction of the United States district attorney, the presumption is that this course was taken in order to save expense, and to best promote the ends of justice, and that, as the officer is bound to obey such instructions, such expense should be repaid to him, irrespective of the question as to who may have finally made the arrest. The item of \$8.76 is allowed. As to the item of \$48.80, expenses of arrest, it appeared that, although the prisoner was not arrested by the officer making this charge, yet that his arrest and conviction followed directly as a result from information obtained by said officer while rendering said services under the direction of the United States district attorney. This item is, for the above reasons, al-

lowed. The item of \$1 for cash paid police is allowed. The amount allowed upon item 2 is \$58.56.

Item 3. Travel to Serve. The charge of \$35.38 is allowed, for the reasons stated in reference to the item of \$8.76 in No. 2 of the summary. This travel was a part of the expenses in the same case. The item of \$4.50,—75 miles,—for services in New York, is disallowed. The items of \$7.20 and \$3.24 are allowed, both upon the presumptions in favor of the account, and, further, because it appears that these costs were taxed up against the accused, were paid by him, and were afterwards turned over to the United States. The item of \$1.20 charged for mileage is allowed. It appeared from the testimony of the officer that he traveled the nearest practicable railroad route at the time. *Fletcher v. U. S.*, *supra*. The items of \$8.80 and \$132 are allowed under the authority of *Harmon v. U. S.*, 43 Fed. Rep. 566, approved in *Fletcher v. U. S.*, *supra*. The charges aggregating \$1.04, disallowed by the auditor on the ground that the mileage between Hartford and New Haven should be only 36 miles, is allowed, the proof showing that the fare charged by the railroad company is for 37 miles, and that it is one mile from the railroad station to the jail. The items of \$3.86 and \$2.10 for travel where the services and returns were in the same place, are allowed; the proof showing that in such cases only actual travel was charged, and that such charges have always heretofore been allowed and paid. Item \$21.12 is allowed. Item \$2.46, travel to serve, is allowed. The officer testified, and I find, that he actually traveled, and served the summons. The item of \$5.25 for travel to summon witnesses is allowed. Birge, the officer, testified, and I find, that the above sum represented his actual traveling expenses, and that he elected to charge therefor in lieu of mileage. U. S. Rev. St., end of section 829, p. 157. The item of \$75.34 is allowed; also \$2.80. Items 52 cents, 26 cents, \$28.70, and 20 cents, for mileage, are allowed for reasons above stated. The item of \$1.50, summoning witnesses in New York, was afterwards admitted by the auditor, and is allowed. Item 50 cents is allowed. The items of \$26.52, \$53.10, 60 cents, and \$13.20 are allowed. It appears and is found that the plaintiff's decedent, by direction of the United States attorney, went to New York, Boston, and other places to secure witnesses in case of *U. S. v. Thompson*, making two trips. As a result, some 113 witnesses in all were necessarily summoned. *Fletcher v. U. S.* *supra*. The item of \$43.76 is allowed. It appeared and is found that no claim has ever been made by the marshal of Massachusetts, and that the services were rendered by the officer from this district. Upon item 3 the amount allowed is \$339.97.

Item 4. Dinners and Expenses of Guard. The charge of \$2.40 is allowed, and the one of \$10 also allowed. I find from the testimony of the officer that there is no jail at New Milford, and that on that account the prisoner was brought to jail by the usual route. Upon item 4 the amount allowed is \$12.40.

Item 5. Travel to Court. The marshal charged for three travels to attend court at New Haven, upon days which were consecutive. He must either remain over these intervals or return and go again.

These travels are to be allowed, under the authority of *Harmon v. U. S.*, supra. But both the marshal and auditor have made errors of computation. Three travels, at \$3.80, equal only \$11.40, and not \$14.40, as the marshal has charged. On the other hand, the auditor had no right to deduct \$10.80, since that leaves the marshal only \$3.60. The proper sum to be now allowed to make up the three travels is \$7.80. Upon item 5 I allow \$7.80.

Item 6. Errors in Computation. I find no evidence of error as to the item of \$2, and the same is allowed. The item of \$10 is an error of the marshal, made by mistakenly carrying forward figures from one page to another, and is to be disallowed. Upon item 6 the sum allowed is \$2.

Item 7. Commissions on Disbursements. A small portion of this charge, amounting to 95 cents, should be disallowed, as the disbursements themselves are reduced by disallowances. The balance should be allowed. Upon item 7 the amount allowed is \$2.21.

Item 8. Mileage to Courts and Jail. These items, amounting to \$17.40 are allowed. It appeared that the charges represented actual travel or actual expenses. They would, therefore, be proper, either under section 829, Rev. St., or under *Harmon v. U. S.*, supra. The item of \$7.60, included therein, was for taking a prisoner from the jail at New Haven to the courthouse at Hartford, court being held at Hartford. I do not understand that a case like this falls within the provisions of Rev. St. § 1030, which seems to contemplate those cases where the court is held in the place where the prisoner is in custody. If this were otherwise, the expenses in a case like the one under consideration would have to be paid by the officer out of his own pocket. Upon item 8 the amount allowed is \$17.40.

Item 9. Mileage to and from Commissioner and Jail. These items amount to \$15.10. The auditor disallows them under section 1030, Rev. St. U. S. Under the practice in Connecticut the complaint of the grand juror contains at the end a warrant, which, however, does not accurately define the offense, but merely orders that the officer forthwith bring the body of the prisoner into court. When, on such complaint, the officer produces the prisoner, the warrant is *functus officio*, and on continuance a mittimus is issued. After waiver of trial, or finding of probable cause, a new mittimus is issued, when the prisoner passes beyond the jurisdiction of the commissioner, and is committed to await the action of the court. Under this practice, a prisoner is never committed without a mittimus. This is, as I understand it, in conformity with the practice at common law. The officer is bound to obey the order, and must have authority for the commitment. Under this practice I am of the opinion that section 1030 does not apply, and that such charges are proper, under the authority of *Harmon v. U. S.*, supra, and I therefore allow the whole of said charge of \$15.10. Upon item 9 the amount allowed is \$15.10.

Item 10. Care of Property Attached. This item of \$18 has been allowed by the auditor, and is therefore allowed. Upon item 10 the amount allowed is \$18.

Item 11. Copies for Town Clerk and Defendant. This item of \$21.25 is admitted by the auditor, and is allowed. These copies are required under the practice in the state of Connecticut. Upon item 11 the amount allowed is \$21.25.

Item 12. Releases on Bail before Commissioner. These amount to \$3.50, of which 50 cents has since been allowed. As each release involved the taking of a bail bond, for which the marshal had a right, under Rev. St. U. S. § 829, to charge 50 cents, I allow the whole of said charge. Upon item 12 the amount allowed is \$3.50.

Item 13. Transportation of Prisoners, and Service. These two items of carriage hire in order to transport prisoners and serve process are allowed. The evidence upon this point shows that the services were of great value, and that the charges include only amounts allowed for travel or actual expenses. *Harmon v. U. S.*, *supra*. Upon item 13 the amount allowed is \$5.

Item 14. Stationery for Courts. This charge is found to be proper. The stationery was furnished by the marshal, and proper vouchers for the cost of the same were duly produced. Upon item 14 the amount allowed is \$17.45.

Item 15. Court Messengers, Criers, and Bailiffs. These items were merely suspended. Nearly all of them have since been allowed. The evidence shows, and I find, that all these payments were made by the marshal to the officers in question, in pursuance of his legal duty according to the statutes. The charges must be allowed. Upon item 15 the amount allowed is the whole charge, to wit, \$148.

All of the accounts involved in the case were presented by the marshal, and all his rights accrued under them within six years before the commencement of this suit, which was on June 15, 1891. It follows from the above conclusions that the sum of \$1,134.53, or the whole demand of the plaintiff, is divided thus: Now disallowed, \$41.05; now allowed, \$846.64. Formerly allowed, but not paid, \$246.84. The sum of the last two items is the amount which the plaintiff is entitled to recover. Let judgment be entered in favor of the plaintiff for the sum of \$1,093.48, with costs.

HENDERSON et al. v. HENSHALL

(Circuit Court of Appeals, Ninth Circuit. January 30, 1893.)

No. 69.

1. DECEIT—FALSE REPRESENTATIONS.

To induce plaintiff to make an exchange of lands, defendant stated that the tract owned by him contained about 560 acres, mortgaged for \$3,000, was worth \$32 an acre; that 80 acres were fenced, 160 planted, and 240 cleared; and to prevent inspection of the land assured plaintiff's husband that the representations could be relied on, and introduced a person, represented as a wealthy banker, as one who was disinterested, and knew all about the land. Such person repeated the representations, and plaintiff's husband executed a contract of exchange. Plaintiff, desiring an op-

portunity to determine the quality and condition of the land before executing a deed, was dissuaded therefrom by defendant's repetition of the representations, and statements that examination was unnecessary, that the transaction must be closed at once, and threats of legal proceedings; and thereupon the deeds were executed. In fact, the land was wild, rocky, and unfit for cultivation, mortgaged for \$700, worth but \$5 per acre, no part was cleared, cultivated, or planted except about four acres, and no part was fenced. *Held*, that these facts constituted a cause of action for damages for false representations.

2. APPEALABLE ORDERS—RULING ON MOTION TO DISMISS.

The circuit court of appeals will review a decision of the circuit court denying a motion to dismiss an action on the ground that it abated by the death of the original plaintiff, where such motion involves the jurisdiction of the court over the parties to the action.

3. SURVIVAL OF ACTIONS—ACTION FOR DECEIT.

Under Civil Code Cal. §§ 953, 954, defining a thing in action, and providing that, when arising out of a right of property, on the death of the owner it passes to his personal representatives, a cause of action for damages by reason of false representations as to the value of land, whereby one is induced to part with his land in exchange, will survive.

In Error to the Circuit Court of the United States for the Northern District of California.

Action by Mary Alice Henshall against Charles Henderson, W. D. Holcom, and John Purcell for damages for false representations leading to an exchange of lands. Plaintiff having died pending the suit, John Henshall, special administrator of her estate, was substituted as plaintiff. Defendants moved to dismiss the action, on the ground that it had abated by the death of the original plaintiff, and for judgment on the ground that the complaint failed to state a cause of action. The motion was denied, and judgment was entered on verdict for plaintiff as against defendants Henderson and Holcom. Said defendants bring error. Affirmed.

Dorn & Dorn, for plaintiff in error Charles Henderson.

W. G. Witter, (S. C. Denson, of counsel,) for plaintiff in error W. D. Holcom.

Norman H. Hurd, for defendant in error.

Before McKENNA, Circuit Judge, and MORROW, District Judge.

MORROW, District Judge. This was an action at law commenced in the circuit court by Mary Alice Henshall, a citizen of the kingdom of Great Britain, against Charles Henderson, W. D. Holcom, and John Purcell, citizens of the state of California, to recover the sum of \$30,000 for damages alleged to have been sustained by plaintiff in the exchange of certain lands in California. It is charged that false representations were made by the defendants Henderson and Holcom as to the value, character, and quality of certain lands in Shasta county, whereby they induced the plaintiff to exchange her lands in Tulare county for the lands in Shasta county, to her damage in the amount stated. The defendants demurred to the complaint, and the demurrers were sustained. An amended complaint was filed, to which demurrers were interposed, alleging, among other things, that the complaint did not state facts sufficient to constitute a cause of action. The demurrers were overruled, and

the defendants thereupon answered. Thereafter, upon the written suggestion of the death of the plaintiff, it was ordered by the court that John Henshall, special administrator of the estate of Mary Alice Henshall, deceased, be substituted as plaintiff. There was a jury trial, and a verdict and judgment against the defendants Henderson and Holcom for \$6,000, and the defendants sued out this writ of error.

It appears from the bill of exceptions that when the case was called for trial, and before the jury had been impaneled and sworn, the defendants moved the court to dismiss the action, on the ground that it had abated by the death of the original plaintiff; that the cause of action did not survive her death; and that John Henshall, as special administrator, could not maintain the action. The motion was denied, and defendants excepted. It further appears that during the trial of the case, and after all the evidence had been introduced on behalf of the plaintiff, and he had rested, and before the defendants had introduced any evidence on their part, the defendants moved the court to instruct the jury to render a verdict in favor of the defendants, upon the ground that the amended complaint did not state facts sufficient to constitute a cause of action. The motion was granted as to the defendant Purcell, but denied as to the other defendants, who duly excepted.

The case presents two questions for determination: (1) Whether the complaint states facts sufficient to constitute a cause of action. (2) Did the action abate by the death of the plaintiff?

The complaint alleges, among other things, that the tract of land owned by plaintiff in Tulare county contained 440 acres; that it was her separate property, and was all agricultural or farming land of the best quality, of the value of \$75 per acre. The complaint charges that the defendants conspired with each other to defraud the plaintiff, and deprive her of said land; that the defendant Henderson, in pursuance of the conspiracy, and with intent to defraud the plaintiff, falsely stated to John Henshall, plaintiff's husband, that he (Henderson) was about to become the owner of a ranch or tract of land in Shasta county, Cal., containing about 560 acres, of the value of \$32 per acre; that there was a mortgage on the land for the sum of \$3,000; that there was a fence around 80 acres of the land; that 160 acres had been planted in grain, and 240 acres had been cleared; that Henderson proposed to exchange the tract of land in Shasta county for plaintiff's tract of land in Tulare county, whereupon Henshall suggested that it would be better for him to visit the land in Shasta county, and inform himself as to the quality and condition of the land, but Henderson represented that it was not necessary for Henshall to do so; that he could rely upon his (Henderson's) representations. The complaint further charges that Henderson represented to Henshall that his real-estate business was extending and becoming so large that he could not conduct it alone, and he proposed to form a partnership, and take Henshall in as one of the partners; that he (Henderson) was a church member and a Christian. It is charged also that Henderson referred Henshall to the defendant Holcom, representing that the latter was a wealthy

banker and resident of Yolo county, above suspicion, and entirely disinterested, and that he knew all about the Shasta county land; that Henderson thereupon introduced Henshall to Holcom; that the latter repeated to Henshall all the statements previously made by Henderson; that Henshall, relying upon and believing that all of said representations were true, gave to Henderson a writing purporting to agree to an exchange of the land in Tulare county, subject to a mortgage for \$7,000, for the land in Shasta county, subject to a mortgage for \$3,000. It is alleged in the complaint that Henshall did not have the legal authority to bind the plaintiff, but he acted upon the belief that plaintiff would acquiesce in his suggestions in regard to her property. It is further alleged that, after delivering the agreement for the exchange of plaintiff's land in Tulare county for the lands mentioned in Shasta county, Henshall wrote to Henderson that the transaction had better be left in abeyance until he could better inform himself as to the condition and value of the land in Shasta county, whereupon Henderson, in pursuance of the conspiracy, and with the intention of intimidating and defrauding plaintiff, went to her, and falsely stated that he had already sold the land in Tulare county to the defendant Purcell, who was in great haste to go into possession, and, unless the trade was carried out, the purchaser would "law him," and he in turn would "law her;" and, further, that he was in possession of papers signed by her husband, which he would at once record in Tulare county; that, for the purpose of deceiving and defrauding plaintiff, Henderson repeated to her all the representations made to her husband as to the character, value, and quality of the land in Shasta county, and stated that the whole of the land could be cultivated; that it was not necessary to make any examination of the land, but that it was necessary to close up the transaction at once. It was alleged that plaintiff believed these representations, and was induced by them and by threats and through fear to sign an agreement concurring in the previous agreement made by her husband for the conveyance of her lands in Tulare county to Henderson, and thereafter, in pursuance of further representations made to herself and husband as to the character, quality, and value of the land in Shasta county, and being urged by Henderson to close up the matter at once, to avoid trouble she executed a deed conveying to Henderson her land in Tulare county, and took from him a deed for the land in Shasta county, but without an opportunity to examine into its value and character.

There are other allegations in the complaint relating to the detail of this transaction, but enough has been stated to disclose the basis of the charge of misrepresentation and fraud contained in the closing paragraphs of the complaint as follows:

"As a matter of fact, the said land in Shasta county was at all said times the property of the defendant Holcom, and he conveyed it to the defendant Henderson on the thirteenth (13) day of September, 1890, for the purpose of carrying out the said conspiracy. No mortgage for three thousand dollars, (\$3,000) or any sum except seven hundred dollars, (\$700,) was on said land before said exchange. The true value of said land in Shasta county was at all the times aforesaid, and is now, five dollars (\$5) per acre. No part of said

land was ever cleared, cultivated, or sown in grain, except about four (4) acres thereof, and no part of said land was ever fenced. The whole of said land, with said exceptions, is wild, uncleared land, and a large part thereof is rocky, and unfit for cultivation. The defendants well knew that all of the said representations made by them, and by each of them, were untrue. In further pursuance of said conspiracy, and for the purpose of preventing the plaintiff from rescinding said transaction, the defendant Henderson did, immediately after obtaining the said conveyance of said land from this plaintiff, convey the said land to a sister of said defendant John Purcell, who had represented, as hereinbefore alleged, that he was in great haste, and was very anxious to purchase said land; and the said land now remains in the possession of said sister of the defendant Purcell, and said Purcell has never become the owner thereof, nor has he ever moved upon the same, or lived there."

It is contended on behalf of the plaintiffs in error that the facts stated in the complaint are not sufficient in law to support the judgment; that the representations as to the land in Shasta county were made with respect to matters equally within the power of both parties to ascertain; that the doctrine of caveat emptor applies in such a case, and to such representations; and that, where a buyer could by reasonable or ordinary diligence have discovered the truth, the law provides no remedy for damages sustained under such circumstances. It is undoubtedly the law that a party to a contract is required to exercise reasonable care and caution to prevent being defrauded. He must not close his eyes to matters directly before him, and, when he finds he has been deceived, expect favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of others. *Slaughters' Adm'r v. Gerson*, 13 Wall. 379-383. But is this the position of the defendant in error? It appears from the complaint, the allegations of which, for the present purpose, must be accepted as true, that the negotiations in this case took place and the bargain was consummated in San Francisco. Now, while it may not be within the province of the court to take judicial notice of the distance from San Francisco to Shasta county, nevertheless it sufficiently appears from the complaint that the land was not near enough to the purchaser to afford her or her husband an opportunity for an immediate and convenient inspection. It is alleged in relation to the first negotiations that John Henshall proposed to visit the land in Shasta county, and inform himself as to its quality and condition, but was dissuaded therefrom by Henderson, who said that it was not necessary to do so, as Henshall could rely upon his representations. Then followed the preliminary agreement between Henshall and Henderson, and, soon after, Henshall, in a letter to Henderson, suggested that the transaction be held in abeyance until he could better inform himself as to the condition and value of the land. Then again, after the second agreement, and before the conveyance of the land, there was a renewal of the proposition by the purchaser to ascertain its value and character. To these suggestions Henderson urged haste in closing up the transaction, giving such reasons therefor as would have a tendency to influence the purchaser to close the bargain without an examination of the premises. From these allegations we are authorized to draw the conclusion that the land was not

conveniently accessible to the purchaser, and this conclusion is further confirmed by the direct averment that the plaintiff did not have an opportunity to examine into the value and character of the land.

In face of the allegations, how can it be said that the representations were made with respect to matters equally within the power of both parties to ascertain, and that the purchaser voluntarily closed her eyes to matters directly before her? The land was at a distance. Representations had been made respecting matters not within the knowledge of the purchaser. She desired to make an examination, or have one made. The vendor urged that it was not necessary, and pressed the bargain to a conclusion with urgent persuasion to overcome the manifest disposition of the purchaser not to proceed without proper care and caution. The complaint is certainly sufficient in this particular to show that the purchaser was being taken at a disadvantage in the matter of the examination of the land.

We come now to the allegations of the complaint respecting the false representations made by the vendor, and here we find an explanation of his urgency in consummating this trade. He is charged with having stated that the land was of the value of \$32 per acre, while its true value was only \$5 per acre; that there was a mortgage on the land for the sum of \$3,000, while the only mortgage on the premises prior to the exchange was one for \$700; that there was a fence around 80 acres of the land, while the fact was that there was no fence around any part of the tract; that 160 acres had been planted in grain, and 240 acres cleared, while the truth was that no part of the tract had ever been cleared, cultivated, or sown in grain, except about 4 acres, and the whole of the tract, with the exception named, was wild, uncleared land, and a large part of it rocky, and unfit for cultivation. Counsel for plaintiffs in error cite a number of cases to the effect that an action will not lie for a false representation by the vendor concerning the value of the thing sold, for the reason that value is a matter of judgment about which men may differ. But falsely stating the number of acres cleared, under cultivation, and inclosed in a tract of land is a very different representation from that of value, particularly when the statement is so far from the actual fact as to exclude it absolutely from the domain of opinion. The statement that there was a mortgage on the premises for \$3,000, when the only mortgage on the place was for \$700, was also a false representation as to a fact concerning which there could be no two opinions. The significance of the statement concerning the amount of the mortgage is disclosed when we consider the allegations of the complaint that the true value of the land was only \$5 per acre, or \$2,800 for the whole tract, and that the vendor in the exchange secured a mortgage from the purchaser for the sum of \$3,000. None of the cases cited go to the extent of protecting a vendor in such a transaction as we find described in this complaint. In *Sherwood v. Salmon*, 2 Day, 128, the plaintiffs in error find authority for invoking the principle of caveat emptor as applicable to some of the facts in this case, but that case was expressly overruled in a suit in equity between

the same parties in 5 Day, 448, where it is declared that the former case was a departure from principle and precedent, and was not of binding authority. In the latter case the court followed the law as laid down by Lord Holt in the leading case of *Lysney v. Selby*, 2 Ld. Raym. 1118, establishing the doctrine "that a fraudulent misrepresentation or false assertion respecting a fact material to show the value of the land, by which the purchaser is injured, will subject the seller to an action for the deceit, though it was in the power of the purchaser to ascertain whether the representations were true or not."

Van Epps v. Harrison, 5 Hill, 63, is also cited in support of the position taken by the vendor in this case. There are some expressions in the opinion of Judge Bronson apparently favorable to that view of the law, but his opinion does not appear to have been entirely concurred in by the court, and the doctrine of the case as determined by the judgment of the court is clearly opposed to some of the statements contained in the opinion. The action was debt on bond. Plea, non est factum, with notice of special matter. Under this plea the defendant offered evidence in bar of the action to the effect that the bond sued on was given for part of the purchase money of certain land purchased by the defendant of the plaintiff at Greenbush, opposite Albany, N. Y. The transaction appears to have taken place in New York city. The land was purchased for the purpose of being laid out and sold for building lots, and the vendor knew it. He also knew, and the purchaser did not know, the condition and situation of the land. The vendor falsely and fraudulently represented that the land was even and level, well situated for building lots, and required no grading, all of which was false; and this false representation the defendant offered to prove, but the evidence was rejected. The defendant also offered to prove that the vendor represented that he had just paid \$32,000 for the land, when in truth he had only paid one half that sum, and this evidence was also rejected. The question in the supreme court was as to the admissibility of the evidence to prove such a fraud as would give the defendant an action of damages which might be allowed in the suit. The supreme court held that the evidence was admissible. The case, as stated by Judge Bronson, is an instructive authority in the application of the law to a state of facts much less favorable to the purchaser than in the case at bar; indeed, it seems remarkable that the principle of caveat emptor was not applied to the transaction involved in the case. "It will seem marvelous," says the judge, "if not wholly incredible, to those who did not live in the years 1835-36, that men should purchase lands lying within ten hours' ride of their residence, and agree to pay thirty-two thousand dollars, without ever having taken the trouble to look at the property either in person or by agent. But farms in the vicinity of cities and villages were then so much in demand for the building of new towns that many persons thought it best not to hazard the loss of a bargain by stopping to look or inquire, when they could purchase at a thousand dollars per acre. They might better lose the little sum of thirty-two

thousand dollars than be absent one whole day from Wall street, and thus miss the possible chance of purchasing the site of some other prospective city of much greater magnitude. Wonderful as it may seem to the next generation, such things did happen, and in this case the defendant offered to prove that he knew nothing about the land, except that it lay on the opposite side of the river from the city of Albany. He trusted to the representations of the plaintiff in relation to the condition of the property, and the only question is whether the defendant must charge the loss upon his own folly and the madness of the times, or whether the plaintiff has done such a wrong as may be redressed by action. The credulity of the defendant furnishes but a poor excuse for the falsehood and fraud of the plaintiff, and the latter will have no just ground for complaint if he is held responsible for his misconduct." If, in such a case, the purchaser is entitled to prosecute an action for damages against the vendor for false representations as to the condition and price paid by the latter for a tract of land, then certainly there can be no question about the right of the purchaser to maintain such an action under the circumstances described in the complaint in the present case.

In *Page v. Parker*, 43 N. H. 363, the supreme judicial court of New Hampshire expressly affirms the doctrine declared in *Van Epps v. Harrison*; but in discussing the rule of damages for false and fraudulent representations the court makes a distinction, pertinent to that case, between representations concerning material and immaterial matters, and between misrepresentations fraudulently and those honestly made. No such distinction as to the rule of damages arises in this case. The question for us to decide is as to whether any one or all of the false representations charged to have been made by the vendor, taken in connection with the allegations as to damages, constitute a cause of action. In this limited field of inquiry many of the authorities cited by the counsel for the plaintiffs in error are inapplicable, and none support his position to the extent he claims. Moreover, the rules of law fixing the rights and liabilities of the parties to such a transaction are well established, as will appear by reference to a few of the leading cases.

In *Vernon v. Keys*, 12 East, 632, Lord Ellenborough declared the doctrine as follows:

"A seller is unquestionably liable to an action of deceit if he fraudulently misrepresents the quality of the thing sold to be other than it is in some particulars, which the buyer has not equal means with himself of knowing; or if he do so in such a manner as to induce the buyer to forbear making the inquiry which, for his own security and advantage, he would otherwise have done."

In *Smith v. Richards*, 13 Pet. 26, the action was to set aside a contract for fraud based upon certain false representations concerning a gold mine in Virginia. The contract was made in New York. The purchaser did not visit the mine, but relied upon the representations of the vendor, which were found to be false. In sustaining the action the court said:

"We think we may safely lay down the principle that whenever a sale is made of property not present, but at a remote distance, which the seller

knows the purchaser has never seen, but which he buys upon the representation of the seller, relying upon its truth, then the representation, in effect, amounts to a warranty; at least that the seller is bound to make good the representation."

In *Stewart v. Cattle Rancho Co.*, 128 U. S. 383, 9 Sup. Ct. Rep. 101, the action was brought by the Wyoming Cattle Ranch Company, a British corporation, having its place of business at Edinburgh, in Scotland, against John T. Stewart, a citizen of Iowa, for damages alleged to have been sustained by the plaintiff in the purchase of a herd of cattle in the territory of Wyoming, upon the false representation of the defendant as to the number of cattle in the herd. A provisional agreement for the purchase of the cattle was entered into between the parties upon condition that a person appointed by the plaintiff should make a favorable report, whereupon one Clay was appointed such agent, who went out to Wyoming, visited the ranch, made an examination, reported favorably, and the purchase was completed. On the trial Clay testified that in the course of his interviews with the defendant the latter made to him the false representations alleged in the petition, and requested him to rely on these representations, and not to make inquiry from the foreman or other persons; and that, relying on these representations, he made a favorable report to the plaintiff, which thereupon completed the purchase. The representations were to the effect that there had already been branded 2,800 calves as the increase of the herd for the current season; that the whole branding of calves and increase of the herd for that season would amount to 4,000, and that, exclusive of the branding for that year, the herd consisted of 15,000 head of cattle; and it was alleged in the petition that, had the representation been true that 2,800 calves had been branded, it was reasonable from that fact to estimate that the whole branding for that year would be 4,000 head, and that the whole herd, exclusive of the increase for that year, was 15,000 head. It appears that, had the agent prosecuted his inquiries, he would have obtained information that less than 2,000 calves had been branded. The testimony was conflicting as to whether the defendant did make the representation that 2,800 calves had been branded in that year, and the chief importance of that misrepresentation, if made, was that it tended to show that the herd of cattle which produced the calves was less numerous than the defendant had represented. The case turned upon the question as to whether the defendant made such a misrepresentation, and, if made, whether the defendant persuaded the agent not to make an inquiry as to its correctness. In submitting the case to the jury the court gave several instructions as to the law applicable to the conduct of the vendor as disclosed by the testimony, among others the following:

"If the testimony satisfies you that when they (the agent, Clay, and the defendant) did go there together, and whilst Clay was making efforts to procure the information which he did, and whilst he was in pursuit of it, and while he was on the right track, Stewart would have no right to throw him off the scent, so to speak, and prevent him in any fraudulent and improper way from procuring the information desired; and if he did that, that itself is making, or equal to making, false and fraudulent representations for the purpose in question."

The court also gave the following instructions:

"If the jury find from the evidence that Stewart purposely kept silent when he ought to have spoken and informed Clay of material facts, or find that by any language or acts he intentionally misled Clay about the number of cattle in the herd, or the number of calves branded in the spring of 1882, or by any acts of expression or by silence consciously misled or deceived Clay, or permitted him to be misled or deceived, then the jury will be justified in finding that Stewart made material misrepresentations, and must find for the plaintiff, if the plaintiff believed and relied upon the misrepresentations made by the defendant."

The supreme court held that these instructions conformed to the well-settled law. The opinion indicates, however, that the instructions were assailed mainly because they went to the extreme length of holding that the silence of the vendor as to a material fact was equivalent to a false representation, and upon this point the court observed:

"In an action of deceit it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment. *'Alind est tacere, aliud celare.'* A suppression of the truth may amount to a suggestion of falsehood, and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, this is evidence of, and equivalent to, a false representation, because the concealment or suppression is, in effect, a representation that what is disclosed is the whole truth."

But in the case at bar the vendor did not remain silent. He did not merely conceal or suppress the truth, but made false representations as to material facts, and when the purchaser proposed to seek for correct information he dissuaded her from prosecuting the inquiry, and thus prevented her from obtaining the information desired. Under such circumstances, the vendor cannot escape responsibility by claiming that the purchaser might have ascertained that such representations were untrue. *Bank v. Hiatt*, 58 Cal. 234. "The seller must not resort to artifice, fraud, or falsehood in misleading the buyer as to facts of which the latter is ignorant, and which are material for him to know." *Senter v. Senter*, 70 Cal. 619, 11 Pac. Rep. 782.

If we look now to the character of the representations made by the vendor in this case, we will find that they relate to matters material for the purchaser to know in determining for himself the value of the property. The representation of the vendor that the value of the land was \$32 per acre may be dismissed as the expression of an opinion. We may also pass the statement about the mortgage, as that representation might have been easily verified by the record; but when the vendor went further, and stated that 80 acres had been fenced, 160 acres planted in grain, and 240 acres cleared, he assumed to state facts upon which the purchaser might well, without an examination, base an opinion as to the value of the property.

In the case of *Ladd v. Pigott*, 114 Ill. 648, 2 N. E. Rep. 503, the action was for deceit and fraud practiced by the defendant in the sale and exchange of property. The plaintiff recovered a judgment. It was objected on appeal that the evidence did not sustain the case

as stated in the declaration, and for that reason the motion for a nonsuit should have been sustained. The opinion of the court indicates that the representations made by the vendor were substantially to the same effect as those alleged to have been made in the present case. The court said:

"The representations made by defendant as to the property situated in Kansas, which he was about to exchange with plaintiff, were much more than mere expressions of opinion as to its value and desirableness. Falsely stating the quantity of land contained in a certain tract, and the size and character of the improvements situated thereon, is quite a different thing from expressing a mere opinion concerning them."

In *Andrus v. Refining Co.*, 130 U. S. 643-648, 9 Sup. Ct. Rep. 645, the supreme court held that the purchaser of a lot of land in the town of Leadville, Colo., could not maintain an action against the vendor upon a false representation that he could put the purchaser in immediate possession of the land sold, but it declared that "false and fraudulent representations upon the sale of real property may undoubtedly be ground for an action for damages when the representations relate to some matter collateral to the title of the property and the right of possession which follows its acquisition, such as the location, quantity, quality, and condition of the land, the privileges connected with it, or the rents and profits derived therefrom;" citing *Lysney v. Selby*, 2 Ld. Raym. 1118; *Dobell v. Stevens*, 3 Barn. & C. 623; *Monell v. Colden*, 13 Johns. 395; *Sandford v. Handy*, 23 Wend. 260; *Van Epps v. Harrison*, 5 Hill, 63. To the same effect are the following: *Anderson v. Hill*, 12 Smedes & M. 679; *Doggett v. Emerson*, 3 Story, 700-733; *Lynch v. Trust Co.*, 18 Fed. Rep. 486.

In whatever light, therefore, we may view the allegations of this complaint, we come to the conclusion that they are sufficient to state a cause of action.

The next question: Did the action abate by the death of the plaintiff? The defendants in the court below moved to dismiss the action on the ground that the special administrator had no power or capacity to maintain the suit, and that the cause of action alleged in the complaint abated by the death of the original plaintiff. The motion has been treated in the argument as in the nature of a plea in abatement, and it is urged that under section 1011 of the Revised Statutes of the United States the judgment cannot be reversed, even though the court below committed an error in denying the motion to dismiss the action. The section provides:

"There shall be no reversal in the supreme court or in a circuit court upon a writ of error, for error in ruling any plea in abatement other than a plea to the jurisdiction of the court, or for any error in fact."

The plaintiff in error contends that the motion was, in effect, a plea to the jurisdiction of the court, and therefore subject to review. The motion was to dismiss the action, and the ruling of the court upon the motion is brought here in the bill of exceptions. We think it is properly before the court for review.

For the determination of the principal question as to the survival of the cause of action resort must be had to the law of the state of California, where the cause of action arose. The following pro-

visions of the Civil Code have been cited as declaring the law on this subject:

Section 953. "A thing in action is a right to recover money or other personal property by a judicial proceeding." Section 954. "A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office." Section 1427: "An obligation is a legal duty, by which a person is bound to do or not to do a certain thing." Section 1428: "An obligation arises either from (1) the contract of the parties, or (2) the operation of law. An obligation arising from operation of law may be enforced in the manner provided by law, or by civil action or proceeding." Section 1458: "A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such."

It is urged that these provisions do not in express terms distinguish those things in action that survive from those that abate upon the death of the owner. There may be some question as to the survival of a thing in action arising out of a personal injury, but the thing in action in this case arises out of the violation of a right of property, which, by the express language of section 954 of the Civil Code, passes to the personal representatives of the deceased. Moreover, section 4 of the Civil Code provides the following rule of construction for its provisions:

"The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed, with a view to effect its objects and to promote justice."

If we follow this rule, and construe the provisions of the Code liberally, with a view to effect its objects and to promote justice, we must determine that the cause of action in this case survived to the administrator as assets on his hands, because the wrong which is the subject of the action was not merely a personal injury inflicted upon the decedent, and the damages claimed the measure of her bodily or mental suffering, but the wrong was to the estate of the original plaintiff, whereby it became diminished in value. "It is now the general American doctrine that all causes of action arising from torts to property, real or personal,—injuries to the estate by which its value diminished,—do survive and go to the executor or administrator as assets in his hands." *Pom. Rem. & Rem. Rights*, § 147. We think, upon principle as well as authority, the cause of action in this case survived to the administrator. Judgment affirmed.

CHARLESTON ICE MANUF'G CO. v. JOYCE.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1893.)

No. 34.

WRIT OF ERROR—REVIEW—INDEFINITE OBJECTIONS TO EVIDENCE.

On writ of error, specific objections to the admission of evidence will not be considered when the general indefinite objection made thereto at the trial was properly overruled.

In Error to the Circuit Court of the United States for the District of South Carolina.

Action by E. F. Joyce against the Charleston Ice Manufacturing Company for damages sustained because of defendant's refusal to allow plaintiff to remove certain property from the premises of defendant. Verdict and judgment were rendered for plaintiff, and a motion for a new trial was denied. 50 Fed. Rep. 371. Defendant brings error. Affirmed.

Samuel Lord, for plaintiff in error.

J. P. K. Bryan, for defendant in error.

Before BOND and GOFF, Circuit Judges, and HUGHES, District Judge.

GOFF, Circuit Judge. This action was instituted by the defendant in error, E. F. Joyce, against the Charleston Ice Manufacturing Company, plaintiff in error, to recover damages for the refusal after demand made by Joyce of that company to allow him to remove from the premises of the company his machinery, tools, derricks, and other implements used by him in his business of boring artesian wells. Joyce claimed that he was entitled to the immediate possession of the property mentioned, which he had placed on the premises of defendant for the purpose of digging a well for it; and that defendant continued for the space of 36 days in its refusal to permit him to remove his machinery and other property, to his great loss and injury in the use of the same, in the obstruction of his calling, and the enforced idleness of his employees, which wrongful acts plaintiff alleged were done by defendant with intent to injure the plaintiff in his business and calling, to his damage \$5,000. The answer of the defendant below is, in effect, a general denial, though it admits the plaintiff's title to the property, and its location on the premises of the defendant. The case was twice tried before a jury. On the first trial a verdict was returned for the plaintiff for the sum of \$3,233, which was, on motion of the defendant, set aside by the court, on the ground that the damages found were excessive. On the second trial the jury found for the plaintiff the sum of \$2,500 damages, which verdict the court refused to set aside, and entered judgment thereon.

During the progress of the second trial defendant below objected to a question propounded a witness and to the introduction of certain evidence. The only question before this court is, as found in the bill of exceptions, as follows:

That in the progress of this cause plaintiff's attorney exhibited to Louis P. Hart, president of the defendant company, and a witness for defendant, then under cross-examination by plaintiff, a business card, as follows:

LOUIS P. HART,

Pres't Central Ice Company.

Incorporated Under the Laws of Alabama,

Controlling Ice Machines at

New Orleans, Ala.,	Crescent City Ice Co.
Mobile, Ala.,	Mobile Ice Co.
Savannah, Ga.,	The Home Ice Mfg. Co.
Charleston, S. C.,	Charleston Ice Mfg. Co.
Birmingham, Ala.,	Avondale Ice Factory.
Brunswick, Ga.,	Brunswick Ice Mfg. Co.

—The following questions being put and answers made: Question. Where were you born? Answer. Brooklyn, New York. Q. Where have you lived? A. At the age of one year my parents removed to Cambridge, Massachusetts. I lived there until I was 29. I am now 38. Q. Where have you lived since then? A. In the south; mostly Savannah. Q. You have been in Savannah ten years? A. Nine years. Q. Is that your business card (indicating.) A. Yes. (Mr. Lord, defendant's attorney, objected to the last question, which objection the court overruled, and permitted plaintiff to put the question and take the answer, and to introduce the card in evidence. Thereupon, Mr. Lord then and there entered an exception.)

This general, indefinite objection or exception is the only one found in the record. It does not appear that there was any specific ground of objection offered to the evidence at the time the exception was taken. It is now, in this court, claimed by plaintiff in error that "the private business card of the witness should not have been allowed to be put in evidence, because clearly irrelevant, and intended and calculated to prejudice the minds of the jury."

The rule is well established that the appellate court will only permit those matters to be assigned for error that were brought to the attention of the court below during the progress of the trial, and then passed upon. *Springer v. U. S.*, 102 U. S. 586, 593; *Wood v. Weimar*, 104 U. S. 786, 795. The supreme court of the United States, in the case of *Burton v. Driggs*, 20 Wall. 125, 133, speaking by Mr. Justice Swayne, on this subject said:

"It is a rule of law that where a party excepts to the admission of testimony he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. If he assigns no ground of exception, the mere objection cannot avail him. In *Hinde's Lessee v. Longworth*, this court said: 'As a general rule, we think the party ought to be confined in examining the admissibility of evidence to the specific objection taken to it. The attention of the court is called to the testimony in that point of view only.'"

The necessity for this rule is so apparent, and the rule itself is so universally enforced by the courts, that further consideration of the question is not required of us. The following cases show the practice to be as we have stated, and demonstrate its wisdom and the importance of adherence to it. *Camden v. Doremus*, 3 How. 530; *Harvey v. Tyler*, 2 Wall. 328, 339; *Beckwith v. Bean*, 98 U. S. 266, 284; *Stebbins v. Duncan*, 108 U. S. 32, 2 Sup. Ct. Rep. 313; *Moulor v. Insurance Co.*, 111 U. S. 335, 337, 4 Sup. Ct. Rep. 466; *Burley v.*

Bank, 111 U. S. 216, 4 Sup. Ct. Rep. 341; Block v. Darling, 140 U. S. 234, 11 Sup. Ct. Rep. 832; Railroad Co. v. Charles, 51 Fed. Rep. 562, 571. We think it clear that the court below properly overruled the general objection made during the trial, as recorded in the bill of exceptions, and it is equally as clear that this court cannot, on writ of error, consider the specific objections made before it, and not presented to the court below.

There are other questions raised by the assignment of error, but they are not presented by the bill of exceptions, and, as we understand the law, and view this case, we cannot consider them.

The judgment of the court below is affirmed.

In re SING LEE.

In re CHING JO.

(District Court, W. D. Michigan. February 28, 1893.)

1. CHINESE—EXCLUSION—PROCEEDINGS—DUE PROCESS OF LAW.

The provision of the Chinese exclusion act of May 5, 1892, for summary proceedings before a commissioner for the deportation of unauthorized persons, is not, by reason of its failure to allow a jury trial, open to the objection that it operates a denial of due process of law; and such proceedings do constitute due process of law, inasmuch as they are those customarily employed in cases of similar character.

2. SAME—EVIDENCE—BURDEN OF PROOF.

The provision of the exclusion act of May 5, 1892, that the person charged is presumed to be guilty without the production of any evidence against him, and must establish his innocence by affirmative evidence, is not repugnant to any provision of the federal constitution, nor does it violate any common-law rule of evidence; for the facts constituting a defense are peculiarly within the knowledge of the party charged, and the burden is naturally upon him.

3. SAME—DENIAL OF EQUAL PROTECTION OF LAWS.

These acts are in no wise repugnant to the fourteenth amendment to the federal constitution, as denying the Chinese the equal protection of the laws; for that amendment is restrictive of the action of the several states, and has no reference to legislation by congress.

4. SAME—NATURE OF PENALTY.

The imprisonment provided for in the act of May 5, 1892, prior to deportation, is not a "punishment," in the sense of the criminal law, but is merely a means of detention.

5. SAME—HABEAS CORPUS—REVIEW—PRIOR RESIDENCE.

On habeas corpus proceedings by Chinamen imprisoned by order of the commissioner, his findings of fact are not reviewable by the court; and hence it cannot be urged as ground for the writ that petitioners are exempt by reason of their residence here prior to the passage of the act of 1882.

On Application for Writ of Habeas Corpus. Denied.

D. E. Corbitt, for petitioners.

L. G. Palmer, Dist. Atty., and J. B. McMahon, Asst. Dist. Atty., for the United States.

SEVERENS, District Judge. The respondents in these cases, who are Chinese persons, being found at Petoskey, in this dis-

trict, were arrested and taken before United States Commissioner Call upon the charge of being and remaining within the United States in violation of the acts of congress excluding Chinese laborers who have entered this country since the passage of the principal act in 1882. Upon a summary proceeding, such as is provided for by those acts, the respondents were on the 7th day of February found guilty, and thereupon the commissioner sentenced them to imprisonment at hard labor for the period of 20 days in the county jail of Kent county, and adjudged that they be then removed to China. They were committed in accordance with that sentence, and on the 21st inst. applied to the district judge for a writ of habeas corpus, alleging that they were in custody under the aforesaid sentence and order of the commissioner, setting it out in full, and further alleging that they were not guilty, setting forth a fact which their counsel claims shows that they were not amenable to that proceeding, namely, that they were lawfully residents in the United States prior to the passage of the act of 1882, above referred to. The district attorney and his assistant, being notified, attended, and the grounds for the application for the writ were fully argued by counsel for the respective parties.

Those grounds, as presented by counsel for the respondents, and strenuously urged, are that the provisions of the recent act of May 5, 1892, prescribing the practice in such cases, and in pursuance of which the present conviction was had, do not provide due process of law, in that the proceeding is summary, and affords no opportunity for a trial by jury, nor even a regular hearing in any court of justice; that they fail to give to all persons the equal protection of the laws; that the statute of 1892 also declares that without any evidence the party is presumed to be guilty; and that he can only establish his innocence by affirmative testimony, showing his right,—which, it is alleged, is contrary to the fundamental principles imbedded in the constitution of the United States. They further claimed the right to prove that the commissioner had no jurisdiction by reason of the fact, as asserted, that the respondents were lawfully resident in the country before the passage of the act of 1882. No other objections are indicated by the petition or were presented in the argument.

To us who live far inland, and not so much subject to the evils intended to be guarded against by these exclusion acts, the lines laid down for their enforcement may seem hard, and because such summary dealing with the rights of persons are out of the common order to which we are accustomed, and are liable to produce injustice in many cases on account of their summary expedition and the presumption against the prisoners, they may seem severe; but if the power resides in congress to enact such provisions, the discretion whether it will do so rests in the lawmaking power, and the courts must presume it was exercised upon sufficient reasons.

In support of the several objections on behalf of the respondents enumerated above, it was insisted, first, that certain rights are guaranteed by the constitution to all persons within the jurisdiction covered by it, among which is the right to a trial by a jury

of any fact upon the issue of which a man may be deprived of his liberty, and expelled from the country, and that this is what is required by due process of law. But it is erroneous to suppose that due process of law necessarily implies a trial by jury, or even a trial before a court organized according to common-law forms, and proceeding according to common-law methods. That is due process of law which is according to the method of legal proceedings employed in similar cases. *Murray's Lessee v. Improvement Co.*, 18 How. 272. There are a great variety of special cases in which, on account of the necessity for prompt action, and because the regular course of proceedings in a court of justice by jury trial would involve delay, and contravene the object sought to be attained by the proceeding, it has always been customary to adopt a summary method. That is one of the principal reasons for the adoption of such proceedings, and there is ground for supposing it to have been a controlling one in the enactment in question. Other cases which might be instanced where summary methods are customary are where steps must be taken to prevent the spread of a pestilence or such mischiefs, and under treaty stipulations for the extradition of criminals. If the process is customary, it is that which is due. It is easy to see that the presence of this class of persons was regarded by congress as dangerous to our society and institutions, and that the general purpose of these exclusion acts is effectually and promptly to exclude their admission into the country, and to expel them if they have already gained a foothold.

It cannot be doubted that congress has power to prevent such persons, being aliens, from entering the country, and the reasons which support that power are equally cogent to authorize it to expel them after they have become residents. This right has been asserted at many periods of our history in diplomatic correspondence, and is in consonance with the doctrine of publicists who have written upon the subject as a branch of international law. *Chae Chan Ping v. U. S.*, 130 U. S. 581, 9 Sup. Ct. Rep. 623. The case therefore falls within the range of that class where summary proceedings are admissible because customary.

Second. It is said that the right of the respondent is violated because a presumption is raised against him, and the burden laid upon him to prove his exemption. No distinct provision of the constitution is invoked to support this proposition, but it is said to be contrary to fundamental principles. The force of the objection, though it sounds plausible on its statement, is seen to grow weaker when we take into view the circumstances. The person brought before the commissioner is one of a class which, by the terms of the statute, is obnoxious to its operation. That must appear before the general jurisdiction can be exercised, and since, generally, that class is interdicted, he can only escape the common lot upon its appearing that he is not within the general condemnation. The means of showing this are presumably in his own control. It would be extremely inconvenient, and probably in most instances impracticable, for the government to bring proof of the negative fact that the respondent is not within the exemption.

Such circumstances are the basis of the rule of evidence which devolves the burden on the party who presumably has the best means of proving the fact. But, whatever the rule which by the common law would be applicable to trials, it cannot be affirmed that in such conditions the legislature cannot prescribe such a rule of evidence. It is worthy of suggestion in this connection that these persons who presumably know what this provision of the law affecting them is, may provide themselves with the certificate from the collector which would be evidence of their right, and, thus armed, could safely wander from their customary residence.

Third. In behalf of the respondents it is also said that this statute denies to them the equal protection of the law, and is therefore void, and section 1 of the fourteenth amendment is invoked; but to this it must be answered that the inhibitions of that section are laid upon the action of the several states, and have no reference to legislation by congress. The amendment does not even compel the state to award a trial by jury. *Walker v. Sauvinet*, 92 U. S. 90.

Fourth. In respect to the allegations in the petitions that the respondents are not liable to the proceedings which the commissioner has adjudged to be taken against them because they are exempt by reason of their residence in the United States prior to the passage of the law of 1882, it is clear that I cannot, on this application, or on the return to the writ if one should be awarded, review the finding of the commissioner. In *re Luis Oteiza y Cortes*, 136 U. S. 330, 10 Sup. Ct. Rep. 1031; *Stevens v. Fuller*, 136 U. S. 468, 10 Sup. Ct. Rep. 911; *Horner v. U. S.*, 143 U. S. 207, 12 Sup. Ct. Rep. 407. The question whether the respondent was subject to the proceedings was one within the jurisdiction of the commissioner. *Horner v. U. S.*, 143 U. S. 207, 215, 12 Sup. Ct. Rep. 407. Under section 13 of the act of 1884 it may be that an appeal could have been taken from that finding. Whether that section survives the enactment of the act of 1892 it is unnecessary to determine. No appeal was taken, and the time therefor had expired before the present application. The foregoing conclusions cover all the grounds stated in the application or urged by counsel, upon the most liberal interpretation.

If the view taken of the statute of 1892 by Judge Billings in *U. S. v. Hing Quong Chow*, 53 Fed. Rep. 233, (in which he holds that it should be construed, not as creating a criminal offense, but as prescribing merely a method of removal, and requiring certain detention as an incident,) is correct,—as I am inclined to think it is,—the sentence in this case, so far as imprisonment is concerned, should have been that the respondent should be imprisoned until he should be deported, but not longer than one year. The sixth amendment to the constitution secures to the accused person in all criminal proceedings the right to a trial by jury, and to like effect is the third paragraph of the second section of article 3. This statute does not make provision for such a trial. It is clear, therefore, that the statute in question cannot be construed as creating a criminal offense, or as declaring a punishment appropriate thereto, without rendering it obnoxious to the sixth amendment. It is a rule of construction that, if a statute is upon one construction in conflict with the constitution, and

upon another is not so, the latter construction, if a fairly possible one, should be adopted, even though it seems the less natural meaning of the terms employed. It is necessary, therefore, to hold that the imprisonment provided for in the act is not a punishment, but a mere means of detention. The sentence in this case was that the respondent should be imprisoned for 20 days, and then removed, etc. In my opinion, the petitioners would be entitled to the writ for the purpose of relief from that portion of the sentence which prescribes a definite term of imprisonment, but that term has expired. The other part of the commissioner's order was, nevertheless, proper upon his finding of the fact, and is probably valid, notwithstanding the irregular part. These applications allege that the respondents are in the custody of the marshal, the theory seeming to be that the custody of the jailer has been subordinate to that of the marshal. From some indications outside the record, I am anxious lest these proceedings operate unjustly, in a large sense, though I have no doubt the commissioner acted upon the best light he had before him. These respondents (there are two of them in like plight, who make separate applications) are mere youths, arrested at a considerable distance from their residence, and are condemned to be transported away from the relatives and friends they may have in this country, and to be landed anywhere in a wide empire, —it may be 1,000 miles from the place which they left in their childhood; but I can see no way for the court to avoid the danger of what may seem to be a wrong, consistently with law, unless the district attorney, in view of the irregularity of the proceedings, will consent that the writs may go, and thereupon the prisoners may be discharged, to the end that new proceedings may be instituted, when the respondents may have more ample opportunity for presenting their defense. It must be admitted that this might seem a rather free exercise of authority, but it would have the quality of mercy. If such consent is not given, inasmuch as the marshal has the custody of the prisoners for the purpose of deportation, the writs must be denied.

Upon the reading of the foregoing opinion, the district attorney announced that he did not feel at liberty to consent to the allowance of the writs, and thereupon the denial of the writs is made absolute.

UNITED STATES v. PATRICK et al.

(Circuit Court, M. D. Tennessee. February 1, 1893.)

No. 7,894.

1. CIVIL RIGHTS—CONSPIRACY AGAINST CITIZENS—REVENUE OFFICERS.

Revenue officers engaged in a search for distilled spirits concealed to evade payment of the revenue tax, for the purpose of making seizure thereof, are exercising a right secured to them by the laws of the United States, and an indictment alleging the killing by defendants of such officers while exercising such right, and while defendants were engaged in a conspiracy to injure or oppress such officers, sufficiently charges the offense

prescribed by Rev. St. § 5509, providing for the punishment of a felony committed in the act of violating section 5508, which denounces conspiracy to injure or oppress any citizen exercising any right secured to him by the constitution or laws of the United States.

2. SAME—RIGHTS OF CITIZENS TO HOLD OFFICE AND EXERCISE ITS FUNCTIONS.

An office is a public employment, and in the performance of its functions the citizen selected to represent the sovereign is in the exercise of both a private right or privilege and public duty, and a conspiracy to hinder, oppress, and injure him in the discharge of such functions cannot be regarded as directed solely against the official in his representative character, but must be considered as also against the citizen exercising or enjoying the right or privilege of accepting public employment and engaging in the administration of its functions.

At Law. Indictment of Andrew J. Patrick, James Epps, and Morgan Petty for conspiracy and murder, under Rev. St. §§ 5508, 5509. Defendants demur to the indictment. Overruled.

Demurrers to indictments based on the same acts were heretofore sustained. See 53 Fed. Rep. 356.

John Ruhm, U. S. Atty.

Jas. H. Holman and Lamb & Tillman, for defendants.

JACKSON, Circuit Judge. The defendants are indicted under the first clause of section 5508 and also 5509 of the Revised Statutes of the United States, which provide that, "if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his having so exercised the same," they shall be subject to fine and imprisonment, and be ineligible thereafter to any office or place of honor, profit, or trust created by the constitution or laws of the United States; and, further, that (section 5509) "if, in the act of violating any provision in the * * * preceding section, any other felony or misdemeanor is committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed."

The indictment contains three counts, each of which substantially charges that the defendants, on October 17, 1892, in the county of Lincoln and district of middle Tennessee, within the jurisdiction of this court, committed the crime of murder while in the execution of an unlawful and felonious conspiracy with one another and with other unknown persons, to injure, oppress, threaten, and intimidate certain designated citizens of the United States in the free exercise and enjoyment of a right and privilege secured to them by the constitution and laws of the United States. In each count of the indictment the citizens of the United States against whom the conspiracy to injure, oppress, threaten, and intimidate in the free exercise and enjoyment of a right and privilege secured to them by the constitution or laws of the United States is alleged to have been made and directed were J. L. Spurrier, S. D. Mather, and S. Creed Cardwell, deputy collectors of internal revenue, and E. S. Robertson and J. E. Pulver, deputy marshals of the United

States in and for the middle district of Tennessee, and David L. Harris, summoned and acting as a "posse;" and the particular right and privilege alleged to have been secured to them by the constitution or laws of the United States, and in the free exercise and enjoyment of which the conspiracy was formed and prosecuted to injure, oppress, threaten, and intimidate them, was the duty, right, and privilege on the part of the said Spurrier, Mather, and Cardwell, as deputy collectors of internal revenue, to make searches for and seizures of distilled spirits upon which the tax imposed by the laws of the United States had not been paid, and, on the part of the said Robertson and Pulver, as deputy marshals, and of said Harris, summoned as a posse, to aid and assist in the search for and seizure of such distilled spirits and in the arrest of persons who might be discovered in possession of such distilled spirits. It is then charged that on the day and in the county and district aforesaid said parties, all being citizens of the United States, were, in the execution of this said duty, and in the exercise of their said right and privilege, searching for a quantity of distilled spirits upon which the tax due the United States had not been paid, and which had been unlawfully concealed by a person or persons to the grand jurors unknown, and were endeavoring to seize the said distilled spirits so unlawfully concealed, when and where the defendants and other persons to the grand jurors unknown, in the prosecution of their said conspiracy, did unlawfully and feloniously discharge deadly weapons, to wit, guns, rifles, and pistols, at said collectors and their aids, being then and there in the discharge of their duty, and in the exercise of their said right and privilege, with the intent to commit bodily injury upon them, and to deter and prevent them from discharging their duty and exercising their said right and privilege; that in the act of prosecuting their said conspiracy said defendants and other persons unknown concealed themselves and lay in wait at or near the place where said officers and aids were in the discharge of their duty and exercise of their said right secured to them by the constitution and laws of the United States as aforesaid, and from their place of concealment, by the discharge of said guns, rifles, and pistols, did willfully, deliberately, maliciously, premeditatedly, with malice aforethought, unlawfully and feloniously kill and murder the said J. L. Spurrier, S. D. Mather, and S. Creed Cardwell, thereby committing the felony of murder in the first degree, contrary to the statute of the United States in such cases made and provided, and against the peace and dignity of the United States.

The second and third counts of the indictment, after charging the same unlawful and felonious combination, conspiracy, and confederation on the part of defendants, by and between themselves and divers other evil-disposed persons, whose names are unknown to the grand jurors, to injure, oppress, threaten, and intimidate said Spurrier and others, who were then and there citizens of the United States, in the free exercise and enjoyment of the aforesaid right and privilege secured to them by the laws of the United States, and the willful, deliberate, malicious, premeditated, unlawful, and feloni-

ous killing of said Spurrier, Mather, and Cardwell, with malice aforethought, as aforesaid, in pursuance of said combination and conspiracy, and in the prosecution thereof, while said Spurrier and his associates and assistants were in the exercise of their right and privilege of making search for distilled spirits on which the tax imposed by the laws of the United States had not been paid, and which had been unlawfully, and contrary to the statutes in such cases made and provided, concealed,—further averred that they, the said E. S. Robertson and J. E. Pulver, as deputy marshals of the United States, were duly called upon and authorized, not only to aid and assist the said Spurrier, Mather, and Cardwell in the search for and seizure of such distilled spirits and in the arrest of persons who might be discovered in possession of or having concealed such distilled spirits, but also to protect said Spurrier, Mather, and Cardwell from the assault of the defendants and other evil-disposed persons, and that it was the right and privilege of said Spurrier, Mather, and Cardwell, citizens as aforesaid, under the constitution and laws of the United States, to be secure in their persons from bodily harm and injury while they were exercising the functions of their offices in making searches for and endeavoring to make seizures of distilled spirits as aforesaid, upon which the tax imposed by the laws of the United States had not been paid, and which had been unlawfully concealed.

The defendants have demurred to the indictment, and to each count thereof, on the ground that no offense against the United States, or within the jurisdiction of this court, is charged; that the offense committed, if any, was against the laws of the state of Tennessee, and of which the courts of that state have exclusive jurisdiction; that there is no such right and privilege secured to citizens by the constitution and laws of the United States as there set out in the several counts, and alleged to have been conspired against; that sections 5508 and 5509 of the Revised Statutes of the United States, upon which all the counts of the indictment purport to be founded, do not create the offense charged, nor authorize a prosecution in this court upon the facts alleged, but have for their object the protection of citizens in the free exercise and enjoyment of all the rights and privileges secured to them as citizens by the constitution, and not for the protection of officers of the United States engaged in the performance of duties as such; that the offense charged comes properly under the provisions of sections 5440 and 5447 of the Revised Statutes of the United States, relating to conspiracies against or to defraud the United States, and to the resistance of officers of the customs, and not under sections 5508 and 5509; that all the counts of the indictment are predicated upon the assumption that the exercise and performance of the functions, powers, and duties of an officer of the United States as an official is identical with the free exercise or enjoyment of a right or privilege secured to a citizen as such, and are therefore bad; and that the allegations and averments of the first, second, and third counts do not show any right or privilege of said persons (Spurrier and associates) as citizens, and secured to them as such by the

constitution or laws of the United States, were either interfered with, or sought to be interfered with, by defendants, but all the acts complained of therein were resistance to and injury of officers in the discharge of official duty.

It is not deemed necessary to consider and pass upon these various objections to the indictment separately. They resolve themselves into the general question whether the facts alleged and charged constitute any crime or offense against the United States under said sections 5508, 5509, Rev. St.; in other words, whether said sections have any application to citizens who, as agents or officers of the national government are discharging functions conferred, or exercising rights and privileges secured, by its laws and primarily for its benefit; or are the provisions of said sections limited and confined to the care of citizens in the exercise of such purely personal, private, or political rights and privileges as are secured to them only as citizens by the constitution and laws of the United States? The contention of the demurrants is that the right or privilege in the free exercise or enjoyment of which the conspiracy to injure, oppress, threaten, or intimidate any citizen must be directed, as provided by the statute, relates alone to such right or privilege as is secured to him in his personal and individual capacity as a citizen, and which he may exercise or abstain from exercising at his own option or pleasure, and does not extend to or include any right or privilege which a citizen as an officer or agent of the United States may be in the exercise of under their authority, and wholly or in part for their benefit. Upon the assumption that this is the true construction of section 5508, it is claimed that the several counts of the indictment only charge a conspiracy to injure, oppress, obstruct, or interfere with the designated persons in the exercise of a right or privilege secured to them by the constitution or laws of the United States, not as citizens, but as officers in the exercise of official duty, right, or privilege, and hence does not come within the purview of said section, so as to bring any act, however criminal in its character, committed in the course or prosecution of such conspiracy, within the provision of section 5509, and subject the conspirators to its penalties. It is undoubtedly true, as claimed by counsel for defendants, that, if the conspiracy charged does not come within the provisions of section 5508, no criminal act committed in pursuance of such conspiracy, or in carrying it into execution, will be covered by or punishable under section 5509. The question presented, therefore, is narrowed down to this: Does the conspiracy so charged in this indictment come within the first clause of said section 5508?

While the cases which have arisen under sections 5508, 5509, Rev. St., and which have been decided by the supreme and circuit courts of the United States do not meet and settle the precise question here presented, they have settled beyond doubt the constitutionality of said sections, and placed such construction upon section 5508 that, to bring a case within its provisions, two things or conditions must coexist, and be distinctly alleged: First, the person whom the conspiracy is intended to injure, oppress, threaten, or

intimidate, must be a citizen of the United States; and, secondly, the right or privilege in the exercise or enjoyment of which he is or has been engaged and on account of which the conspiracy is directed against him, must be one secured to him, not by the state, but by the constitution or laws of the United States. It is clearly alleged in the indictment under consideration that the persons conspired against were citizens of the United States. The particular rights and privileges averred in the indictment as being secured to them by the constitution or laws of the United States, and in the exercise of which, it is alleged, the defendants combined, conspired, and confederated to injure, oppress, threaten, intimidate, and obstruct them, are the following, viz.: As to Spurrier, Mather, and Cardwell, "the duty, right, and privilege to make search for and seizure of distilled spirits upon which the tax imposed by law had not been paid, and which were concealed," and also "the right and privilege to be secure in their persons from bodily harm, injury, assaults, and cruelties while exercising the functions of their office in making searches and seizures of such distilled spirits;" and as to Robertson, Pulver, and Harris, "the duty, right, and privilege to aid and assist in the search for and seizure of distilled spirits upon which the tax imposed by law had not been paid, and which were concealed, and in the arrest of and to arrest persons who might be discovered in possession of or having concealed such distilled spirits, etc., and the duty, right, and privilege to protect Spurrier and his associates from bodily harm and injury, assaults," etc., while exercising their functions. The allegations of the indictment as to the conspiracy to prevent said parties from exercising their designated rights and privileges, or to injure, oppress, and interfere with them in the exercise of the same, and the acts done in pursuance of such conspiracy, resulting in the killing of Spurrier, Mather, and Cardwell, are all stated with reasonable and sufficient certainty and precision to satisfy and comply with the requirements of the law and good pleading, provided the rights and privileges described are such as come within the meaning of section 5508.

In respect to citizenship, and the rights and privileges incident thereto, it should be borne in mind that we have in the political system of this country, since the adoption of the fourteenth amendment to the constitution, if such did not previously exist, both a national and state citizenship, corresponding with our dual form of government, state and federal, which owes allegiance to and is subject to the jurisdiction and entitled to the protection of each government within the sphere of their respective sovereignties. "The same person may be at the same time a citizen of the United States and a citizen of a state; but his rights of citizenship under one of these governments will be different from those he has under the other. The government of the United States, although it is, within the scope of its powers, supreme, and beyond the states, can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction. All that cannot be so granted or secured are left to the exclusive protection of the states." U. S. v. Cruikshank, 92 U. S. 542. Speaking

generally, the constitution and laws of congress add nothing to the rights of one citizen as against another, nor do they aim to protect one citizen from personal injury or violence by another within the limits of a state. These are matters coming properly within the sovereignty and jurisdiction of the states. But in respect to rights and privileges derived from the United States, or secured by their constitution or laws, and exercised by their authority, within the scope of their powers and the sphere of their jurisdiction the general government may, under the legislation of congress, protect its citizens. Now, in the present case, it is not questioned, nor does it admit of question, that the foregoing duties, functions, rights, or privileges in the exercise of which the designated parties were conspired against were in no sense dependent upon, derived from, or secured by the constitution or laws of the state of Tennessee, but were wholly dependent upon and secured by the constitution and laws of the United States. The state had no authority or jurisdiction whatever over said duties, rights, or privileges, or the subject to which their exercise related. They had no existence prior to or apart from the constitution and laws of the United States, which created and sanctioned their exercise. Neither had the state any control, supervision, or direction over the persons representing the national government in the discharge of said duties, or in the exercise of such rights, while they acted within the line of the authority conferred upon them; but such control, supervision, and direction, as well as the primary duty and obligation of protecting them while engaged in the execution of their functions and in the exercise of the rights and privileges with which they were invested, rested upon the United States. The provisions of the statutes relating to the rights and privileges which the parties conspired against were exercising when the offenses were committed are found generally in sections 788, 3148, (Act March 1, 1879,) 3172, 3176, 3177, 3453, Rev. St. U. S., and the duty and obligation of the national government to protect its officers and agents as declared in the decisions hereafter referred to. If, therefore, the particular rights and privileges described are within the purview, true intent, and meaning of section 5508, nothing is wanting to give validity to the indictment, inasmuch as the parties exercising such rights and privileges are averred to be, or to have been, citizens of the United States. It is begging the real question, or evading it, to say that said rights or privileges were not secured by the constitution or laws of the United States to the designated persons exercising the same and conspired against as citizens, or did not belong to them as citizens in common with all other citizens of the United States. The statute applies to any citizen in the exercise "of any right or privilege secured to him by the constitution or laws of the United States." This language does not indicate or fairly imply that the right or privilege secured and exercised must be such right or privilege as is common to all citizens of the United States as such.

While section 5508 is taken, with some slight changes, from section 6 of the enforcement act of May 31, 1870, its construction and

application has not been limited and confined to the protection of the civil rights of citizens, which said enforcement act was designed to protect. This will clearly appear by a brief reference to the cases which have since arisen under said section 5508. Thus in the case of *U. S. v. Cruikshank*, 92 U. S. 542, the rights alleged to have been interfered with or prevented by the conspiracy were not in fact secured by the constitution or laws of the United States, as claimed; but in respect to that portion or count of the indictment which averred that the conspiracy was intended "to prevent them in the free exercise of the right to peaceably assemble with each other and other citizens for a peaceable and lawful purpose," the court, while holding this was defective and bad, said:

"The right of the people peaceably to assemble for the purpose of petitioning congress for a redress of grievances, or for anything else connected with the powers and duties of the national government, is an attribute of national citizenship, and, as such, under the protection of and guarantied by the United States. If it had been alleged in the indictment that the object of the defendants was to prevent a meeting for such purpose, the case would have been within the statute and within the scope of the sovereignty of the United States. Such, however, is not the case. The offense, as stated in the indictment, will be made out if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose."

In *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. Rep. 152, the indictment charged that the defendants conspired to intimidate a citizen of African descent in the exercise of his right to vote for a member of congress of the United States, and that in the execution of such conspiracy they beat, bruised, wounded, and otherwise maltreated him. It was held that this conspiracy was embraced within the provisions of section 5508 of the Revised Statutes, because the political right of such a voter to protection from violence in the exercise of his privilege was secured by the constitution of the United States. In the case of *U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. Rep. 35, the particular right in the exercise of which a citizen was conspired against was that of remaining on the land upon which, under the laws of the United States, he had made a homestead entry, a sufficient time to entitle him under the statute to a patent therefor. This right being secured to him by the laws of the United States, the conspiracy against him in its exercise came within the provisions of section 5508. In *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. Rep. 617, the particular right involved was that of a citizen in the custody of the United States marshal, under a lawful commitment, to be protected against a conspiracy to oppress, injure, or maltreat him. This was a private right, implied from the duty and obligation of the government to protect the citizen while thus in its custody. This right of a citizen in custody of the United States marshal, under a lawful commitment, to answer for an offense against the United States, to be protected against lawless violence, was held to be such right or privilege secured by the constitution and laws of the United States as said section 5508 was intended to protect against a conspiracy to interfere with. In that case it is directly declared that said section is not limited to political rights of citizens. In *U. S. v. Lancaster*, 44 Fed. Rep. 885, the

particular right or privilege described was that of a citizen of another state, who had obtained a judgment in ejectment in the United States circuit court for the southern district of Georgia, to prosecute contempt proceedings in said court against a party who had violated an injunction granted in the cause. The conspiracy was directed against the plaintiff's agent in the exercise of this private right to institute and prosecute such contempt proceedings, and was held to come within the purview of section 5508. It will be observed that none of the foregoing rights or privileges in the exercise or enjoyment of which the citizen was conspired against were specially embraced or included in said enforcement act of May 31, 1870, but depended upon and were secured by other statutes or constitutional provisions. The proposition that said section 5508 should be read and construed in the light of the objects and purposes which said act of May 31, 1870, was designed to cover and protect, and should not be extended to other rights secured by law, cannot, therefore, be sustained.

It is said by the court in *U. S. v. Waddell*, *supra*, that section 5508 is carefully limited in "its operation to an obstruction or oppression in the free exercise of a right or privilege secured by the constitution or laws of the United States, or because of his having exercised such right; * * * that the protection of this section extends to no other right,—to no right or privilege dependent on a law or laws of the state. Its object is to guaranty safety and protection to persons (citizens) in the exercise of rights dependent upon the laws of the United States, including, of course, the constitution and treaties as well as statutes, and it does not, in this section, at least, design to protect any other right. * * * Wherever the acts complained of are of a character to prevent this, or throw obstruction in the way of exercising this (federal) right, and for the purpose and with the intent to prevent it, or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of congress to make the statute." It is further stated in this case that, if the acts complained of were the result of an ordinary quarrel or malice, they would be cognizable under the laws of the state and by its courts,—that is to say, mere acts of personal violence by one or more citizens against another are matters of state jurisdiction; but, when the conspiracy is to injure or oppress a citizen in the exercise of a right or privilege secured by the constitution and laws of the United States, the wrongful acts done in its execution become offenses within the jurisdiction of the United States under said section. In other words, when a conspiracy is directed against a citizen in the exercise of a federal right or privilege, with intent and purpose of preventing or obstructing the exercise or enjoyment of such right or privilege, there is an interference with national authority, and the criminal or unlawful acts done in pursuance thereof are included in the provisions of the statute, and come within the legitimate cognizance of the United States and their courts.

In *Baldwin v. Franks*, 120 U. S. 678, 7 Sup. Ct. Rep. 656, 763, the person conspired against was in the exercise of a right secured by treaty, but, being an alien, it was held that the case did not come within either clause of section 5508. If the party affected or injured by the conspiracy had been a citizen, it is clear that the offense charged would have been embraced by the provisions of said section. In the *Case of Neagle*, 135 U. S. 1, 10 Sup. Ct. Rep. 658, the authority and duty of the general government to protect its officials, to command and enforce obedience to its laws, and keep the peace of the United States, as contradistinguished from the peace of a state, is strongly maintained, even in the absence of any act of congress on the subject. And in *Logan v. U. S.*, *supra*, Mr. Justice Gray, after a full review of the previous cases under this section in question, clearly asserted the right and duty of the government to protect against lawless interferences or violence not only prisoners in its custody, but all the officers charged with and engaged in the execution of its laws. The general principles clearly announced and applied in that case have a direct bearing upon, if they do not settle, the questions involved in the case at bar. Under the authority of that decision, if the defendants had been found in possession of the concealed spirits on which the tax imposed by law had not been paid, for which search was being made, and had been arrested by the deputy collectors or their associates and assistants, the deputy marshals, and, while in custody, had been injured by lawless violence under or in pursuance of a conspiracy to defeat or deprive them of the protection to which they were entitled, the conspirators would have committed an offense within the purview of section 5508. It would be a strange construction of the statute to hold that their rights to protection would be provided for and secured against conspiracy while in custody, but that the parties invested with the sovereign's express sanction or direction to make the arrest and retain them in custody, would not be entitled to any protection against a like conspiracy intended to prevent or obstruct them in exercising the right conferred. Is it to be said that the duty of the national government to protect its citizens in the enjoyment of rights or privileges secured by its constitution or laws, and intended for their private advantage or voluntary exercise, is greater, or rests upon a higher obligation, than the duty of protection which it owes to those same citizens, when exercising rights and privileges conferred by law and intended primarily for its benefit? In a general sense, the national government, as a political organization, is interested in the maintenance and preservation of any right or privilege secured to its citizens under its constitution or by its laws, enacted in pursuance of the sovereign power conferred upon it; and, co-extensive with such rights or privileges, whether they relate to or concern private or public interests, it has the authority, if not the duty, of extending its protection. In calling upon a citizen to act as its agent or officer, in the exercise of a right or privilege secured by its constitution or laws, the duty of protecting the citizen therein is certainly as great, if not greater, when such right or privilege concerns the government, representing the entire political commu-

nity, as when it relates to the individual alone, and rests within his option to exercise or not. In *Ex parte Yarbrough*, 110 U. S. 662, 4 Sup. Ct. Rep. 152, the point was made that the parties assaulted were not officers of the United States, and their protection, in exercising the right to vote, did not stand upon the same ground, but Mr. Justice Miller, speaking for the court, said:

"The distinction is not well taken. The power in either case arises out of the circumstance that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. In both cases it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practiced on its agents."

It is not necessary to attempt, if it were practicable, a definition of all the rights, privileges, and immunities of citizens of the United States, secured by the constitution or laws, which are or may be protected against conspiracy in their exercise or enjoyment under said section 5508. In *Crandall v. Nevada*, 6 Wall. 36, among other rights incident to national citizenship there enumerated, is said to be the right "to share [the government's] offices, and to engage in administering its functions." This is approved in the *Slaughter House Cases*, 16 Wall. 79. The words "rights" or "privilege" have, of course, a variety of meanings, according to the connection or context in which they are used. Their definition, as given by standard lexicographers, include "that which one has a legal claim to do," "legal power," "authority," "immunity granted by authority," "the investiture with special or peculiar rights." In this enlarged sense they are used in section 5508, with the qualification that the right or privilege must be one derived from or secured by the constitution or laws of the United States to the citizens engaged in its exercise or enjoyment. That such is the meaning of these terms as used in said section will further appear from this consideration: Suppose the parties here alleged to have been conspired against had been sued in the state court for or on account of acts done by them within the scope of the particular rights or privileges set out and described in the indictment, and in such suit had specially set up or claimed that they were exercising said rights and privileges under and in pursuance of authority conferred by the constitution or laws of the United States, and the decision of the highest court of the state had been against the right, privilege, or immunity so set up and claimed, they could have sued out a writ of error from the supreme court of the United States to the supreme court of Tennessee, and had the decision of the latter court reviewed and reversed, under section 709, Rev. St., which embodies and reproduces the twenty-fifth section of the judiciary act of 1789, and the second section of the act of February 5, 1867. This is well settled by the authorities. Upon no other construction can the decisions already referred to be rested, as no other will meet the duty of the government to protect its citizens in the exercise of functions involving rights and privileges, which it has conferred.

An office is a public employment, conferred by appointment of government, and in the performance of its functions the citizen selected to represent the sovereign is in the exercise of both a private right or privilege and a public duty. Upon no sound principle, therefore, can it be held that a conspiracy, in cases like the present, should be regarded as directed solely against the official in respect to his representative character, and in no sense against the citizen exercising or enjoying the right or privilege, secured to him by the constitution or laws of the United States, of accepting the public employment, and engaging in administration of its functions, when the statute undertakes to protect the citizen against conspiracy intended to injure, oppress, threaten, or intimidate him "in the exercise or enjoyment of any right or privilege" so secured to him.

It is argued that this construction should not be given to section 5508, because other statutes of the United States make other special provision for the prevention of injury to their officers, and for their protection against combinations and conspiracies to interfere with and obstruct them in the discharge of their duties. Thus by section 3171, Rev. St., it is provided that, "if any officer appointed under and by virtue of any act to provide internal revenue, or any person acting under or by authority of any such officer, shall receive any injury to his person or property for or on account of any act by him done under any law of the United States for the collection of taxes, he shall be entitled to maintain suit for damage therefor in the circuit court of the United States in the district wherein the party doing the injury may reside or be found." This civil remedy for the recovery of damages for a personal injury done the officer is in no way inconsistent with section 5508 as we have interpreted it; on the contrary, it is in perfect harmony therewith. Section 5440 provides that, if two or more persons conspire to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of the conspirators do any act to effect the object of the conspiracy, all the parties thereto are liable to the prescribed penalty. This manifestly has no connection with such an offense as section 5508 relates to. By section 5447, "every person who forcibly assaults, resists, oppresses, prevents, or interferes with any officer of the customs or his deputy, or any person assisting him in the execution of his duties, or any person authorized to make searches or seizures in the execution of his duty," is subject to fine or imprisonment; "and every person who discharges any deadly weapon at any person authorized to make searches or seizures, or uses any deadly or dangerous weapon in resisting him in the execution of his duty, with intent to commit a bodily injury upon him, or to deter or prevent him from discharging his duty, shall be imprisoned," etc. This relates clearly to assaults, resistances, or interferences by an individual, and to the use of deadly or dangerous weapons with intent to commit bodily injury, or to deter or prevent the person authorized from discharging his duty. It does not deal with the case of conspiracy, and the actual commission of personal or bodily injury, and is entirely consistent with sections 5508 and

5509, which only extend the same principle to crimes actually committed in pursuance of a conspiracy to prevent the exercise of the authority conferred by law. By section 5518 (which is substantially the same as the first and second clauses of section 1980) it is provided that, "if two or more persons in any state or territory conspire to prevent by force, intimidation, or threat any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, * * * or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, * * * each of such persons shall be punished," etc. This statute is in perfect harmony with sections 5508 and 5509, and, instead of showing that congress did not intend by said sections to include the case of a citizen in the exercise of a right or privilege appertaining to official station or function, it tends strongly in the other direction.

It is further claimed by counsel for defendants that, if sections 5508 and 5509 are so construed as to embrace the conspiracy and the crime alleged to have been committed in pursuance thereof, as charged in the indictment, the jurisdiction of the federal courts can be extended over all conspiracies and offenses perpetrated in the execution thereof against any citizen in respect to his life, liberty, or property, and thus absorb, if not supersede, the criminal jurisdiction of the several states over such matters. This is clearly incorrect, as will readily appear from a careful examination of the foregoing authorities, and especially *Logan v. U. S.*, 144 U. S. 285-290, 12 Sup. Ct. Rep. 617, where the previous decisions are reviewed. No provision of the constitution undertakes to secure or to confer upon congress the authority to protect individual rights, such as existed before the establishment of the general government, against private or individual encroachments. By article 4, § 2, of the constitution, the privileges and immunities secured to citizens of each state in the several states included those rights which were common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. This provision did not create the rights which it called "privileges and immunities of citizens of the states." "It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state government over the rights of its own citizens. Its sole purpose was to declare to the several states that, whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction." *Slaughter House Cases*, 16 Wall. 76, 77.

By the first section of the fourteenth amendment the states are prohibited from abridging the privileges or immunities of citizens of the United States from depriving any person of life, liberty, or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. This

relates, as has been repeatedly held, to state action, and confers no power or authority upon congress to undertake by it legislation to protect individual rights of person or property not created by or derived directly from the federal government against individual violence or encroachment. It was accordingly held in *U. S. v. Cruikshank*, 92 U. S. 542, and reaffirmed in *Logan v. U. S.*, 144 U. S. 287, 12 Sup. Ct. Rep. 624, "that a conspiracy of individuals to injure, oppress, and intimidate citizens of the United States with intent to deprive them of life and liberty without due process of law, did not come within the statute, (section 5508,) nor under the power of congress, because the rights of life and liberty were not granted by the constitution, but were natural and inalienable rights of man; and that the fourteenth amendment of the constitution, declaring that no state shall deprive any person of life, liberty, or property without due process of law, added nothing to the rights of one citizen as against another, but simply furnished an additional guaranty against encroachment by the states upon the fundamental rights which belong to any citizen as a member of society. It was of these fundamental rights of life and liberty that the court said, (in *U. S. v. Cruikshank*, 92 U. S. 553, 554:) 'Sovereignty, for this purpose, rests alone with the states. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a state, than it would be to punish for false imprisonment, or murder itself.'" Upon this distinction between rights and privileges existing independent of the constitution or laws of the United States, and those rights and privileges which are created or secured by said constitution, depends the authority of congress to legislate for the protection of citizens. Sections 5508 and 5509 are confined to rights or privileges of the latter class, and can never be allowed to extend to offenses affecting rights or privileges of citizens which exist by state authority, independent of the constitution or laws of the United States.

After the best consideration we have been able to give this matter, our conclusion is that the indictment is good, and that it charges an offense within the jurisdiction of this court. It follows, therefore, that the demurrer should be, and is accordingly, overruled.

UNITED STATES v. DAVID BURNS and GIDEON BURNS.

(Circuit Court, D. West Virginia. January 25, 1893.)

1. NAVIGABLE WATERS—OBSTRUCTION—THE DUTY OF FEDERAL OFFICERS.

A criminal prosecution for the obstruction of navigable waters of the United States under Act Cong. Sept. 19, 1890, §§ 6, 7, 10, (26 St. p. 426,) may be maintained, although neither the officers and agents of the United States in charge of works for the improvement of said waters, nor the collectors of customs or other revenue officers, have given information to the district attorney, as provided in section 11.

2. SAME—INDICTMENT—DUPLICITY.

An indictment under Act Sept. 19, 1890, § 6, for casting certain rubbish, tending to obstruct navigation, into the Little Kanawha river from a certain ship and from the shore and from a certain pier upon the bank, is bad for duplicity, since it charges three distinct offenses.

3. SAME.

Such an indictment, describing the rubbish as "ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, and other waste of divers kinds," and alleging that it was cast into the Little Kanawha river "at the district of West Virginia," is bad, although it quotes the words of the statute, since it does not give the defendant sufficiently clear notice of the character of the article or of the place where the alleged offense was committed.

4. SAME.

An indictment in similar terms, charging the placing of such articles upon the banks of the Little Kanawha river "at the district of West Virginia," in a place where the same were liable to be washed into the river, and thereby impede navigation, is bad for want of particularity of place, which is of the utmost importance in the offense charged.

5. SAME.

An indictment charging the building of a certain wharf, pier, or other structure "in, along, upon, and across" the Little Kanawha river "at the district of West Virginia," so as to obstruct navigation, (in violation of Act Sept. 19, 1890, § 7,) is bad for want of particularity of place.

6. SAME.

Such an indictment, which charges the building of "a certain wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, and certain other structures," is bad for duplicity.

7. SAME.

It is not a crime, under Act Sept. 19, 1890, § 10, to float rafts, logs, timber, boats, and vessels, loose and adrift, in and upon the navigable waters of the United States, especially when the offense is alleged to have been committed upon the Little Kanawha river, the navigation of which has been improved for that very purpose, and when the alleged offender pays toll, under lawful regulations, to the Little Kanawha Navigation Company, for the privilege of floating such articles upon the river and through the locks of the company. The obstructions to navigation prohibited by section 10 are only those which are permanent in their nature.

8. SAME.

An indictment charging that defendant, in conducting the logging business, unlawfully created an obstruction, not affirmatively authorized by law, to the navigable capacity of the Little Kanawha river, is bad for want of particularity of description of the offense.

9. SAME.

An indictment charging the excavation of the bottom, shore, side, bed, and channel of the Little Kanawha river "at the district of West Virginia," and with filling the same, thereby unlawfully altering the course and capacity of the channel of the said river, in violation of Act Sept. 19, 1890, § 7, is bad for want of particularity of place.

10. SAME.

Act Sept. 19, 1890, § 7, forbidding the excavation and filling, the altering and modifying, of the course, location, and capacity of the channel of navigable waters, refers to such permanent construction as tends to obstruct navigation, the building of which must, by the provisions of such section, have the approval and authorization of the secretary of war, and not to such alteration of the channel as would result from a violation of section 6.

Indictment of David and Gideon Burns for obstruction of navigable waters. On a plea in abatement, demurrer, and motion to quash. Motion granted.

G. C. Sturgiss, U. S. Dist. Atty.

H. M. Russel, B. M. Ambler, J. B. Jackson, and W. N. Miller, for defendants.

Before GOFF, Circuit Judge, and JACKSON, District Judge.

GOFF, Circuit Judge. This indictment, containing six counts, charges the defendants with violating the provisions of sections 6, 7, and 10 of the act of congress approved September 19, 1890, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes." Defendants demur to the indictment, and to each count thereof, and move to quash the same. (By consent of the district attorney and defendants an order was entered in this case, agreeing that the filing of the demurrer and motion to quash should not be construed as waiving the plea in abatement, filed by defendants.)

Sections 6, 7, and 10 of the act mentioned read as follows:

"Sec. 6. That it shall not be lawful to cast, throw, empty, or unlade, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river or navigable waters of the United States, which shall tend to impede or obstruct navigation, or to deposit or place, or cause, suffer, or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters, where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: provided, that nothing herein contained shall extend or be construed to extend to the casting out, unlading, or throwing out of any ship or vessel, lighter, barge, boat, or other craft any stones, rocks, bricks, lime, or other materials used or to be used in or toward the building, repairing, or keeping in repair any quay, pier, wharf, weir, bridge, building, or other work lawfully erected or to be erected on the banks or sides of any port, harbor, haven, channel, or navigable river, or to the casting out, unlading, or depositing of any material excavated for the improvement of navigable waters into such places and in such manner as may be deemed by the United States officer supervising said improvement most judicious and practicable, and for the best interests of such improvements, or to prevent the depositing of any substance above mentioned under a permit from the secretary of war, which he is hereby authorized to grant, in any place designated by him, where navigation will not be obstructed thereby.

"Sec. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the secretary of war, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the secretary of war, or to excavate or fill, or in any manner to alter or modify, the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the secretary of war: provided, that this section shall not apply to any bridge, bridge draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works, under an act of the legislature of any state, over or in any stream, port, roadstead,

haven, or harbor, or other navigable water not wholly within the limits of such state."

"Sec. 10. That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks, and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense, and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. The creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist, and proper proceedings in equity to this end may be instituted under the direction of the attorney general of the United States."

This legislation is an exercise by congress of its constitutional right to regulate commerce between the states, and the object evidently is to take exclusive control of the navigable waters of the United States, and protect the interests of commerce from the obstructions, encroachments, and carelessness of those using the same, and occupying the lands adjacent thereto.

Defendants have tendered a plea in abatement, to the filing of which the district attorney has objected. The plea is as follows:

"And the said David Burns and Gideon Burns, in their own proper person, come into court here, and, having heard the said indictment read, say that the said United States ought not to further prosecute the said indictment against them, the said David Burns and Gideon Burns, because they say that no officer or agent having supervision on the part of the United States of any works in progress for the preservation or improvement of any navigable waters of the United States, and no United States collector of customs, or any other revenue officer, did give any information or make any complaint to the district attorney of the United States for the district aforesaid, regarding the matters in said indictment set forth, or regarding any violation of any provision of the act of congress entitled 'An act making appropriations for the construction and repair and preservation of certain public works on rivers and harbors, and for other purposes,' passed by the congress of the United States, and approved September 19, 1890; nor did any officer, or agent having such supervision, or collector or other revenue officer, or any other officer or agent of the United States, authorized in that behalf, sanction, authorize, or procure, or make himself responsible for, the said indictment, or any part thereof, as contemplated by section 11 of said act of congress. Wherefore they pray judgment, and that by the court here they may be discharged and dismissed from the premises in the said indictment above specified." (Verified by affidavit.)

This plea is based on section 11 of the act of congress before mentioned, the section reading as follows:

"Sec. 11. That it shall be the duty of officers and agents having the supervision, on the part of the United States, of the works in progress for the preservation and improvement of said navigable waters, and, in their absence, of the United States collectors of customs and other revenue officers, to enforce the provisions of this act by giving information to the district attorney of the United States for the district in which any violation of any pro-

vision of this act shall have been committed: provided, that the provisions of this act shall not apply to Torch lake, Houghton county, Michigan."

Counsel for defendants insist that this section confers upon the officers and agents of the United States having supervision of the work in progress for the preservation and improvement of the navigable waters of the United States, and, in their absence, upon the collectors of customs and other revenue officers, the exclusive right to enforce the provisions of the act of congress mentioned; that they are to determine when the law has been violated, and when and against whom proceedings shall be instituted; and that, if they refuse or fail to give information to the district attorney of the violation of the act referred to, no indictments can be returned, or no informations filed. I do not concur in this construction of the eleventh section. I think the congress intended to require of the officers and agents referred to special attention to the requirements of said act of congress, and to charge them with the duty of protecting the navigable waters of the country from the obstructions to commerce prohibited therein. It is made their duty to give information to the district attorney of any violation of the provisions of the legislation referred to, as their attention would likely be called to such infractions of the law; but the right and the duty of the district attorney and of the grand jury to initiate proceedings in the manner usual to criminal cases, is not affected, and remains as heretofore. The objection of the district attorney to the filing of the plea in abatement is sustained.

I come now to the consideration of the demurrer and motion to quash. The indictment reads as follows:

"In the Circuit Court of the United States of America for the District of West Virginia, in the Fourth Circuit, at Parkersburg, in the year of our Lord one thousand eight hundred and ninety-one.

June Term, 1891.

"First count. The grand jurors of the United States of America within and for the district of West Virginia, now attending the said court, upon their oaths do present that David Burns and Gideon Burns heretofore, to wit, on the — day of October, in the year of our Lord one thousand eight hundred and ninety, at the district of West Virginia, aforesaid, did willfully and unlawfully cast, throw, empty, and unlade, and cause, procure, and suffered to be cast, thrown, emptied, and unladen, from and out of a certain ship, vessel, lighter, barge, boat, and other craft then and there in and upon the Little Kanawha river, and from the shore of said Little Kanawha river, and from a certain pier, wharf, furnace, manufacturing establishment, and mill, then and there situate upon the bank of and adjacent to the said Little Kanawha river, certain ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, and other waste of divers kinds into the said Little Kanawha river, which said river was then and there a navigable river, and a part of the navigable waters of the United States, and which said ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, and other waste so cast, thrown, emptied, and unladed did then and there tend to impede and to obstruct navigation in and upon the said Little Kanawha river, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

"Second count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that David Burns and Gideon Burns heretofore, to wit, on the — day of October, in the year of our Lord one thousand eight hundred and ninety, at the district of West Virginia, aforesaid, did willfully and un-

lawfully deposit and place, and cause, suffer, and procure to be deposited and placed, certain ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, and other waste of divers kinds, in such a place and situation on the bank of the Little Kanawha river, which said Little Kanawha river was then and there a navigable river, and a part of the navigable waters of the United States, where the same was and is liable to be washed into the said Little Kanawha river, by ordinary and high tide, and by storms, floods, and otherwise, whereby navigation might and may be impeded and obstructed in and upon the said Little Kanawha river, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

"Third count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that David Burns and Gideon Burns heretofore, to wit, on the — day of October, in the year of our Lord one thousand eight hundred and ninety, at the district of West Virginia, aforesaid, did knowingly, willfully and unlawfully build a certain wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, and certain other structures in, along, upon, and across the Little Kanawha river, on which river no harbor lines were or are established, and without the permission of the secretary of war, in such a manner that the said wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, and structures did, and still do, obstruct and impede navigation, commerce, and anchorage on, in, and upon said river and waters, which said Little Kanawha river is and was a navigable river, and a part of the navigable waters of the United States, in respect of which the United States then and there had, and still has, jurisdiction, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

"Fourth count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that David Burns and Gideon Burns heretofore, to wit, on the — day of October, in the year of our Lord one thousand eight hundred and ninety, at the district of West Virginia, aforesaid, did willfully and unlawfully cast, throw, and place, and cause and procure to be cast, thrown, and placed, in, into, and upon the waters of the Little Kanawha river, which said river was then and there a navigable river, and a part of the navigable waters of the United States, divers and sundry rafts, logs, sticks of timber, planks, boards, lumber, slabs, and cross-ties, barges, boats, and vessels, loose and adrift, and unconnected and unfastened to and with each other or with the bank, bottom, or shore of said river, or with any pier, post, wharf, draw, abutment, or any other structure or thing, by which the same might or could be handled, controlled, steered, managed, or navigated, and without any sail, oar, rudder, paddle wheel, steering gear, or other apparatus or device by which the same could be steered, guided, propelled, directed, or controlled, and without any agent, employe, servant, or other person upon or in charge of, or having control in any wise of, said rafts, logs, sticks of timber, planks, boards, lumber, slabs, cross-ties, barges, boats, and vessels, and without any light, signal horn, whistle, or any other device or apparatus thereon or connected therewith, to give signal, warning, or notice of the presence or approach or of the vicinity of the said rafts, logs, sticks of timber, planks, boards, lumber, slabs, cross-ties, barges, boats, and vessels; and the said Gideon Burns and David Burns then and there willfully and unlawfully caused and permitted the said rafts, logs, sticks of timber, planks, boards, lumber, slabs, cross-ties, barges, boats, and vessels to float, drift, and be carried about upon and in the waters of the said Little Kanawha river, propelled, moved, and carried about and controlled only by the current, eddies, and backwater of said river, and by the winds and storms that pass over and upon said river, by all which the navigation of said river was then and there and thereby greatly obstructed, impeded, and endangered, and an obstruction to the navigable capacity of said Little Kanawha river was created and continued for a long time, to wit, for the space of one week, which obstruction was not affirmatively authorized by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

"Fifth count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that David Burns and Gideon Burns heretofore, to wit, on

the —— day of October, in the year of our Lord one thousand eight hundred and ninety, at the district of West Virginia, aforesaid, were engaged in and carried on and conducted the timbering and logging business on the waters of the Little Kanawha river, and in conducting and carrying on said business they then and there and thereby knowingly, willfully, and unlawfully created an obstruction not affirmatively authorized by law to the navigable capacity of the said Little Kanawha river, which said river was then and there a navigable river, and a part of the navigable waters of the United States, in respect of which the United States had and has jurisdiction, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

"Sixth count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that David Burns and Gideon Burns heretofore, to wit, on the —— day of October, in the year of our Lord one thousand eight hundred and ninety, at the district of West Virginia, aforesaid, did willfully and unlawfully alter and modify the course, location, condition, and capacity of the channel of the Little Kanawha river, the said Little Kanawha river being then and there a navigable river, and a part of the navigable waters of the United States, by then and there excavating the bank, bottom, shore, side, bed and channel of the said Little Kanawha river, and by then and there filling the side, bed, shore, bank, and channel of said Little Kanawha river, and by casting, throwing, emptying, and unlading, and by then and there causing, suffering, and procuring to be cast, thrown, emptied, and unladen, ballast, stone, rocks, brick, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, and other waste of divers and sundry kinds upon the shore, bank, sides, and bottom of said river, and into the bed, channel, and waters of the said navigable river, and by depositing and placing, and causing, suffering, and procuring to be deposited and placed, a large quantity of ballast, stone, rocks, brick, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, and other waste in, along, upon, and against the bank, side and shore, bed and bottom of the said navigable river, and in other manners, without the said excavating, depositing, placing, filling, casting, throwing, emptying, and unlading said materials in manner and form as stated aforesaid having been in any wise approved and authorized by the secretary of war, and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

[Signed]

"Geo. C. Sturgiss, U. S. District Attorney.

"Upon the information of

"John Murry,

"R. C. Buckner,

"Parkersburg, W. Va.

"Witnesses sworn in open court, and sent to the grand jury to give evidence."

It is argued by counsel for defendants that the indictment does not state with sufficient clearness the offense charged, and that the accused are unable to determine from it the nature of the accusation they are called upon to answer; also that the matters and things set forth in the six counts do not constitute any offense against the laws of the United States, and do not come within the true intent and meaning of the act of congress, under which they are drawn; and it is also claimed that several of the counts are bad for duplicity, several separate offenses being charged in each of such counts.

The first count is drawn under section 6, by which the casting, throwing, etc., of certain articles from or out of any vessel, or from the shore, into navigable waters, which shall tend to impede or obstruct navigation, is prohibited. The district attorney claims that

but one offense is charged in this count; that it is reasonably definite; and that it is good pleading, as the language of the statute has been followed and used. What is the offense charged in this count? What are the defendants accused of doing? If but one violation of section 6 is set forth, which one is it? Can the court tell from this count in what manner the law has been violated? Did the defendants unlawfully throw from a steamboat, then in the Little Kanawha river, in October, 1890, certain rubbish into the river, it being a navigable river of the United States, in the district of West Virginia, and did the rubbish so thrown tend to impede and to obstruct navigation in and upon said river? If the defendants did so, and there is sufficient allegation of time, place, and circumstances, would not the count be good? And, if so, is there not much in this count that should not be in it? Is it proper to charge in one count that the defendants "did unlawfully cast, throw, empty, and unlade, and cause, procure, and suffer to be cast, thrown, emptied, and unladen, from and out of a certain ship, vessel, lighter, barge, boat, and other craft, then and there in and upon the Little Kanawha river," certain ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, and other waste of divers kinds, into the said Little Kanawha river, a navigable river of the United States, and which articles so cast did then and there tend to impede and obstruct navigation in and upon said river; and that they did so cast, throw, empty, and unlade the same articles, at the same time, into the same river, from the shore of the river, and also from a certain pier, wharf, furnace, manufacturing establishment, and mill, situate upon the bank of and adjacent to said river, which said articles so cast did also so tend to impede and obstruct navigation on said river? In my opinion, there are several distinct offenses combined in this one count, or, rather, attempted to be set forth in it. The district attorney claims that he has but followed the words of the statute in the description of the offense, and has simply adopted the usual rule that both at common law and under penal statutes permits offenses to be alleged cumulatively, as that "the defendant published and caused to be published a certain libel," that he "forged and caused to be forged," etc., from the well-known precedents where one offense is alleged to have been committed in different ways. The rule cited is good, but it does not sustain the position assumed. If the language of a statute creates or describes several separate offenses, then, in charging one of them, only the words as applicable to the one intended to be set forth should be used in the count charging the violation, and all of the language used in describing all the offenses should not be employed. Where, in the instances referred to, "the defendant published and caused to be published a certain libel," and "forged and caused to be forged a certain note, in each case but one offense is charged; while in the statute under consideration it is an offense to cast any of the articles mentioned from a vessel in the river, an offense to cast any of them from the shore of the river, and a separate, though a like offense to so cast any of them from a wharf upon the bank

of the river into the same, it being navigable, and the articles so cast tending to impede and to obstruct navigation. The difficulty is not in the description of the offense, so far as that part of the count is concerned, but in the combination of separate offenses in the one count, and the confusion and uncertainty produced thereby. I do not think it is improper to charge the defendants with unlawfully casting, throwing, emptying, and unloading, and causing, procuring, and suffering to be cast, thrown, emptied, and unladen, from and out of a certain vessel, then and there in and upon the Little Kanawha river, certain stone into the said river, which was then and there a navigable river of the United States, which said stone, so cast, etc., then and there tended to impede and to obstruct navigation in and upon said river; and a count so drawn, with proper allegations as to time, place, and circumstances, would, in my judgment, be good.

I cannot agree with the district attorney in his claim that proof that the defendants did throw or cause to be thrown from any vessel on the Little Kanawha river, at the time and in the district alleged, any of the many articles mentioned, which shall have the result charged, will sustain this count, and justify a verdict of guilty on it. I cannot agree that all the other allegations and charges are mere words of description of the one offense as to which such evidence would be offered; nor do I think that in this count they can be regarded as surplusage. In my opinion, the count is bad, for the reasons I have stated. If it was good as matter of pleading, then, in order to convict under it, it would be necessary to prove that the defendants did each and all of the different matters charged in the count. I do not mean that proof would be required that they did cast, etc., each and all of the articles enumerated, but that it would be necessary to show that some of said articles were so cast, etc., from each of said separate places, establishments, and objects. A conviction upon this count, as drawn, would not show for what offense defendants were found guilty.

There are other objections to this count. The defendants should be advised more clearly as to the character of the article or waste matter they so threw into the river, and as to the place where it was so done,—what was it, and where was it? The evidence must show it, and the district attorney must be advised as to the place, or the prosecution must fail. Then why should not the defendants be informed? The government does not wish their conviction unless they be guilty, and it should not be permitted to demand their conviction until it has given them a full and fair opportunity to make their defense to a plain and positive charge. How, in fact, can the defendants prepare for trial on this count? Will they endeavor to show that they did not throw sawdust into the river from their mill on the bank of the river in Wirt county, and be met with testimony that they cast ashes from a steamboat on said river, in Wood county? The party accused has the constitutional right to be informed of the nature and cause of the accusation. In *U. S. v. Mills*, 7 Pet. 142, this was construed to mean that the indict-

ment must set forth the offense "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged." In *U. S. v. Cook*, 17 Wall. 174, it was held that "every ingredient of which the offense is composed must be accurately and clearly alleged." It is well understood in criminal pleading that where the definition of an offense, either at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as the definition; but it must give the species; it must give particulars. 1 Archb. Crim. Pr. & Pl. 291. An indictment should furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of either conviction or acquittal, for protection against a further prosecution for the same offense; and it should also, by its statements and allegations, so inform the court that it may decide whether they are sufficient to support a conviction. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place and circumstance. The indictment must allege everything which it is necessary to prove in order to convict the party accused. All the facts which enter into an offense must be set down by express averment, and the allegation must be full, nothing being left to intendment. The judge should not assume that anything is meant which is not in exact words plainly alleged. The accumulated wisdom of the past, of years of judicial investigation, has established these rules. They are necessary, not to aid the guilty, but to protect the innocent. As has been well said: "Precision in the description of the offense, is of the last importance to the innocent, for it is that which marks the limits of the accusation, and fixes the proof of it." Judge Story, in his commentaries on the Constitution of the United States, (volume 2, § 1785,) on this subject, says:

"The indictment must charge the time and place and nature and circumstances of the offense with clearness and certainty, so that the party may have full notice of the charge, and be able to make his defense with all reasonable knowledge and ability."

In *U. S. v. Simmons*, 96 U. S. 360-362, Mr. Justice Harlan uses this language:

"Where the offense is purely statutory, having no relation to the common law, it is as a general rule sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter. 1 Bish. Crim. Proc. § 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal proceeding, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

In *U. S. v. Nelson*, 52 Fed. Rep. 646,—an indictment under the act of congress "to protect trade and commerce against unlawful restraint and monopolies,"—Judge Nelson uses this language:

"It is urged by the district attorney that, the offense being statutory, the general rule in such cases, to wit, that it is sufficient to allege the offense in

the language of the statute, will sustain the first six counts. I cannot agree to that. This is not a case where every fact necessary to constitute the offense is charged, or necessarily implied, by following the words of the statute, and the words themselves fully and directly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense; and it is not sufficient to follow only the language of the statute. * * * The charge must contain a statement of facts constituting the offense, and a certain description of it, which this indictment does not in either of the first six counts, and they cannot be sustained."

It is charged in the second count, which is also drawn under the sixth section of the act of congress I have mentioned, that the defendants, in October, 1890, in the district of West Virginia, did unlawfully deposit and place, and cause, suffer, and procure, to be deposited and placed, certain ballast, stone, etc., and other waste of divers kinds, in such a place and situation on the bank of the Little Kanawha river, then and there a navigable river, where the same was and is liable to be washed into the said river by storms, floods, and otherwise, whereby navigation might and may be impeded and obstructed in and upon the said river, contrary, etc. It will be observed from the reading of the section alluded to that the depositing and placing of ballast, stone, and the other articles mentioned in the count under consideration in any place or situation on the bank of a navigable river is not absolutely prohibited, but the prohibition applies only to such places where the same shall be liable to be washed into such navigable river by ordinary or high tides, or by storms or floods or otherwise, and not even then unless navigation shall or may be impeded or obstructed. The importance of observing the rules I have already referred to is strikingly illustrated by this second count. In the offense here alluded to, place is of the utmost importance, and the allegation as to the location should be clear and unequivocal. To require this is not unreasonable; it is not demanding anything that the district attorney is not fully advised of. The necessity to so allege could not be avoided in this instance by saying that "it is to the jurors unknown," for, in order to convict, it must be shown to be of the character of places prohibited by the statute, and consequently the government is presumed to have the information. If so, it is but simple justice that the defendants be advised of it. Surely it is not sufficient to say, as does this count, that the offense was committed "at the district of West Virginia, at a place on the bank of the Little Kanawha river," and thus permit the United States to offer testimony tending to locate the place anywhere in five counties, from the source to the mouth of the river. The defendants should not be liable to be surprised as to the place, but should be fully advised, and an opportunity given them to show, by witnesses who have examined the place designated, that it is not such a situation where the articles enumerated were liable to be washed into the river, and navigation impeded thereby. The count is bad.

The third count is based on section 7, and charges that defendants, in October, 1890, at the district of West Virginia, did knowingly, willfully, and unlawfully build a certain wharf, pier, dolphin,

boom, dam, weir, breakwater, bulkhead, jetty, and certain other structures in, along, upon, and across the Little Kanawha river, on which river no harbor lines were or are established, and without the permission of the secretary of war, in such a manner that the said wharf, etc., did and still do obstruct and impede navigation, etc. The statute makes it an offense to build a wharf outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the secretary of war, in any port, roadstead, etc., in such manner as shall obstruct or impair navigation, commerce, etc. It is not an offense, under this section, to build any of the structures mentioned in the third count, in any of the places designated, without the permission of the secretary of war, unless the structures so built are so constructed as to obstruct or impair navigation, commerce, and anchorage of the waters where they are located. Consequently the place where the structure is located should be given with more definiteness (than this count does) than "in, along, upon, and across the Little Kanawha river." If a wharf has been built, there is no trouble in locating it. If a pier has been constructed, there is no difficulty in saying where it can be found. If a dam has been erected, it is easily described. The defendants may have built more than one of each of such structures, and one only in such manner as to impede navigation and commerce. In that event, they should be advised as to the one complained of, in order that they may have time to show if they can, that by and through it, they have not violated the law.

There is another objection to this count. I find, (as I did in reference to the first count,) that there are several distinct offenses combined and charged in this the third count. The reasons assigned for holding the first bad apply even with greater force to the one now under consideration.

The fourth count is drawn under the provisions of section 10, and it is claimed that the defendants, by throwing and placing the rafts, logs, sticks, boats, and other things in the count mentioned, under the circumstances described, have violated that section. Defendants insist that the matters and things stated and set forth in this count do not constitute any offense against the laws of the United States, and do not come within the purview, true intent, and meaning of the act of congress, of which section 10 is part. What is it that the congress has prohibited by the tenth section? All obstructions to the navigable capacity of the river are not prohibited, but only those "not affirmatively authorized by law." This legislation, in effect concedes that which is well known to be true, that the necessities of commerce, the interests of the country, demand that certain obstructions to the navigable capacity of our rivers must be authorized, and their creation permitted. Under certain circumstances, bridges, piers, docks, dams, and booms, the object of which is to facilitate trade and commerce, become in many instances serious obstructions to the navigable capacity of our waters, and yet they are "affirmatively authorized by law." In the seventh section of the act under consideration congress has authorized the building

of many structures that may obstruct or impair the navigable waters of the United States, provided the permission of the secretary of war has been first obtained. By that section it is made unlawful to hereafter build in the navigable waters of the United States any structure of any kind in such manner as will obstruct or impair navigation, without the permission of the secretary of war. The evident intention of congress was to take exclusive charge of such matters in the future for the United States, and to place them under the charge of the secretary of war, leaving it to his discretion to authorize or prohibit the building of the structure and the creation of the impairment of navigation; thus rendering it unnecessary to apply to congress for permission, or special legislation in particular cases, as had frequently been done theretofore. At the time of the passage of this act authority to build structures of the character mentioned in it had been given by the states as well as by the United States, and congress did not intend to prevent their construction absolutely, but prohibited those only authorized by the legislative assembly of the states until the location and plan of the structure had been submitted to and approved by the secretary of war. It was thus possible, even after the passage of the act, to construct certain structures in a manner prohibited by the act, provided it had been authorized by law previous to such enactment. I think that the obstructions contemplated by the tenth section—those that have not been affirmatively authorized by law, and are therefore prohibited—are such obstructions as are permanent in their nature, as are created for special purposes, by the usual modes of construction. I cannot agree with the district attorney in his construction of the statute, and I cannot hold that it was the intention of congress, by this tenth section, to prohibit the floating of rafts, logs, timber, boats, and vessels, loose and adrift, in and upon the navigable waters of the United States. I cannot conclude that congress intended to make it a crime to carry on a business in which vast sums of money have been invested in most of the states of the nation, a business that has heretofore received the encouragement and protection of the law, the aiding of which was one of the commendable objects had in view by those who commenced the work of improving the very river that is now said to be obstructed, by the success that has crowned their undertaking. I cannot find in this statute any authority for holding that to be a crime which is fostered by both usage and law,—a business that in fact pays toll and tribute, under lawful regulations, to the Little Kanawha Navigation Company, for the privilege of floating rafts, logs, timber, boats, and vessels in that river, and through the locks of that company,—the very things charged in this count as obstructing and impeding the navigation of the river mentioned. Locks and dams are themselves obstructions to the navigation of rivers for certain articles of commerce, and yet they are absolutely essential for the full and convenient use of our waters for general purposes. If the position contended for by the district attorney in connection with this fourth count is correct, why cannot it with equal force be maintained that the structures of the Little Kanawha Navigation Company are also, under

the statute, obstructions to the navigable capacity of that river? If the answer is that they have been "affirmatively authorized by law," does not the reply made suggest that the same laws permit the use of the river for all purposes necessarily included in the business for the carrying on of which they require the payment of a toll? I do not say that congress cannot prohibit the casting and placing of rafts, logs, timber, cross-ties, barges, and boats, loose and adrift, in the manner described in this fourth count, into the navigable rivers of the United States, but I do find that congress has not as yet so legislated; and therefore I hold that, admitting the matters of fact alleged against the defendants in this count to be true, they do not, in point of law, constitute them guilty of an offense, and so as to the fourth count the defendants' demurrer is sustained.

The fifth count is so indefinite that it will not be seriously contended that defendants should be required to plead to it. It gives neither place nor circumstance, and is too vague and general. It charges the defendants with unlawfully creating an obstruction, not affirmatively authorized by law, to the navigable capacity of the Little Kanawha river; but it gives not the slightest notice or description of the acts done by them which they are called upon to defend. For reasons that I have already given, I hold this count bad.

The sixth count is based on that part of the seventh section immediately preceding the proviso thereto, and charges the defendants with unlawfully altering and modifying the course, location, condition, and capacity of the channel of the Little Kanawha river, a navigable river of the United States, by excavating, and by filling, the bank, bottom, bed, shore, and channel of the river, as prohibited in section 7, and by doing all the things mentioned in section 6 as not being lawful to do, and in other manners not described, without the same having been in any wise approved and authorized by the secretary of war. The position assumed by counsel for defendants—that this count charges in mass every offense suggested by the statute; that it combines all the offenses mentioned in section 6, and part of those in section 7—cannot be maintained. The charge is plainly set forth that the defendants did "unlawfully alter and modify the course, location, condition, and capacity of the channel of the" Little Kanawha river, the doing of which, under certain circumstances, is made an offense by the seventh section. The many ways in and by which "the altering and modifying" was done, as alleged in this count, constitute the mass of charges referred to. The district attorney claims that the casting, throwing, etc., and the depositing, placing, etc., of the things mentioned in section 6, constitute such altering or modifying of the course, location, condition, or capacity of the channel of the river as is made unlawful by the portion of the seventh section under which this count is drawn. My judgment is that congress did not so intend, and I construe the statute otherwise. I cannot reach the conclusion that congress authorized the secretary of war to approve and authorize the casting of ballast, stone, earth, rubbish, and filth in any of the navigable waters of the country, in such a manner as to alter or modify the course, location, and capacity of the channel of such waters, as 1

would be compelled to if I acquiesced in the position contended for by the attorney for the United States. By the latter clause of the proviso to section 6, the secretary of war is authorized to grant a permit for depositing any of the substances mentioned in section 6 in a place designated by him; not where it will alter the course of the channel of the navigable waters of the United States, but where "navigation will not be obstructed thereby." I think that the excavating and filling, altering and modifying of the course, location, and capacity of the channel, as described in section 7, must have reference to such permanent construction as tends to obstruct navigation, the building of which must have the approval and authorization of the secretary of war. This count charges the defendants with excavating the bank, bottom, shore, side, bed, and channel of the Little Kanawha river, and with filling the side, bed, shore, bank, and channel of the same, and thereby unlawfully altering and modifying the course, location, condition, and capacity of the channel of the river. This constitutes one of the offenses created by the seventh section, and, if there was sufficient clearness of allegation as to the place where the excavation was made, or the filling was done, and the channel was changed, the count would be good, treating that which relates to the substances mentioned in the sixth section as unnecessary detail and as surplusage. But for reasons I have already given in connection with the other counts of this indictment, I must hold this one bad. If the defendants are to be required to answer to the charge of excavating the banks of the river and filling the bed and channel of the same, the place or places where it is alleged they so excavated and filled should be given with more definiteness than that it was done "at the district of West Virginia."

The indictment, and each count thereof, will be quashed.

In re SHATTUCK et al.

(Circuit Court, S. D. New York. January 23, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—SILK AND COTTON ELASTIC WEBBING.

Elastic webbing composed of India rubber, cotton, and silk, India rubber being the component material of chief value, but cotton being the chief component material as to quantity, *held*, that the merchandise was properly dutiable, as the manufacture of which India rubber is the component material of chief value, at 30 per centum ad valorem, under paragraph 460 of Schedule N of the tariff act of October 1, 1890, and not as "cotton webbing," at 40 per cent. ad valorem, under paragraph 354 of Schedule I of said tariff act, as decided by the board of general appraisers.

At Law. Appeal by the importers from a decision of the board of general appraisers affirming the decision of the collector of the port of New York in the classification for customs duties of certain elastic webbing imported into that port November 18, 1890, and returned by the appraiser as "silk and cotton elastic webbing, silk chief value, 50%," and duty accordingly assessed thereon by the collector at that rate, under the provisions of paragraph 412 of Schedule L of the tariff act of October 1, 1890. The importers duly filed their protest against this classification, claiming that

the component material of chief value was India rubber, and that the merchandise was therefore dutiable at 30 per cent. ad valorem, under Schedule N, par. 460, of said tariff act. After the proceedings came before the board of general appraisers, the different articles were analyzed in the office of the United States appraiser, and those represented by sample "A" were found to consist of India rubber, silk, and cotton, silk being the component material of chief value. In those represented by samples "B" and "C" the component materials were found to be the same, but of different proportions; India rubber in both cases being the material of chief value, but cotton being the component material in chief quantity. The board of general appraisers thereupon found as conclusions of fact:

"(1) That the merchandise is elastic webbing, composed of cotton, silk, and India rubber; (2) that all of the goods are manufactured chiefly of cotton; (3) That in Exhibit A silk is the component material of chief value; (4) that Exhibits B and C have India rubber as the component material of chief value."

The board, in their decision, say:

"Webbing is an especial kind of goods, well known in trade and commerce, for which congress made specific provision in paragraphs 354, 298, and 412, Act Oct. 1, 1890. The two paragraphs with which we have to deal are: 354: 'Cotton, * * * webbing, * * * elastic or nonelastic, 40 per cent. ad valorem;' and 412: 'Webbing, * * * elastic or nonelastic, * * * made of silk, or of which silk is the component material of chief value, fifty per cent. ad valorem;'"

—And decided that in webbing of which silk was the component material of chief value, exclusive of India rubber, the merchandise was provided for as silk elastic webbing, and that the articles, which were cotton elastic webbings, made chiefly of cotton, were properly dutiable under paragraph 354 of said tariff act, in which they formed a portion or group or class of goods *sui generis*; and that hence the protest of the importers as to those articles was not well taken, and that the action of the collector should therefore stand. On the trial in the circuit court it was argued in behalf of the collector and the government that the merchandise was silk and cotton elastic webbing, as returned by the appraiser and classified by the collector, and was therefore designated *eo nomine* either in paragraph 412 or paragraph 354, and that there was no evidence taken before the board, and none was taken in the circuit court, to disprove the correctness of this finding of fact by the collector, which, under a well-recognized rule of law, must be presumed correct, as made by sworn officers of the government, until the contrary should be proved by competent evidence; hence the cases in the supreme court, (*Hartranft v. Meyer*, 135 U. S. 237, 10 Sup. Ct. Rep. 751, and others,) which make the classification depend upon the component material of chief value as between two general descriptions, should not apply.

Curie, Smith & Mackie, for importers.

Edward Mitchell, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for collector and the United States.

LACOMBE, Circuit Judge. As to the silk goods, of course the board's decision is affirmed. There is no dispute in regard to that.

If it appeared here that it was not practicable to make cotton webbing elastic without the presence of India rubber, I should be inclined to affirm the board's decision; but as there is no evidence to that effect, and as in fact there could not very well be such evidence,—as we all know, it is a matter of weave, as well as material, that cotton webbing can be made elastic without the presence of any India rubber in it whatever,—I am of the opinion that the webbing clause (paragraph 354) cannot cover these articles of which India rubber is the component material of chief value. Therefore the decision of the board is reversed, and it is directed that the articles be classified for duty under paragraph 460, as to Exhibits B and C.

UNITED STATES v. FIELD et al.

(Circuit Court of Appeals, Seventh Circuit. February 11, 1893.)

No. 68.

CUSTOMS DUTIES—PROPERTY SUBJECT TO DUTY—SILK VEILS.

Silk goods, which, although made in the manner of laces, and having the substantial characteristics of laces, are not commercially known as "laces," but as "silk nets," "veillings," and "drapery nets," are dutiable under Schedule L, (paragraph 414 of the customs act of 1890,) as a manufacture of silk not otherwise provided for, and not as silk laces. 50 Fed. Rep. 908, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Proceeding by Marshall Field & Co. to review a decision of the board of general appraisers. The circuit court reversed the decision, and ordered the collector to reliquidate the duties. 50 Fed. Rep. 908. The government appeals. Affirmed.

Thos. E. Milchrist, U. S. Dist. Atty.

N. W. Bliss, for appellees.

Before GRESHAM and WOODS, Circuit Judges, and BUNN, District Judge.

PER CURIAM. The decree appealed from is affirmed upon the grounds stated in the opinion of the court below, reported in 50 Fed. Rep. 908.

KIDD et al. v. FLAGLER.

(Circuit Court, N. D. New York. March 2, 1893.)

No. 2,583.

I. CUSTOMS DUTIES—REIMPORTED LIQUOR WITHDRAWN FROM BOND.

Where a person has removed liquor from a bonded warehouse to Canada without paying the internal revenue tax, and landed it, and permitted it to remain there for a month, he is entitled to bring it back to the United

States on payment of duty equal to such tax, as provided in Rev. St. § 2500, notwithstanding that he intended, when he sent it to Canada, to bring it back again.

2. SAME—"EXPORT" DEFINED—INTENT.

The word "export," as used in the customs laws, means the taking of goods out of one country into another, and there unloading them; and it is entirely immaterial whether or not the owner intends to bring them back again. It is the converse of "import."

At Law. Action by George W. Kidd and others against Benjamin Flagler, as collector of customs, to recover damages for illegal detention of imported goods. Verdict for defendant. Motion for a new trial. Granted.

Statement by COXE, District Judge:

In 1884 the plaintiffs were manufacturers of distilled spirits. Their distillery was at Des Moines, Iowa. Their principal place of business was at New York city. The defendant was collector of customs at Suspension Bridge, N. Y. The action was brought to recover damages of the defendant for detaining, for over two months, 65 puncheons of spirits belonging to the plaintiffs. In July, 1884, the plaintiffs withdrew this property from their bonded warehouse at Des Moines, for export to Canada, (section 3330, Rev. St.) without paying the internal revenue tax of 90 cents per gallon, intending to remove it to New York and pay the tax there. The route by which they proposed to send the property was to Detroit and thence to New York, via Windsor, Can., and Suspension Bridge. The property arrived at Windsor on the 12th of July, 1884. It was taken out of the cars, measured by the Canadian officials and placed in a warehouse under the charge of the Canadian customs officers, where it remained in bond until August 16, 1884. No duty was paid to the Canadian government. On the 16th of August, it was shipped from Windsor, invoiced to the collector of the port of New York for the benefit of the plaintiffs. The cars in which it was placed for shipment were under the seal of the consul of the United States at Windsor. It reached Suspension Bridge on the 18th of August, 1884, where it was detained by the defendant, acting under instructions from the secretary of the treasury.

The plaintiffs insist that they had a right to bring the property back to the United States upon paying a duty equal to the revenue tax upon it at Des Moines. They claimed this right under section 2500 of the Revised Statutes, which provides: "Upon the reimportation of articles once exported, of the growth, product, or manufacture of the United States, upon which no internal tax has been assessed or paid, or upon which such tax has been paid and refunded by allowance or drawback, there shall be levied, collected, and paid a duty equal to the tax imposed by the internal revenue laws upon such articles." The defendant insisted that the property had not been properly withdrawn from the warehouse at Des Moines and exported to Canada and that he had a right to detain it for that reason. The jury found that it was not the intention of the plaintiffs at the time the property was sent from Des Moines to Windsor to deal with it at Windsor as Canadian property. On the contrary, it was their purpose to pass it through Canada in order that they might pay the revenue tax at New York rather than at Des Moines. Some of these facts are admitted and others were established by the verdict of the jury. None of them can be questioned on a motion of this character, which proceeds upon the theory that the plaintiffs are entitled to recover non obstante verdicto.

Matthew Hale, for the motion.

D. S. Alexander, U. S. Atty., and Frank C. Ferguson, Asst. U. S. Atty., opposed.

COXE, District Judge, (after stating the facts.) The main question is one of law. It is this: Is a person who has, pursuant to

law, removed property to Canada, landed it and permitted it to remain there for a month, entitled to bring it back to the United States on payment of the duty provided in section 2500, notwithstanding the fact that he intended when he sent the property to Canada to bring it back again to this country? Still further simplified the question is, was the plaintiff's property exported? It is perfectly plain, if the owners' intent as to the ultimate disposition of the property is not an element in determining this question, that section 2500 is applicable.

The defendant maintains that if the owners intended to bring the property back, it was not exported. The plaintiffs assert that the question of intent has no bearing whatever upon the point at issue. The dictionary meaning of the term "export" is as follows: "To carry from a state or country, as wares in commerce." Webst. Dict. "To send goods and merchandise from one country to another." 1 Bouv. Law Dict. 502; 1 Rap. & L. Law Dict. 487. The term is the direct converse of "import," which means, "to bring into a country merchandise from abroad." These terms, as they appear in revenue and customs laws, have frequently been considered by the courts and their meaning judicially determined. Some of these decisions are as follows: "The term used is 'import' and legislation employed that term in its commercial sense, which is to 'bring' from a foreign jurisdiction, into this jurisdiction, merchandise not the product of the country. Its commercial meaning is directly contrary to the term 'export.' Both phrases have a technical meaning in the law. We 'import' teas from China, wines from France. We 'export' cotton, tobacco, pork and wheat. The one term signifies etymologically 'to bring in,' the other 'to carry out.'" The Forrester, 1 Newb. Adm. 81. "The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country,—articles which are not sold or consumed in the United States." Campbell v. U. S., 107 U. S. 407, 413, 2 Sup. Ct. Rep. 759. "The literal meaning of 'importation' is to bring in with intent to land." Kohne v. Insurance Co., 1 Wash. C. C. 158, 165. An importation means "a bringing into some port, harbor or haven with an intent to land the goods there." The Mary, 1 Gall. 206. Importation takes place when the vessel arrives at a port of entry intending there to discharge her cargo. U. S. v. Vowell, 5 Cranch, 368; McLean v. Hager, 31 Fed. Rep. 602; U. S. v. 10,000 Cigars, 2 Curt. 436; Arnold v. U. S., 9 Cranch, 104; Meredith v. U. S., 13 Pet. 486; Clarke v. Clarke, 3 Woods, 408; Barrett v. Railroad Co., 2 Man. & G. 155; Two Thousand Tin Cans, 7 Ben. 34.

It will be observed that in none of these definitions is exportation made to depend upon the purpose of the owner regarding the disposition of his goods after they have been landed in a foreign country. No authority has been cited by the defendant's counsel or found by the court holding that an intent that the goods shall remain in the foreign jurisdiction is necessary to complete exportation. Indeed, it would seem almost impossible to administer the customs laws if such an inquiry were pertinent in every case. The

collector could seize goods upon the pretext that the intent of the exporters ultimately was to bring them back again, whether they have been in a foreign jurisdiction one month, or one year, or twenty years. The authorities seem to be unanimous on the point that merchandise is exported from this country when it is landed in a foreign country. So, when the puncheons in question were unloaded from the cars at Windsor they became "imports" in Canada, and the moment they became "imports" there they became "exports" here.

Section 3330, as amended by the act of June 9, 1874, (18 St. at Large, p. 64) recognizes the fact that goods are exported when they are unloaded at the foreign port. It says: "That the bond required to be given for the landing at a foreign port of distilled spirits shall be canceled upon the presentation of satisfactory proof and certificates that said distilled spirits have been landed at the port of destination named in the bill of lading or any other port without the jurisdiction of the United States." It does not add: "Together with proof that the owner does not intend to reimport said spirits to this country."

When the government receives proof that the goods have been landed in a foreign country, it is satisfied that they have been exported, and cancels the bond. Such proof was given in this case, the collector, under date of September 24, 1886, certifying as follows: "I hereby certify that proof of landing in Canada of the following described shipments of spirits has been received at this office, and that the exportation bonds covering said goods have been canceled." Here is an express admission on the part of the collector that the plaintiffs have fully performed their agreement to export the goods. In a transaction of this kind between individuals the party making such an admission would be estopped from asserting that the goods were not exported.

The court cannot resist the conclusion that the plaintiffs fully complied with the law permitting the exportation of distilled spirits, that they did export the 65 puncheons in question to Canada, and that they had a right to reimport them under section 2500. It follows, of course, that the defendant's action in detaining them for the reason assigned by him, that they were not exportations, was without warrant of law. A common-sense construction of section 2500 would seem to be that the owners of domestic goods liable to pay an internal revenue tax may, if they find it for their interest, take such goods out of the country without paying the tax; if, however, at any time, they see fit to bring them back again they can do so on paying the tax. In other words, taxable domestic goods consumed here must pay the tax. The United States is only concerned in the collection of this tax. When it is paid the government has no further interest in the property. The United States loses nothing by the reimportation of the goods, and if the owners can gain anything by temporarily exporting them, why should the government be eager to deprive its citizens of this lawful and legitimate advantage? It should rather be a matter of satisfaction. The plaintiffs were at all times ready to pay the internal revenue tax. After the return of the spirits the tax was payable in New York instead of

Des Moines. The government should have received the amount of the tax. The plaintiffs had committed no fraud and there was nothing to justify the treatment they received.

The verdict must be set aside and a new trial granted.

In re BACHE et al.

(Circuit Court, S. D. New York. February 10, 1893.)

1. CUSTOMS DUTIES—WINDOW GLASS—BREAKAGE ON THE VOYAGE.

Window glass, which was in a sound condition when it was shipped, but has been broken on the voyage, so as to be useless except for remanufacture, is entitled to free entry, under paragraph 590 of the tariff act of October 1, 1890, for it is, for tariff purposes, different merchandise from that which was shipped, and not merely damaged merchandise of the same kind. *Marriott v. Brune*, 9 How. 619, followed.

2. SAME—BOARD OF APPRAISERS' DECISION—APPEAL—JURISDICTION.

The collector classified certain window and other glass under Schedule B, (paragraph 112 of the act of October 1, 1890,) and the importer protested, claiming that on the voyage part of the glass was broken into pieces which could not be used without remanufacture, and was therefore exempt from duty, under paragraph 590 of the free list. Before the board of general appraisers the importer offered to prove the number of pounds of glass thus broken, but the board refused the offer, deciding that the claim was in legal effect one for reduction of duties on account of damages to part of the goods, and that such a claim was inadmissible, under the act of June 10, 1890, § 23. The facts were undisputed, and the board found as a fact that part of the glass was broken on the voyage. *Held*, that the proceeding before the board was in the nature of a demurrer by the collector to the protest; that the board had authority to determine the question of law thus presented without admitting the evidence; and that, on an appeal from its decision, the circuit court had authority to review and reverse the same, notwithstanding the absence of evidence in the record to support the finding as to the broken glass.

Appeal by the Importers from a Decision of the Board of General Appraisers affirming a decision of the collector of the port of New York. Reversed.

W. Wickham Smith, for importers.

James T. Van Rensselaer, Asst. U. S. Atty., for collector.

COXE, District Judge. The appellants are dealers in glass. They have, at various times, imported into this country window glass which was in a sound condition when purchased abroad, but which, to a considerable extent, was broken on the voyage; the broken portions when brought to this country being fit only to be remanufactured. The collector assessed the entire merchandise, the broken as well as the unbroken portions, under paragraph 112 of the new tariff act. The importers insist that the broken portions are entitled to free entry under paragraph 590 of the free list, which is as follows: "Glass, broken, and old glass, which cannot be cut for use, and fit only to be remanufactured." The board sustained the collector and the importers appeal to this court.

The question is one of law. Appellants have imported into this

country glass which, concededly, is within the provisions of the free list. Had it started from Europe in the condition it was in when it reached New York there can be no doubt that it should enter free. The question is: Does the fact that it was broken while in an Antwerp ship, instead of in an Antwerp factory, change its nondutiable character? The law concerns itself only with merchandise which is imported; that is, brought into this country. It is of very little moment what is the character of the merchandise which leaves the foreign market. What is its character when it reaches our market? This is the all-important question. If a ship were to leave a foreign port having on board a consignment of some material entitled to free entry here, and during the voyage it should be manufactured into dutiable articles, no one would seriously contend that they could escape duty. The converse of this proposition should also be true. If merchandise is duty free when it reaches New York no duty should be charged. Of what moment is it where or when it became nondutiable, so long as it is nondutiable when it enters our ports and becomes subject to our laws? A happy illustration was presented at the argument. A cattle dealer buys a cow in England intending to bring her to this country and pay the duty of ten dollars on arrival at New York. On the voyage the cow dies, and he brings nothing but her hide to New York. Hides are free. Why should not this hide be free? Why should its owner pay duty on a cow because the ship left England with a cow? So in the case at bar, the Westernland left Antwerp with dutiable merchandise. When she reached New York this merchandise was free. What right, then, had the collector to levy a duty on goods which congress has declared shall enter free? To adopt the language of the court in *Marriott v. Brune*, 9 How. 619:

"To add to such unfortunate losses, the burden of a duty on them, imposed afterwards, would be an uncalled-for aggravation, would be adding cruelty to misfortune, and would not be justified by any sound reason or any express provision of law."

This is not a case of damaged goods at all. The value of the goods was not diminished. The goods ceased to exist. There was no longer window glass 16 by 24 inches square. In its place was a quantity of broken glass. The character of the merchandise was entirely changed during the voyage. For tariff purposes it was different merchandise. The glass schedule no longer described it. The language of the free list covered it with perfect accuracy. If the appellants' cases had contained broken glass and nothing else it will hardly be argued that it should be charged with duty, but, on principle, there can be no distinction. It can make no difference that dutiable and nondutiable goods happen to come to this country in the same box. It is the character of the merchandise and not the case in which it is packed that determines its tariff classification. These views are, it is thought, sustained by the following authorities: *Marriott v. Brune*, 9 How. 619; *Lawrence v. Caswell*, 13 How. 488; *U. S. v. Nash*, 4 Cliff. 107; *Weaver v. Saltonstall*, 38 Fed. Rep. 493; *Reiss v. Magone*, 39 Fed. Rep. 105; *Lead Co. v. Seeberger*, 44 Fed. Rep. 258.

The principal objections to the contention of the importers relate to matters of detail in administration based upon alleged difficulties in administering the law as interpreted by the importers. I do not think such difficulties exist, but if they do it is entirely clear that matters of convenience must yield to matters of right. No impediment has been suggested which cannot be readily removed by the officers of the customs. If the interpretation now placed upon the law is correct it may require greater care and diligence upon the part of these officers, but nothing more. No fault is found with the protest either as to form or time of service, and the importers have complied with every provision of the law necessary to enable them to obtain relief. The case in this regard is a simple one. The collector has levied a duty upon goods which were entitled to enter duty free. The importers duly protested, pointing out the precise injury complained of. This is all the law required them to do to protect their rights. They have rights and they should be protected.

This cause has been treated thus far, as it was treated upon the argument, as if the fact found by the board, that the glass was broken in transitu, was fully established by the proof. At the close of the argument the point was taken that the decision of the board must be affirmed for the reason that there was no evidence to support this finding, and, therefore, that this court must disregard it. The facts bearing upon this proposition are as follows: The importers in the protest allege that on the voyage considerable quantities of the glass became broken into pieces which were fit only for remanufacture and they say:

"We are prepared to prove the number of pounds of the glass covered by this entry that have been broken so as to be unfit for use, and we claim it is your duty to ascertain and determine such number of pounds and reliquidate the entry accordingly."

The return also contains the following entry:

"Schedule of protests to accompany letter of Sept. 22d, '91. Window glass and pieces. Semon Bache & Co."

The decision of the board states:

"The importers in each case appeared before the board of general appraisers and offered to produce evidence showing the amount of damage done to each package or case, and this evidence was held by the board to be irrelevant, and was excluded on the ground that allowances for damage of the kind under consideration were abolished by section 23 of said act of June 10, 1890. * * * The case is one which would fall directly within the terms of section 2927 of the Revised Statutes, but for the repealing effect of section 23 of the act of June 10, 1890, which latter statute, in our judgment, prohibits us from entertaining such a claim in any form whatever. Holding as we do that the claim is one, in legal effect, which seeks a reduction of duties on account of damage to a portion of the merchandise, we decide that it is not well taken. The protests are accordingly overruled on this ground, and the collector's decision is affirmed in each case."

The proceeding before the board was in the nature of a demurrer by the collector to the protest of the importers. In legal contemplation the collector's position was this:

"I concede all you say in your protest, but it is bad in law. I object to your taking up my time and that of the board by the production of irrelevant

and immaterial testimony, for when it is all in, when you have proved all that you allege in your protest it will avail you nothing, for the reason that your claim is one for a reduction of duties on account of damage and such allowances have been abolished by law. Your broken glass is not entitled to free entry and the board cannot entertain your claim in any form whatever. There is no law for it."

The board took this view, and, entertaining the opinion of the law they did, their action was perfectly natural and proper. Should the collector now be permitted to take advantage of the absence of proof which, in effect, was rejected on his motion, in order that the point of law which lies at the threshold of a recovery might be determined? It is thought not. If the point had been made before the board they would undoubtedly have required an admission from the collector or in some other way would have obviated the difficulty. But it is perfectly evident that all parties regarded the point as sufficiently presented, and nothing to the contrary appeared until the cause had been argued on the merits and was about to be decided in the circuit court. Indeed, it would seem doubtful whether under the provisions of section 15 of the act of June 10, 1890, such a point can be raised at all by a respondent. This action provides in substance that any person, whether importer or collector, who is dissatisfied with a decision of the board may apply "for a review of the questions of law and fact involved." He must, moreover, file "a concise statement of the errors of law and fact complained of."

In this case the board finds as matter of fact that "a considerable quantity of said glass was damaged by being broken during the voyage and before arrival at the port of New York in such manner as to be unfit for any other use than to be remanufactured." No error was pointed out by the collector in this finding. Indeed, no error of fact was assigned by either party. As the facts were wholly undisputed it may well have been that the board thought it unnecessary to attach the testimony. If the collector had raised the point in the manner required by the statute it may be that the board would have returned either testimony or proof of an admission that would obviate the present difficulty. It would certainly be a most novel proceeding if a respondent can succeed in having a judgment in his favor affirmed because of an error committed by the court below. The anomalous aspect of the proceeding would not be diminished should it appear further that the error was one which the trial court made upon the motion of the respondent and against the strenuous objection of the appellant. So far as the question affects the case at bar I can see no reason in favor of sustaining the objection and many reasons why it should not be sustained. It is for the interest of all, importers and collectors alike, that this question should be decided speedily. Why should the board of appraisers be burdened with the preparation of another cause with its consequent labor and delay? If it is held that the evidence is necessary, weeks may be required to produce it, for the proceeding would be in the nature of an accounting, and should the court ultimately sustain the board, the testimony will be wholly unavailing. On the other hand no injury can happen to the govern-

ment, for no money can be refunded except upon proof of the facts stated in the protest. So far as the question affects the practice in such cases generally it is manifestly for the interest of all that such questions should be determined with as little annoyance, expense and delay as possible. It was partly to produce this result that the board was established. If the practice before the board is to be more cumbersome and involved than under the old system the public will reap little advantage by the change. Where the board is of the opinion that the protest is frivolous on its face or that it has absolutely no law to sustain it I can see no reason why they should not say so and have the question of law thus raised disposed of in limine without incumbering the record with a mass of testimony which may in the end turn out to be mere worthless rubbish.

The decision of the board should be reversed.

LALANCE & GROSJEAN MANUF'G CO. v. HABERMANN MANUF'G CO.

(Circuit Court, S. D. New York. January 5, 1893.)

PATENTS FOR INVENTIONS—INTERLOCUTORY DECREE—APPEALS—SUPERSEDEAS.

Upon an appeal to the circuit court of appeals from an interlocutory decree sustaining a patent, declaring infringement, and granting an injunction, defendant is not entitled to a supersedeas as a matter of right, but the matter rests in the discretion of the circuit court, and the injunction will be stayed only under exceptional circumstances. *Societe v. Blount*, 51 Fed. Rep. 610, disapproved.

In Equity. Bill by the Lalance & Grosjean Manufacturing Company against the Habermann Manufacturing Company for infringement of a patent. The patent was heretofore sustained, infringement declared, and an injunction granted. See 53 Fed. Rep. 375, 380. The case is now heard on a motion to stay the injunction pending an appeal to the circuit court of appeals, under section 7 of the judiciary act of March 3, 1891. Denied.¹

Robert N. Kenyon, for the motion.

Arthur v. Briesen, opposed.

COXE, District Judge. This motion presents the situation which usually arises where a patent has been sustained. The defendant asserts that his business will be irreparably injured if he is compelled to stop infringing. The complainant, on the other hand, is equally strenuous in contending that his business will be destroyed if the infringement continues. If the two parties stood on equal footing, the question would be a difficult one. But they do not. The complainant is the owner of a valid patent and the defendant is a tres-

¹Subsequent to this decision the respondent applied to the supreme court of the United States for leave to file a petition for a writ of mandamus to the circuit judge, requiring him to allow a supersedeas, but that court denied the application, holding, as did the circuit court, that the granting or refusing of a supersedeas was within the discretion of the circuit court, and that the supreme court had no jurisdiction to control that discretion by a writ of mandamus. See 13 Sup. Ct. Rep. 527.

passer. The one is right, and the other is wrong. In such circumstances the former is entitled to relief. The rule as enunciated in *Societe v. Blount*, 51 Fed. Rep. 610, 61 O. G. 1484, is not, as I understand it, the law of this circuit. The injunction has sometimes been suspended here after final hearing, but only in exceptional cases. This is not such a case.

I am convinced that the rights of the public will not suffer and that the defendant's employees will not be disturbed if the usual course is adopted here. The defendant can enamel its goods in any way it sees fit, and the record shows that the ways are numerous, so long as it does not use the patented process. That any injury will result, other than that which generally follows where an injunction overtakes an infringement, I cannot believe. The injury here will not be unusual or exceptional. A bond will offer little or no indemnity. An injunction is the complainant's only available remedy. I think the case should take the ordinary course.

The motion is denied.

BRIGGS v. CENTRAL ICE CO.

(Circuit Court, N. D. New York. February 20, 1893.)

No. 6,028.

PATENTS FOR INVENTIONS—INFRINGEMENT—ICE PLANERS.

In letters patent No. 367,267, granted July 26, 1887, to John N. Briggs, for an improvement in ice planers, the claim was as follows: "The combination with the cutter head and racks, directly attached thereto, of the guides for both cutter head and the racks, arranged perpendicularly to the plane of the elevator, the pinions mounted on said guides, and engaging in said racks, and the levers or arms for operating said pinions, * * * so that the depth of the cut may be directly and positively regulated by means of the levers." *Held* that, in view of the prior state of the art, this claim must be limited to the precise mechanism described; and hence the patent is not infringed by a device wherein the cutter head is moved, and the depth of the cut regulated, by means of endless chains passing over sprocket wheels.

In Equity. Suit by John N. Briggs against the Central Ice Company to restrain the infringement of a patent. Bill dismissed.

Benjamin F. Lee, for complainant.

Edwin H. Brown and Frank L. Freeman, for defendant.

COXE, District Judge. This is an action for the infringement of letters patent, No. 367,267, granted to John N. Briggs, the complainant, July 26, 1887, for an improvement in apparatus for planing cakes of ice. It is not a pioneer patent, but relates only to improvements on the apparatus for which letters patent No. 346,576 were granted to the patentee August 3, 1886, in which a similar ice planer attached to an ice elevator is described and claimed. The object of the patent is to facilitate the adjustment of the planing device described in the prior patent and to render it more effective in operation. The usual method of elevating ice from the river or pond to the storing house is by means of an elevator or railway pro-

vided with endless chains carrying hold bars against which the cakes of ice are lodged; as the chains move the ice is drawn up the incline. For various reasons it is expedient that the blocks of ice should be planed down to a uniform thickness and grooved to prevent the ice from freezing into a solid mass in the storage house. It is also advisable so to construct the planing device that it can operate upon cakes of different sizes and remove layers of frozen snow and other impurities, which often differ in thickness. It frequently happens that worthless blocks, or blocks of different thickness, or blocks having a crust of frozen snow on the top are forced up the incline in close proximity. Again, it is not an unusual occurrence for ice to become dislodged from the hold bars and slide down the incline with great velocity, and, if it comes in contact with the planer in its downward passage, it is liable to destroy the entire machine. For these reasons it is necessary to elevate and lower the cutter bar rapidly.

For several years prior to the application for the patent (November 22, 1886,) it had been customary to accomplish these results by means of ice planers attached to the elevator. These machines were all provided with cutters and mechanism for raising and lowering the cutter carrying frame, consisting of pulleys and weights, levers, screws operated by bevel gearing, or other familiar equivalents for these old and well-known devices. The prior planers and the patented planer operate in substantially the same way. The blocks of ice are forced up the inclined elevator by the endless chains in the usual manner. The mechanism which holds the chisels or cutters is regulated by the operative in charge. As the ice is drawn upwards it encounters the cutters which penetrate the cakes to the required depth, removing any excess of thickness or impurities therefrom. The specification says:

"A little experience will enable the operative in charge quickly to determine at sight the best position for the cutter head during its operation on the approaching cake of ice, and said cutter head is under such perfect and positive control of the operative that he can easily maintain it at the position where its teeth first enter the cake of ice during the time required to effect the planing of said cake."

The only claim involved has reference to the problem of raising and lowering of the cutter bar by the attendant in charge. It is as follows:

"(1) The combination, with the cutter head and the racks directly attached thereto, of the guides for both cutter head and the racks, arranged perpendicularly to the plane of the elevator, the pinions mounted on said guides and engaging in said racks, and the levers or arms for operating said pinions, all constructed, substantially as described, so that the depth of the cut may be directly and positively regulated by means of the levers, as herein specified."

A claim much broader in scope was originally asked for. The examiner rejected the broad claim as being anticipated by two prior patents and suggested a claim in the language quoted. The complainant acquiesced in this ruling. The defenses are lack of invention and noninfringement. In considering these questions it

is wise to keep in mind the precise nature of the patented improvement. The claim, it will be observed, is for a combination having the following elements: First, the cutter head; second, the racks directly attached to the cutter head; third, guides for both the cutter head and racks arranged perpendicularly to the plane of the elevator; fourth, pinions mounted on the guides and engaging in the racks; fifth, levers or arms for operating the pinions. All of these elements are to be constructed substantially as described, so that the depth of the cut may be directly and positively regulated by means of the levers in the manner specified.

Did it require an exercise of the inventive faculties to originate this combination? Ice elevators were concededly old; so were ice planers attached to ice elevators. The knives of ice planers, so attached, had been raised and lowered by mechanisms which are well-known equivalents for the apparatus of the claim. Every element of the claim, considered separately, was old, and the combination itself, when considered broadly, was anticipated by several prior structures. It is unnecessary to enter upon a discussion of the prior references which establish this proposition, for it was admitted by the patentee himself when he formally acquiesced in the disallowance of the broad claim and accepted the narrow claim of the patent. *Royer v. Coupe*, 62 O. G. 318, 13 Sup. Ct. Rep. 166. As favorable a statement as the patentee can expect regarding his contribution to the art, is that his machine is an improvement upon prior machines, in this, that his device for raising and lowering the cutter head operates with greater accuracy, ease and speed. There can be no pretense that it performs a new function or produces a new result. It may produce the old result in a better way, but this is all. If invention resides anywhere in the claim it must be in the substitution of the racks, pinions and guards for the elevating devices of the old machines. A rack and pinion has long been recognized as an equivalent for a lever, a pulley and weight and a screw. As almost every other equivalent had previously been used to raise the cutter carrying device, it is not impossible to imagine that the use of the rack and pinion might have suggested itself to a mechanic without any assistance from the prior art. But the patent to Butterfield, No. 24,076, dated May 17, 1859, shows racks and pinions used to raise and lower the cutter head of a wood-planing machine. The specification says:

"A is a sliding frame, to which is attached the knife, D. The pinion, C, raises or lowers the frame, A, regulating the contact of the knife, D, with the lumber to be planed as it passes through the machine over the rollers, E, E. * * * The knife, D, is adjusted or set by operating the pinion, C, and raising or lowering the frame, A."

Suppose a person engaged in the business of harvesting ice, who had been using the Rockland planer, the Smith planer or the Briggs planer of 1886, had consulted an intelligent mechanic, and, after explaining to him that the raising and lowering apparatus was defective for the reasons suggested, and after placing in his hands the Butterfield patent, had asked him to remedy the defects. Would not the mechanic have seen at a glance that as racks and pinions

operated successfully to raise and lower the knife in a wood planer, they would do the same thing in an ice planer? In other words, would one who took the racks and pinions of Butterfield and utilized them to elevate and lower the knife of an ice planer be entitled to a broad monopoly? Manifestly not. *Heating Co. v. Burtis*, 121 U. S. 286, 7 Sup. Ct. Rep. 1034; *Derby v. Thompson*, 61 O. G. 1950, 13 Sup. Ct. Rep. 181; *Pomace Holder Co. v. Ferguson*, 119 U. S. 335, 7 Sup. Ct. Rep. 332; *Fox v. Perkins*, 62 O. G. 160.¹ Enough has been said to demonstrate the proposition that the claim, to be sustained, must be limited to the precise mechanism described, and that, in no circumstances, can it be held to cover other improvements which adopt different though equivalent devices. See authorities cited in *Hill v. Sawyer*, 31 Fed. Rep. 282.

The court does not overlook the argument of popularity with the public which influenced, if it did not induce, the decision of the supreme court in favor of the barbed-wire patent. 12 Sup. Ct. Rep. 443, 143 U. S. 275. The difficulty here is, conceding that the Briggs planer has been accepted by the public to the exclusion of other planers, that it is by no means demonstrated that this popularity is due to the use of the combination of the claim involved in this suit. The defendant uses an ice planer for which two patents have been granted to George A. Birch, No. 436,492, dated September 16, 1890, and No. 447,000, dated February 24, 1891. The cutter head in defendant's planer is raised by means of endless chains passing over sprocket wheels. That these would be considered equivalents of the racks and pinions of the claim, broadly construed, need not be disputed. In the same sense they would be equivalents for the lifting devices of the prior structures. But with the limited construction made necessary by the prior art it is manifest that the defendant does not infringe. Indeed, even upon the complainant's theory, the argument to support infringement, though ingenious, is too strained and artificial to satisfy one whose only interest in the matter is to arrive at the truth. It sometimes happens, in patent litigation, that arguments which, apparently, satisfy the mind of the complainant's expert that the patent has been infringed, fail to convince the judge who tries the cause. In the defendant's planer there are no racks directly attached to the cutter head, there are no guides for both cutter head and racks and there are no pinions mounted on the guides and engaging in the racks. In short, the defendant does not infringe, unless a construction so broad as to invalidate it is placed upon the claim. The bill is dismissed.

¹52 Fed. Rep. 205.

SINGER MANUF'G CO. v. BRILL.

(Circuit Court of Appeals, Ninth Circuit. April 20, 1892.)

No. 49.

1. PATENTS FOR INVENTIONS—VALIDITY—SEWING-MACHINE TREADLES.

The second claim of letters patent No. 128,460, issued July 2, 1872, to A. Brill, for an improvement in sewing-machine treadles, consisting of a combination with "a driving or fly wheel of adjustable bearings," is void for want of invention, in view of the prior state of the art.

2. SAME—APPEAL—QUESTIONS OF FACT.

The first claim of the patent covers a combination of a fly wheel having a short projection or axle at the center on one side, and on the other an arm attached to the wheel a short distance from the center, with a crank returning to the center, and a short projection or axle at the end of the crank; the wheel being held in place by pointed screws passing respectively through one of the standards of the machine, and through a bracket attached to the under side of the table, the screws fitting in conical sockets in the axle. *Held*, that the claim is not void upon its face, although all the elements are old, and that the question whether it produced a new and useful result was a question of fact to be determined by the jury; and their finding that the claim was valid was not reviewable on appeal, since it was supported by some legal evidence. *Heald v. Rice*, 104 U. S. 737; *Lumber Co. v. Rodgers*, 5 Sup. Ct. Rep. 501, 112 U. S. 659; and *Fond du Lac Co. v. May*, 11 Sup. Ct. Rep. 98, 137 U. S. 395,—distinguished.

3. SAME—APPEAL—INFRINGEMENT.

The question whether the second claim was infringed by a machine made under letters patent No. 224,710, issued February 17, 1880, to Miller & Diehl, assignors of the Singer Manufacturing Company, was also a question of fact for the jury, and their finding of infringement upon competent evidence was not reviewable on appeal.

In Error to the Circuit Court of the United States for the Northern District of California.

At Law. Action by Andrew Brill against the Singer Manufacturing Company for infringement of letters patent No. 128,460, issued July 2, 1872, to complainant, for an improvement in treadles for sewing machines. The alleged infringing machine was made under letters patent No. 224,710, issued February 17, 1880, to L. B. Miller and P. Diehl for band-wheel bearings for sewing machines, and by them assigned to the Singer Manufacturing Company of New Jersey. There was a verdict and judgment for plaintiff. Defendant appeals. Affirmed.

M. A. Wheaton, I. M. Kalloch, F. J. Kierce, and F. M. Husted, for plaintiff in error.

J. J. Scrivner, George W. Schell, and C. W. M. Smith, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and KNOWLES, District Judge.

GILBERT, Circuit Judge. A. Brill brought an action at law against the Singer Manufacturing Company to recover damages for infringement of United States letters patent No. 128,460, bearing date July 2, 1872, for an improvement in sewing-machine treadles.

The answer of the defendant pleaded the general issue, and notice was given of special matters claimed to be in anticipation of the patent. The case was tried by a jury, who returned a verdict for plaintiff, fixing his damages at \$10,008.30, and judgment was entered for that amount. Although the bill of exceptions contains numerous assignments of error, both as to the ruling of the court upon the testimony and the instructions to the jury, the argument of counsel for the defendant brought to the consideration of the court but two principal questions, to wit, whether the circuit court erred in not directing a verdict for the defendant—First, upon the ground that the plaintiff's patent was void for want of novelty; and, second, because there was no evidence of infringement.

The plaintiff's patent is for an improvement in sewing-machine treadles. The object of his invention, as stated in his patent, is to increase the ease of operating the machine, diminish the noise, and provide a means of readily adjusting the bearing of the driving or fly wheel, so that it may always run true and without shaking. To accomplish these results the plaintiff's improvement combines mechanical devices, none of which was new. His specifications describe a fly wheel or driving wheel having upon the one side, at the center, a short projection or axle; upon the other side an "arm," attached to the wheel a short distance from the center, with a crank returning to the center, with a short projection or axle at the end of the crank. The wheel is held in place by pointed screws, passing respectively through one of the standards of the sewing machine and through a bracket, which is attached beneath the sewing-machine table, and extends downward to a point opposite the center of the wheel. The wheel has conical sockets, in which the points of the screws are inserted and adjusted. The claims of the patent are two. The first is for a combination including as separate and distinct elements the wheel, "C," arm, "E," bracket, "B," standard, "H," and screws, "G, G;" the second claim is for the combination with "a driving or fly wheel of adjustable bearings."

On the trial the defendant put in evidence several prior patents, claimed to be anticipatory of the plaintiff's patent, and also as showing the state of the art in that class of machinery at and prior to the date of plaintiff's invention. One of these prior patents shows in the drawings a combination of a fly wheel and crank shaft and adjustable screws passing through the standards at either end of the machine. It is a patent for a sewing-machine brake, and its purpose is to make it impossible for the fly wheel to turn backward. It contains no description of the adjustable screws, and no claim is made for their use in combination or otherwise. The drawings, however, plainly show that the shaft is supported and turns upon screw points similar to those employed by plaintiff. Another of these older patents is for a turning lathe, in which a combination of the fly wheel with a crank shaft and adjustable screws upon the ends of the shaft plainly appears. A third is for a fly wheel with shortened axle, one end of which is supported by a bracket, but no adjustable screws are employed. Owing to the existence of these prior patents, and the state of the art as evidenced by them, the

plaintiff's second claim, for a combination with "a driving or fly wheel of adjustable bearings," under his own admissions, is clearly without merit. The validity of the first claim depends upon whether or not the plaintiff brought together the mechanical devices which he claims in a new and useful manner, or in a shape or form which produced results different from those which had been produced before. This question was submitted to the jury under proper instructions from the court, and we have not the power to disturb their verdict.

It is urged on behalf of the defendant that the court below should have instructed the jury to return a verdict for the defendant, and that the refusal so to instruct is error for which this court may reverse the judgment. Since the adoption of the seventh amendment to the constitution, declaring that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, the supreme court has repeatedly affirmed the doctrine that upon writ of error the federal courts are confined to the consideration of exceptions to the evidence and to the instructions given or refused to the jury, and that they have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted. *Parsons v. Bedford*, 3 Pet. 436; *Barreda v. Silsbee*, 21 How. 167; *Railroad Co. v. Fraloff*, 100 U. S. 31; *Insurance Co. v. Ward*, 140 U. S. 91, 11 Sup. Ct. Rep. 720.

Where there is any evidence whatever to go to the jury upon an issue of fact, the refusal of the court to instruct the jury to return a verdict for the defendant is not reviewable in this court. There is nothing in the case before the court to make it an exception to the rule. The defendant relies upon *Heald v. Rice*, 104 U. S. 737; *Lumber Co. v. Rodgers*, 112 U. S. 659, 5 Sup. Ct. Rep. 501; and *Fond du Lac Co. v. May*, 137 U. S. 395, 11 Sup. Ct. Rep. 98,—as sustaining a contrary doctrine. In *Heald v. Rice* the action was brought for alleged infringement of reissued letters patent. One of the defenses relied upon was that the reissued letters described an invention different from that covered by the original patent. This was a question of law for the court, to be determined by a comparison of the two instruments. The decision of the supreme court went no further than to hold that the reissued letters patent should have been held to be void, and that the jury should have been instructed to return a verdict for defendant. To the same effect was *Lumber Co. v. Rodgers*. In the case of *Fond du Lac Co. v. May* the supreme court expressed the opinion that the court below should have directed a verdict for the defendant, and that the judgment must be reversed, but expressly based the decision upon the ground that the patent was void. The patent in that case was for "an improvement in the construction and operation of prisons." The invention was claimed to consist in the interposition of a grating between the jailer and the prisoner at every stage of opening and closing the cell doors. Every element of the combination was admitted to be old. The court held, upon the plaintiff's own testimony, that the patent was void, for the reason that the interposed grating was made part of the combina-

tion solely for the protection of the keeper, and had nothing to do with locking or unlocking the doors, and that the mechanical devices adopted to produce that result acted precisely the same without the grating as with it. In other words, the court held that there was no patentable combination between the grating and the devices. Neither of those decisions is a precedent for the case under consideration. There was nothing upon the face of the plaintiff's patent to show that it was invalid. The questions of the novelty and utility of the plaintiff's invention were not questions of law to be determined by the court, but were issues of fact to be submitted to the jury. It cannot be said that there was no evidence to support the verdict. The plaintiff's invention, if any there was, consisted in shortening or dispensing with the wheel shaft, which, in combination with adjustable screws, had, before his invention, extended from one standard of the machine to the other. He thus brought the adjustable supports of the wheel nearer together, dispensing with a considerable amount of material, which could only add to the weight, the friction, and the cost, and bringing the point of application of the treadle bar to a central position between the two points of support of the wheel, thereby increasing the ease of operation of the machine. It may be conceded that the plaintiff's combination approaches very closely the line which separates that which is patentable from that which is not, and that the amount of invention involved in it is small. The patent, however, was prima facie evidence of its own validity, and the burden of proof was upon the defendant to establish its want of novelty. *Cantrell v. Wallick*, 117 U. S. 690, 6 Sup. Ct. Rep. 970; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486; *Lehnbeuter v. Holthaus*, 105 U. S. 94.

There was evidence that the plaintiff's machine was used to a very considerable extent by manufacturers; that the plaintiff sold numerous shop rights for its use; and that he manufactured and sold a number of his wheels with their adjustable bearings. There were witnesses who testified to the novelty and the utility of his invention. There is testimony that the wheels in use prior to his invention were unsatisfactory; that they were difficult to operate, and were noisy in operation; and that a considerable amount of attention was bestowed upon the question of their improvement during a period of several years antedating his patent. All these facts may be taken into consideration in a doubtful case. *Topliff v. Topliff*, 145 U. S. 164, 12 Sup. Ct. Rep. 825; *Loom Co. v. Higgins*, 105 U. S. 591; *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 495.

There was evidence, also, of infringement by the defendant, and that question was properly submitted to the jury under correct instructions from the court. The patent under which the defendant was manufacturing wheels when the action was commenced was issued February 17, 1880. It is a patent for "an improvement in band-wheel bearings for sewing machines." The specifications show that the results sought to be accomplished thereunder were substantially the same that are arrived at in the plaintiff's patent, namely, "to do away with the rattling of the band wheel, and to reduce the friction;

also to simplify and condense the parts, lessening the cost, and avoiding the complications of the antirattling journals in use."

It is claimed that the combination used in the defendant's patent differs essentially from that covered by the plaintiff's patent in several distinct particulars: First, that the defendant dispenses with the bracket; second, that it dispenses with the arm, "E," which is attached to plaintiff's wheel, and made a part of his combination; third, that, instead of two adjustable screws, the defendant uses but one, and in the machines manufactured under its patent prior to 1886 it used no adjustable screw whatever. The plaintiff's patent being a patent for a combination of old devices, the question of the infringement depended upon whether or not the changes from that combination adopted in defendant's wheel were merely changes in form, or such as arose from the substitution of equivalents. The defendant had the right to make improvements upon the plaintiff's combination, and defendant's patent cannot be held to be an infringement if it presents a new combination of the elements that are found in plaintiff's patent, or substitutes for one or more of the same a new ingredient, performing a new function. But the changes adopted in the defendant's device were evidently found by the jury to be merely formal. The jury must have found that by substituting one screw or an adjustable slide or lug for the two adjustable screws of plaintiff's patent the defendant accomplished all the results of that feature of plaintiff's combination by an equivalent device, and that the deflection of the defendant's axle to form the crank is but a change in form from the plaintiff's arm, "E," which is attached to the side of the wheel, and that the defendant's brace brings the point of support of the wheel to the same relative position it would occupy if the plaintiff's bracket were used. There was evidence before the jury to sustain this view. There was testimony to the effect that all of the devices employed by the defendant were the same as plaintiff's device, with the exception of slight changes in form, which performed no new functions, and which accomplished all the results attained by the plaintiff, with no improvement in operation, and no perceptible advantage in construction or cost; and that it was wholly immaterial whether there were two adjustable screws, or one adjustable screw, or an adjustable lug, whether the treadle were attached to an arm affixed to the wheel out of its center, or to an axle passing through the center, and deflected away therefrom, to form the treadle crank, or whether the support were a brace or a bracket. In short, the jury must have found that the improvement or invention of plaintiff, if any there was, consisted, in its essential features, in combining the advantage of adjustable screws, whereby friction and noise were lessened, and opportunity was afforded to adjust and take up lost motion, together with an axle so shortened as to leave only length for support upon both sides of the wheel, and room between for the central and even operation of the treadle crank, and that these are likewise the essential features of the defendant's wheel. There being no error in the rulings or charge of the court, the judgment must be affirmed, with costs to the defendant in error.

NATIONAL SHEET-METAL ROOFING CO. v. SMEETON.

(Circuit Court of Appeals, Seventh Circuit. February 11, 1893.)

No. 41.

PATENTS FOR INVENTIONS—NOVELTY—METAL ROOFING PLATES.

The second claim of letters patent No. 256,083, issued April 4, 1882, to John Walter, for "a sheet-metal roofing plate having one of its lateral edges formed with two parallel corrugations to form a gutter, and the other lateral edge formed with a broad corrugation, adapted to make a seam with corrugations and the cap for the gutter of a corresponding plate," is void for want of novelty, since gutters in rigid roofing plates were previously known. 47 Fed. Rep. 307, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

In Equity. Suit by the National Sheet-Metal Roofing Company against Henry Smeeton to restrain the alleged infringement of a patent. The bill was dismissed at the hearing. Complainant appeals. Affirmed.

Hill & Dixon, for appellant.

Banning, Banning & Payson, for appellee.

Before GRESHAM and WOODS, Circuit Judges, and BUNN, District Judge.

PER CURIAM. The decree appealed from is affirmed upon the grounds stated in the opinion of the court below, reported in 47 Fed. Rep. 307.

LEIB v. ELECTRIC MERCHANDISE CO. et al.¹

(Circuit Court of Appeals, Seventh Circuit. February 11, 1893.)

No. 53.

PATENTS FOR INVENTIONS—NOVELTY—ELECTRIC RAIL—CONNECTOR.

Letters patent No. 434,087, issued August 12, 1890, to Charles Leib, for an electric rail connector consisting of a short metallic wire with each end passing through a bolt or rivet, which is firmly inserted into a hole drilled into the rail, are void for want of novelty over the Gassett & Fisher patent of May, 1880, in which the connecting wire is coiled round the heads of the rivets, instead of passing through them, as well as the Westinghouse patent of July 31, 1883, and the Winter patent of April 14, 1885, in which the ends of the wires are directly inserted in holes in the rails. 48 Fed. Rep. 722, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Suit by Charles Leib against the Electric Merchandise Company and others for alleged infringement of a patent. The bill was dismissed at the hearing. Complainant appeals. Affirmed.

Banning, Banning & Payson, for appellant.

F. W. Parker, for appellees.

¹Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Before GRESHAM and WOODS, Circuit Judges, and BUNN, District Judge.

PER CURIAM. The decree appealed from is affirmed upon the grounds stated in the opinion of the court below, reported in 48 Fed. Rep. 722.

SERATED FUEL CO. v. WOODBURY GLASS CO. SAME v. COX & SONS CO. et al. SAME v. COHANSEY GLASS MANUF'G CO.

(Circuit Court, D. New Jersey. January 31, 1893.)

1. PATENTS FOR INVENTIONS—COMBINATION—ANTICIPATION.

Letters patent No. 397,336, issued February 5, 1889, to James H. Bullard, for an apparatus for burning hydrocarbon fuels, in which the oil-supply pipe and the air-supply pipe are capable of independent regulation so as to vary the character of the flame to meet the requirements of different kinds of work, were not anticipated by letters patent No. 365,789, granted to the same inventor, July 5, 1887, in which the oil and air supply were not capable of independent regulation; nor was there anything in the prior state of the art, including the earlier Bullard patent, to invalidate this combination, though all the particular elements entering into it were old.

2. SAME.

The fact that the apparatus covered by the 1889 patent permits of the supply of oil and air to a great number of furnaces from one fuel tank, and a single air compressor governed by one regulator, is not to be left out of view in considering the validity of the patent because this feature is not referred to in the specifications, and may not originally have been perceived by the inventor. *Roberts v. Ryer*, 91 U. S. 157, followed.

In Equity. These were three suits brought by the Aerated Fuel Company against the Woodbury Glass Company, the Cox & Sons Company and others, and the Cohansey Glass Manufacturing Company, respectively, for infringement of a patent. Decrees in each case for complainant.

Briesen & Knauth, for complainant.

Francis T. Chambers, for defendants.

ACHESON, Circuit Judge. Each of these three suits is upon letters patent No. 397,336, to James H. Bullard, dated February 5, 1889. The patented invention, the specification represents, relates to an "apparatus for securing the burning of hydrocarbon fuels and the regulating thereof." The apparatus illustrated and described comprises a burner, which, as shown, is arranged within a glass furnace, two distinct pipes running to and connected with the burner,—one an oil-supply pipe leading from a liquid-fuel receptacle; the other an air-supply pipe leading from an air-compressing machine,—and a regulator for automatically controlling the compressor, and maintaining the compressed air as fed to the burner at a uniform pressure. The specification states:

"A cock is provided both in the air and oil supply pipes, as seen at h and j, respectively, whereby a normal or desirable proportional issue of air and oil to the burner is secured under their proper operations."

The patent has a single claim, which is as follows:

"An apparatus for securing and regulating the combustion of liquid fuel in glass-melting and analogous furnaces, consisting of a burner, a liquid-fuel tank, a pipe connecting said fuel tank and burner, an air compressor having a steam pipe for conveying steam thereto for driving the same, provided with a valve, a pipe connecting said air compressor and said burner, a regulator connected to and actuated by the pressure in said air pipe, and a connection between a movable part of said regulator and said steam valve, whereby the feeding of steam to said air compressor is regulated, and a consequent regulation of the air pressure to the burner is secured, substantially as and for the purpose described."

There is here no contest as to infringement. It is conceded by the defendants' counsel, and must be under the uncontradicted proofs, that, if the patent is valid, the defendants, respectively, infringe the claim. As then, admittedly, the only question for the court is whether the plaintiff's patent is valid, we might perhaps avoid any reference to the construction to be given to the claim. But it may be well here to say that we do not accept the suggestion that the words, "whereby the feeding of steam to said air compressor is regulated, and a consequent regulation of the air pressure to the burner is secured," define the function of the entire combination. That reading would be too narrow. The quoted clause expresses the specific function of the particular constituent with which it stands immediately connected, while the opening words of the claim—"An apparatus for securing and regulating the combustion of liquid fuel in glass-melting and analogous furnaces"—indicate the purpose of the combination as a whole.

The validity of the plaintiff's patent is denied upon the grounds—First, that the entire combination claimed was anticipated by letters patent No. 365,789, granted to said Bullard on July 5, 1887; and, secondly, that in view of the previous state of the art, including what was shown in Bullard's earlier patent, no patentable invention is disclosed or claimed by the patent in suit. Now, the earlier Bullard patent cited is, indeed, for improvements in furnaces for burning hydrocarbon fuels, and certainly it does exhibit many of the constituents of the combination here in question, including an air compressor and an automatic regulator. But we cannot assent to the defendants' proposition that the two Bullard patents show, respectively, exactly the same combination of working parts. There are, we think, essential differences between the two devices in construction, operation, and results. In the 1887 apparatus the air pipe from the air compressor does not, as in the later construction, run to and connect with the burner, but leads to and communicates with an air space in the upper part of the liquid-fuel tank, and, by the air pressure thus applied, oil for the burner is forced into and through a tube which extends from near the bottom of the tank, up to and through an exterior tube secured to the top of the tank, while at the same time air is forced from the air space in the tank up through an annular air passage between said inner and exterior tubes. The latter tube is provided at its outer end with a screw cap having a small central perforation through which the mingled liquid fuel and air are ejected, in proportions regu-

lated by screwing the cap in or out. Thus, it will be perceived that in the apparatus of 1887 the supply of oil to the burner depends altogether upon the pressure of the air, whereas under the patent in suit the oil supply and the air supply are entirely independent of each other. Then the apparatus of 1887 is so organized that, with respect to the oil and air supplies, it is not capable of independent regulation. Thus, the flow of oil cannot be reduced without increasing the flow of air, and so vice versa. This proved to be a most serious defect, for, as a result, the power to vary the character of the flame to meet the necessities of the work in hand was very much limited. But the two supply pipes in the apparatus of 1889, being entirely separate, and drawing their contents from distinct sources, are capable of independent regulation, so that the quantities of oil and air can be controlled independently of each other, and thereby such varying character of flame produced as is required. Undoubtedly, the regulation by means of cocks of the flow of fluids through pipes was old. Many of the prior patents in evidence show cocks employed to perform this function. Indeed, they are obvious and implied devices for the purpose. But here the point is this: that Bullard's 1887 apparatus did not admit of the independent control of the flow of oil and air by cocks, or by any other means. Therein it was radically defective.

Again, Bullard's 1889 apparatus has another important capability not to be found in that of 1887. By the earlier apparatus it was impossible to supply more than one furnace from the same fuel tank; but the 1889 construction permits of the supply of oil and air to a great number of furnaces from one fuel tank, and a single air compressor governed by one regulator. Nor is this great advantage incident to Bullard's later patented apparatus to be left out of view because it is not referred to in the specification, or even may not originally have been perceived by the inventor. *Roberts v. Ryer*, 91 U. S. 157.

Once more, it appears that in actual practice the Bullard apparatus of 1887 was a failure, and this chiefly because its construction and mode of operation precluded the independent regulation of the oil and air. In fact, the use of the 1887 apparatus has been abandoned. Furthermore, the evidence shows that the machines which were constructed in accordance with the earlier patent have been replaced by others made under the 1889 patent, and that these latter machines have given entire satisfaction. Upon the whole case, then, we feel quite justified in holding that the plaintiff's patent was not anticipated by Bullard's earlier apparatus. *Consolidated Safety-Valve Co. v. Crosby, etc.*, Valve Co., 113 U. S. 157, 179, 5 Sup. Ct. Rep. 513; *The Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. Rep. 443.

We do not feel called upon to discuss at length the features of the numerous other patents of prior dates set up by the defendants. Avoiding particularity, we content ourselves with saying that while they show that the several elements here employed are in themselves old, yet none of them discloses the combination of the patent in suit. Finally, not only does the presumption of patent-

ability arising from the grant of the patent stand unshaken, but there is affirmative proof of the patentable novelty and utility of the combination. A decree in favor of the plaintiff will be entered in each of the cases.

VIRGINIA HOME INS. CO. v. SUNDBERG.

(Circuit Court, S. D. New York. February 6, 1893.)

1. ADMIRALTY—PLEADING.

The libelant is entitled to an admission or denial of each distinct and separate averment in his libel separately and distinctly, and an answer is insufficient which admits some of the averments of the libel, but concludes: "He denies the other allegations of the fourth article, as therein alleged, and refers to the allegations of the eighth article of the answer;" such eighth article being a narrative somewhat different from the libelant's.

2. SAME.

An averment in the answer to a libel that the persons for whose benefit this action is prosecuted "had full notice and knowledge of and participated in the prosecution" of a former action, does not sufficiently advise the libelant whether evidence of some specific written notice in addition to a general knowledge is to be introduced, but such defect may be cured by amendment.

3. SAME.

A pleader who sets forth a detailed narrative of the movements of his own vessel cannot be required to add thereto averments as to other matters of detail upon which his adversary may wish to have specific averments, but as to which it does not appear that he has knowledge sufficient to enable him to set them forth, nor that he intends to rely upon them at the trial.

In Admiralty. Libel by the Virginia Home Insurance Company against John P. Sundberg. Reargument on exceptions to the answer.

Geo. A. Black, for plaintiff.

Goodrich, Deady & Goodrich, for defendant.

LACOMBE, Circuit Judge. Upon more careful consideration of the points urged upon the reargument, I am led to the conclusion that in some respects I erred in my former decision.¹ The fifth article of the answer is an answer to the fourth article of the libel. It admits specifically, separately, and distinctly some of the averments therein contained, and concludes as follows: "He denies the other allegations of the fourth article, as therein alleged, and refers to the allegations of the eighth article of the answer." Such eighth article is a narrative of events in some respects like the libelant's, in some differing therefrom. Except for the denial above quoted, the following allegations of fact in the fourth article of the libel are neither admitted nor denied, nor is there a denial as to them of knowledge or information sufficient to form a belief: (1) That the Newport passed out to sea "through the Swash channel" in part; (2) that she so passed in

¹No opinion was then filed.

part "through the South channel;" (3) that she so passed on a "course of about S. E. $\frac{1}{2}$ S.;" (4) which was the "usual channel course;" (5) that "at 5:35 P. M. she had Sandy Hook light bearing abeam;" (6) that "at 5:40 P. M. she had Sandy Hook bearing west;" (7) that when she passed Scotland light-ship at 5:50 P. M. "it bore west;" (8) that at such time it was "about one quarter of a mile distant;" (9) that she took her course of about S. $\frac{1}{2}$ W. "when distant about one quarter of a mile from Scotland light-ship, bearing west." The above-quoted general denial is conjunctive, and does not severally deny these averments. Under the rules and practice, I am satisfied that libelant is entitled to an admission or denial of each distinct and separate averment in its libel, separately and distinctly; and the fifth article of the answer does not thus answer the fourth article of the libel. The exception to it is therefore sustained.

The third article of the answer avers that the persons for whose benefit this action is prosecuted "had full notice and knowledge of and participated in the prosecution" of a former action. To this libelant excepts because it does not state what kind of notice is intended. If, as seems probable, (and which was the view I took of the averment on the original argument,) the word "notice" is used as the equivalent of "knowledge" of the existence of the former suit, the averment is full enough, but as it stands it would warrant proof upon the trial of some specific written notice. The libelant is entitled to be advised by the answer whether anything of that kind is sought to be proved, and for that reason his exception to the third article of the answer is sustained. The answer may be amended either by striking out the word "notice," if it is used merely as the equivalent of "knowledge," or by stating what kind of notice is intended, if some specific one is relied on.

My opinion as to the sufficiency of the exceptions to the fifth and eighth articles of the answer (except as to the denials of the fifth article) remains unchanged. I do not think the pleader who sets forth a detailed narrative of the movements of his own vessel can be required to add thereto averments as to other matters of detail, upon which his adversary may wish to have specific averments, but as to which it does not appear that he has knowledge sufficient to enable him to set them forth, nor that he intends to rely upon them on the trial. Nor do I think the claimant should be required to set forth the details asked for touching the Newport's collision with an unknown schooner. To do so would seem a reversal of the position of the respective parties. It is for the libelant to show that the Newport did collide with the John K. Shaw. The claimant it not called upon to show that she did not, and the details of a collision with some other vessel are irrelevant to this controversy.

The seventh exception, namely to the ninth article, is sustained. The various points as to which express averments are asked for seem material to the sufficiency of the defense set up, and should be pleaded. In all other respects my former opinion remains unchanged. Order accordingly.

THE CERRO GORDO.

TABOR et al. v. THE CERRO GORDO.

(District Court, D. Connecticut. February 28, 1893.)

No. 923.

SEAMEN'S WAGES—LIEN—WAIVER—MERGER—ACTION IN STATE COURT.

Seamen recovered a judgment at law for wages in a state court against a part owner, and attached and sold his interest in the vessel, subject to a certain mortgage, but did not obtain full satisfaction of their claim. The purchaser bought in this mortgage, and subsequently became sole owner. *Held*, that the proceedings in the state court neither operated as a waiver of their lien nor a merger of their cause of action, and the lien could still be enforced against the vessel to the extent of the mortgage and the interests not before sold.

In Admiralty. Libel by Nelson W. Tabor and others against the schooner Cerro Gordo to enforce a lien for seamen's wages. Decree for libelants.

Arthur L. Shipman, for libelants.
Samuel Park, for claimant.

TOWNSEND, District Judge. Libel in rem. There is no dispute as to the facts in this case. The libelants, with three other seamen, originally brought actions at law in the state court against one Henry G. Chapman, then master of the schooner Cerro Gordo, and owner of three eighths thereof, for wages as seamen on board said schooner. In said actions said schooner was attached, judgment was rendered in favor of plaintiffs, and the said interest of said Chapman was sold, under the execution, to the present claimant. The sale was made subject to certain claims, the only one among them which is of any importance in the consideration of this case being a mortgage for \$1,200, which was afterwards bought by this claimant. He is now the sole owner of the schooner. The amount received by libelants under the execution sale being insufficient to satisfy their claims for wages, they now seek to recover the balance thereof by a libel in rem against the schooner.

The claimant contends that the libelants, by the sale under the execution, waived the right to again proceed against the vessel for the same cause of action. Counsel for libelants claims that the favor shown by courts of admiralty to the lien of seamen for wages gives them a peculiar right to enforce such lien in this court, and illustrates his claim by the distinction between their lien and the implied lien of the material man.

It is true that seamen are treated as a privileged class, and that, as their services are presumably necessary for the preservation of the res, their liens for wages are of the highest rank; and the remedies allowed them for the enforcement of their claims "ought not to be abridged, except in cases of a clear, common understanding to that effect." Judge Brown, in *Russell v. Rackett*, 46 Fed. Rep. 201. But I do not see how these facts can give them any greater rights

in the proceedings for the enforcement of their lien. A lien is a *jus in re*. Once acquired, whether by a seaman, or by a material man, under a state statute, the admiralty will recognize and enforce it, subject only to the rules of priority adopted in its courts. *Henry*, Adm. Jur. & Proc. pp. 197, 198; *The Lottawanna*, 21 Wall. 558; *The Guiding Star*, 18 Fed. Rep. 263; *The William T. Graves*, 14 Blatchf. 189. The favor shown to the lien of the seaman does not affect the question of the nature or extent of his remedy, but only that of priority of satisfaction.

But the effect of the prior attachment, judgment, and sale on execution presents a novel and difficult question. It seems to be settled that the mere fact that libelants had already brought suit in the state court for the same claim is no bar to this proceeding in admiralty. *The Highlander*, 1 Spr. 510; *The Brothers Apap*, 34 Fed. Rep. 352; *The Kalorama*, 10 Wall. 218. If the two suits were pending at the same time, that might be ground for a stay of proceedings. *The Edith*, 34 Fed. Rep. 927; *The John and Mary*, Swab. 473. It would seem from some of the cases that a sale by libelants under the former execution might have operated as a waiver of their lien, provided they had thereby assumed to sell the entire vessel, and all rights and interests therein. *The Kalorama*, *supra*; *The Mary Morgan*, 28 Fed. Rep. 202. And it makes no difference whether such conduct would operate as an estoppel. Under the doctrine of admiralty, applicable to the enforcement of liens, the vendor at the execution sale in such a case would be held to have lost his lien by laches. *The Seminole*, 42 Fed. Rep. 924; *The Scow Bolivar*, Olcott, 478.

But the attachments and sale under the execution affected only the part interest of the defendant therein. The attachments could not interfere with the interest of the mortgagee, for they were subsequent to it. Furthermore, the execution sale was made expressly subject to this mortgage. The present claimant is not only the purchaser of the execution debtor's interest, but he is also the assignee of the mortgagee. Prior to his purchase of the mortgage, the liens of these libelants had already become vested. He therefore acquired the title of said mortgagee, subject to said liens, (*The Guiding Star*, 18 Fed. Rep. 263;) and of course the purchase under the execution did not impair said liens in the absence of laches, (*The Gazelle*, 1 Spr. 378; *The Julia Ann*, Id. 382; *Crosby v. The Lillie*, 40 Fed. Rep. 368.) It does not appear that the claimant has been in any way prejudiced by the action of libelants. It does not appear that there have been any laches on their part. The claim accrued between March 9 and April 7, 1892. The attachment was made on said April 7, the execution sale was on May 10, and the libel was filed on June 15, 1892. Nor does it appear that they made any misrepresentations, or failed to make any representations which it was their duty to make. *Crosby v. The Lillie*, 42 Fed. Rep. 238. They were not called upon to speak at the execution sale, for they assumed to sell only the interest of Chapman in the vessel. Their present claim is not inconsistent with a waiver, by such sale, of all rights to said interest. *Crosby v. The Lillie*, 40 Fed. Rep. 368.

Furthermore, the purchaser of a mortgage on a vessel, or of an interest in a vessel, on an execution issuing out of a state court, is presumed to know that such purchases are subject to all existing liens. These libelants, by their execution sale, waived only their right again to proceed against such portion of the vessel, or interest therein, as had been sold by them. It would seem, therefore, that they might thereafter enforce their lien in admiralty against the vessel, to the extent of the mortgage interest therein, just as they might have done against the entire vessel in the first instance. In the latter case they would have been entitled, as against the mortgage, to the whole of the fund arising from a sale, by virtue of the priority of their lien.

It may be objected to this conclusion that the lien was waived, and the cause of action merged, by the suit in the state court, and judgment thereon. No cases were cited by counsel upon this point, except *The Kalorama*, supra, in which the supreme court of the United States suggests the question, but leaves it undecided. An examination of the authorities shows the differing opinions entertained as to the effect of such proceedings in a state court upon a subsequent action in rem in the admiralty. In *Dudley v. The Superior*, and *Sexton v. The Troy*, (decided in 1855,) 1 Newb. Adm. 176, certain Ohio creditors, having both maritime and nonmaritime liens, proceeded to seize the boats under the state water-craft law, by process from the state courts. Afterwards, the boats having been sold under the order of the court of admiralty, and the proceeds paid into the registry of the court, these creditors claimed liens for the full amount of their claims under the state law, whether originally maritime or not, and, the fund being insufficient for the payment of the claims in full, they insisted upon their right to share pro rata with those parties holding liens originally maritime, who had not made seizures under the state law. The court suggested that a party who voluntarily waived his admiralty lien, and resorted to the local law for his indemnity and protection, could not resume it at his pleasure, and thereby be reinstated in his original rights; and held that such liens should be postponed to those of parties claiming under their original admiralty liens only. The ground of this decision, as stated by the court, is that a maritime lien existing under a state law must be subordinated in rank and postponed in payment to an original maritime lien of the same class. This view of the law is directly contrary to that expressed in *The Guiding Star*, supra, where Mr. Justice Matthews holds that a maritime lien for supplies furnished at the home port, "for which a lien is given by the local law, must be placed upon the same footing, in the distribution, with similar claims arising in foreign ports." In *Stapp v. The Swallow*, 1 Bond, 190, certain material men, who had obtained judgments under said Ohio water-craft law, filed said judgments in the admiralty court as evidence of their claims, and maintained that said judgments still retained their original character as maritime liens, and that they should have priority of payment over those not importing such lien where seizures had been made under state process. Judge Bond says, (page 190:)

"In the case of *Dudley v. The Superior*, decided in this court some years since, and reported in 1 Newb. Adm. 176, this question was presented, though not argued; and the court held that a claimant having an original maritime lien, who, instead of asserting and enforcing his claim in the admiralty court, proceeded under the state water-craft law, thereby waived such lien, and occupied in this court a position of equality with those claiming liens solely by virtue of seizures under the state statute. I have no reason to doubt the correctness of the views indicated in the case referred to. It is true I have found no reported case in which this question has been under consideration in any other court. It is, however, clearly consonant with reason and the analogies of law that, if a party, having an undisputed maritime lien, voluntarily waives it by seeking another remedy, he cannot be reinstated in his original right. His claim against the boat has passed into a judgment, pursuant to the state statute, and before a state magistrate or court, thereby losing wholly its original character as a maritime claim. It results, from this view, that this class of claimants can have no preference or priorities, except such as belong in common to all those who have made seizures under the water-craft law."

Without discussing the correctness of these views in the light of the later decisions upon the subject of maritime liens, it seems to me that the cases are not controlling upon the present case. In neither of them were the parties seeking to merely enforce original admiralty liens against the vessel. They were claiming, by virtue of judgments, which, in one case at least, confessedly embraced non-maritime claims, to obtain a priority over other lienors in the distribution of a fund in the registry of the court. The only question before the court was that of priority. The question of merger was not necessarily before the court; it was not argued; and the court, in its dictum, says that it has found no other case in which this question has been considered. It appears that in the original suits under the water-craft law the proceeding was against the entire vessel, and all interests therein.

But, irrespective of these questions, it seems to me that the reason for the above statements by the court, and the distinction between these cases and the one under consideration, are to be found in the provisions of the Ohio water-craft law, then in force. Rev. St. Ohio 1854, pp. 185, 186. Section 1 provides "that steamboats and other water crafts * * * shall be liable for debts contracted on account thereof by the master, owner, steward, consignee, or other agent for materials, supplies, or labor, in the building, repairing," etc., "of such water craft." Section 2 provides that "any person having such demand may proceed against the owner or owners or master of such craft, or against the craft itself." The act further provides, when the suit is against the craft, for seizure, detention, and sale, and that, "if the proceeds of such sale fall short of satisfying the judgment, the balance shall remain to be collected on execution as upon other judgments." It will thus be seen that the lien allowed by this law might arise from nonmaritime as well as maritime services, even when the bill was contracted by the owner; that any deficiency after sale of the craft might be collected on execution; and that the proceeding might be either in rem or in personam. The remedy, therefore, was even greater than that allowed in a court of admiralty. And, while such a proceeding in rem might formerly have been enforced in the state courts, it is

now well settled that no such jurisdiction exists, but that admiralty alone can enforce maritime liens by proceedings in rem. *The Belfast*, 7 Wall. 624; *Leon v. Galceran*, 11 Wall. 192; *The Lottawanna*, supra; *The De Smet*, 10 Fed. Rep. 483; *The Guiding Star*, supra.

Now, in order that a judgment may operate as a merger, it is not only necessary that the identical cause of action between the same parties or their privies should have passed into judgment, but also that the plaintiff should have had a full and complete opportunity to recover his whole demand. *Black*, Judgm. § 675. Thus in *Toby v. Brown*, 11 Ark. 308, it was held that a judgment in rem against a steamboat, if unsatisfied, could not be pleaded as a bar to a subsequent action against the owners. The court proceeded on the theory that, as in the proceeding in rem no satisfaction could be had against the owners, such proceeding was no bar to a suit in the state court. See, also, *Durant v. Abendroth*, 97 N. Y. 142. Under the water-craft law the plaintiff had a full and complete opportunity to recover his whole demand against the craft and her owners. In this case, as no recovery could be had in the state court against any one or anything except the part owner and his interest, there was no full and complete opportunity to recover the whole demand. It may further be suggested, in view of the difference between the character of the two proceedings, that the parties defendant in the two proceedings are not the same, and do not stand in the same relation to the seamen. *The Pioneer*, 21 Fed. Rep. 426. In *Boynton v. Ball*, 121 U. S. 466, 7 Sup. Ct. Rep. 981, where there was a judgment on a debt, the court held that, notwithstanding the change in form by merger into a judgment of a court of record, it still remained the same debt. Here the debt for seamen's wages is the foundation of this lien, and, as such, if unsatisfied, should, it seems to me, in the absence of laches or misrepresentation, be enforceable against the res, which has presumably been preserved by means of the services for which recovery is sought. This is the view taken in the English cases. Thus in *The Bold Buccleugh*, 7 Moore, P. C. 267, this whole question is fully discussed, and the right of one having an admiralty lien to proceed in rem without reference to a prior suit in personam in the state court is upheld even as against purchasers without notice. And in *The Bengal*, Swab. 468, Dr. Lushington, in a case strikingly like the present in all essential particulars, sustained the right to proceed against the vessel, and held that one having a twofold security for his wages—the personal action at common law, and the action in rem in the admiralty—might “avail himself of the second; the first which he tried (the personal action) having practically failed to give relief.” The personal action had proceeded to judgment against the original owner, but he was bankrupt. Before the commencement of the proceeding in rem the vessel had been sold to third parties. See, also, *The John and Mary*, supra. If the cause of action was not merged, clearly the lien was not waived. In *The Gate City*, 5 Biss. 207, Judge Blodgett says:

"It is a settled principle of admiralty law that a seaman or mariner who has acquired a maritime lien will not be construed as having parted with that lien and waived it by anything short of an express contract or payment."

Let a decree enter for the amount of libelants' claims.

THE SAMUEL MARSHALL

PITTMAN et al. v. THE SAMUEL MARSHALL

(Circuit Court of Appeals, Sixth Circuit. February 6, 1893.)

No. 38.

1. MARITIME LIENS—SUPPLIES—HOME PORT OF A VESSEL.

Under the general maritime law, one who furnishes supplies to a vessel has a right to suppose her home port to be that where she is enrolled, and therefore that which is painted on her stern; but where she is chartered by her owners, the charterer to have full control, and to employ and discharge her officers and men, with the obligation of paying all running expenses, her home port, for the purpose of determining whether the supply man's lien attaches, is the port of the charterer, provided the supply man has knowledge of the facts, or sufficient notice to put him on inquiry. 49 Fed. Rep. 754, affirmed.

2. SAME—NOTICE OF CHARTER—AGENT'S AUTHORITY.

An employe in charge of a coal dock in the Detroit river had authority to furnish coal to any steamer calling for it, and to either receive cash, or take a receipt from the master, and get the name of the person who would pay the bill. He was then to take a memorandum of all these facts, and at once notify his employers. Demand for payment was always made personally or by mail, but the coal was always charged on the books against the steamer to which it was furnished. *Held*, that the employe was clothed with apparent authority to sell on credit, and so to receive notice of any limitation of the vessel's liability, and that the supply man, under the general maritime law, could not hold the vessel liable, when the master notified the employe that she was chartered by a citizen of the same state as the supply man.

3. SAME—SUPPLIES FURNISHED ON CREDIT OF THE VESSEL—EVIDENCE.

Certain merchants furnished coal to a steamer for a part of two seasons, receiving payment, from time to time, from a company not the owner. They had furnished coal to other vessels, and received payment from the same company, and in previous seasons had furnished coal to the same master, then in charge of another vessel, and been paid by the same company, which was well known, and of good financial standing. Its principal business office was directly across the street from the supply man's office, and it was engaged in business requiring it to charter vessels. The supply man had twice received its acceptances for coal furnished to this vessel, though it was charged on the supply man's books to the credit of the vessel. *Held*, that the supply man had notice that the company had chartered the vessel, or of facts sufficient to put him on inquiry; and that the coal was furnished on the credit of the charterer, and not of the vessel.

4. SAME.

The lien on a vessel given by a state statute (How. Ann. St. Mich. § 8236) for all debts contracted for by the owner or master on account of supplies furnished is maritime in its nature, because the contract out of which it springs is maritime, and as such it is subject to the limitations of the general maritime law. It therefore does not attach unless the supplies were furnished on the credit of the vessel. 49 Fed. Rep. 754, affirmed. *The Young Mechanic*, 2 Curt. 404, applied. *The Illinois White and Cheek*, 2 Flap. 383, disapproved.

Appeal from the District Court of the United States for the Eastern District of Michigan.

In Admiralty. Libel by James E. Pittman and others against the steam barge Samuel Marshall (Edward Smith and others, claimants) for supplies. The district court dismissed the libel. 49 Fed. Rep. 754. Libelants appeal. Affirmed.

Bowen, Douglas & Whiting, for appellants.

John C. Shaw and Herbert A. Wright, for appellees.

Before JACKSON and TAFT, Circuit Judges, and SAGE, District Judge.

TAFT, Circuit Judge. This is an appeal from a decree of the district court for the eastern district of Michigan in admiralty, dismissing a libel against the steam barge Samuel Marshall. The libelants were a firm of coal merchants doing business in Detroit, Mich. The Samuel Marshall was a steam barge enrolled at Buffalo, N. Y. The libel alleged that she was a foreign vessel, wholly owned by persons residing at Buffalo; that at the several times during the year 1890, mentioned in the schedule of coal deliveries attached to the libel, while the vessel was lying at the port of Detroit, the master represented that the vessel stood in need of supplies and fuel to render her seaworthy and able to proceed on her voyages or trips, and requested the libelants to furnish the same, which the libelants did; that the libelants, in doing so, relied upon the credit of the vessel, as well as upon that of the master and owners thereof, and would not have furnished the supplies and fuel except upon the credit of the vessel. The claim is for \$1,193.11, with interest from the 1st day of November, 1890. The defense was that the vessel was under charter by the J. E. Potts Salt & Lumber Company, a corporation organized under the laws of and doing business in the state of Michigan, with its principal office at the city of Detroit; that the company was bound under the charter to furnish all supplies and fuel which it should need or desire on said vessel; and that the fuel and supplies furnished were not, and could not be, for the benefit of the vessel, or the actual owners thereof,—all of which was well known to libelants when the coal was furnished. Subsequently an amended libel was filed in which the claim for the lien was based, not only on the general maritime law, but also upon the laws of the state of Michigan conferring a lien for supplies furnished to boats navigating the waters of the state. The evidence shows that the libelants owned and used a dock on the Detroit river, at which they were in the habit of supplying coal to steamers. The dock was in charge of one McDonald, an employe of libelants, who was given authority to furnish coal for any steamer that called for it, and to receive the cash if tendered. If cash was not paid, then it was his duty to take a receipt for the coal from the master, and to get from him the name of the individual or company who would pay the bill. McDonald entered upon a memorandum book all these facts, and at once gave notice of them to the libelants, whose principal office was some distance from the dock. Demand for payment was made either by

the local collector of the firm or by mail, as the person named by the master was a resident or nonresident of Detroit. The coal delivered on credit was always charged on the books of the libelants against the steamer to and for which it was furnished.

The steamer Samuel Marshall was chartered for the season of 1889 by the Potts Salt & Lumber Company, a corporation of the state of Michigan, with its principal office in Detroit. Under the charter the Potts Company was given possession of the vessel, and authority, at its own expense, to victual, man, and navigate her, to hire a master agreeable to the owners, to exercise entire and sole control and direction over him, to summarily discharge him for disobedience of orders, and employ another to be approved by the owners. The master was given power to hire and discharge the other officers and the crew. The Potts Company bound itself to furnish the master with funds sufficient to pay all running and partial loss expense of the vessel. The charter was renewed for the season of 1890. The Potts Company did a most extensive business in carrying salt and lumber on the lakes, and had several vessels under charter. The master of the Marshall in 1890 had been in 1888 and 1889 master of the Colwell, another vessel chartered by the Potts Company, and had during those seasons procured his monthly supplies of coal from libelants, who collected the bills from the Potts Company. As master of the Marshall he had obtained monthly supplies of coal from libelants from April until September, 1890, and the Potts Company had paid for them. The company had other vessels under charter in 1890 whose coal bills with libelants it also paid. The principal office of the Potts Company was immediately opposite that of libelants, on the same street, in Detroit. It was a well-known company, with very large interests, and up to November 24, 1890, had good financial standing. In July, 1890, before the coal was delivered for which this libel was filed, the master of the Marshall told McDonald, libelants' dock man, that his vessel was under charter by the Potts Company. In September, when payment was demanded of the Potts Company for the coal delivered to the Marshall in the previous month, the collector was tendered an acceptance of the company for the amount. He telephoned his principals to know what he should do, and was directed to receive the acceptance, and receipt the bill, which he did. In November of the same year, on the presentation of another bill for additional coal delivered to the Marshall, and including also coal delivered to another vessel chartered by the Potts Company, a second acceptance was received by the collector, this time without special authority from libelants. The second acceptance was, however, delivered by their collector to libelants, and deposited by them in their cash drawer. On November 24, 1890, the Potts Company made an assignment for the benefit of creditors, and on the next day, before the second acceptance was due, the libel in this case was filed.

The questions in the case are two: First. Did the libelants obtain a lien for the coal furnished to the steamer Marshall under the general maritime law? Second. If they did not, then are they entitled to a lien under the state law of Michigan? Judge

Severens, in the court below, held, in a satisfactory and convincing opinion, that they had no lien in either aspect of the case, and we entirely concur with him in that view.

Under the general maritime law, any one furnishing necessary supplies or material to a vessel in a foreign port, on the order of its master, and on the credit of the vessel, has a lien thereon, entitling him to proceed against the vessel in rem, and have her sold to pay his claim. Such a lien is not given when the supplies are furnished to a vessel in her home port, because it is then supposed that they are furnished on the credit of the owner. The home port of the vessel is the port of the country where her owner lives. In *The General Smith*, 4 Wheat. 443, it was held by the supreme court that vessels having their home port in one state of the United States are to be regarded, in the application of the foregoing rules, as foreign vessels, in the port of another state. One of the owners of the *Marshall* lived in Michigan, and the other three in New York. The vessel, as has been stated, was enrolled at Buffalo, and carried that as her hail port upon her stern. When a material or supply man furnishes supplies to a vessel without other knowledge of her, he has a right to suppose that her owners live in the state of the port where she is enrolled, and that, therefore, her home port is that which is painted on her stern. When a vessel is chartered by her owners so that the charterers are to have full control of the vessel, and to employ and discharge her officers and men, with the obligation of paying all her running expenses, then the charterer becomes the owner *pro hac vice*; and the home port of a vessel, for the purpose of determining whether a lien attaches, is the port of the charterer, and not the port of the actual owners, provided that the supply or material man has knowledge of the change of ownership, or has notice of facts putting him on inquiry with reference thereto. *The Golden Gate*, 1 Newb. Adm. 308; *Beinecke v. The Secret*, 3 Fed. Rep. 665; *The Norman*, 6 Fed. Rep. 406; *The Secret*, 15 Fed. Rep. 480; *Stephenson v. The Francis*, 21 Fed. Rep. 715.

The first important inquiry in this case, in view of these principles of the admiralty law, is whether notice was brought home to the libelants that the *Samuel Marshall* was under charter to the Potts Company. The libelants deny all knowledge of the fact. The master of the *Marshall* says he told McDonald that the *Marshall* was chartered by the Potts Company. McDonald was not called as a witness by libelants, and his absence is not accounted for. It must, therefore, be taken as a fact that McDonald knew that the *Marshall* was chartered by the Potts Company. It is vigorously urged, however, that McDonald had no authority to receive notice of such a fact. His orders were to deliver coal to any steamer whose master requested it,—if cash was paid, to receive it; if not, to take the name of the person from whom collection should be made. It is said that he had no discretion to pass on credits. The question is of apparent authority. If the libelants gave McDonald orders to deliver coal at request to any steamer without receiving cash, then they have clothed him with apparent authority to sell on credit, and so to receive notice of any limitation upon the liability of the

vessel. Otherwise the libelants would have power to sell coal to a master, and hold the vessel, though the master should expressly say to McDonald that, if the coal was delivered to him, the vessel could not be held for it. They cannot, by limitations on the seeming authority of an agent, be permitted to mislead third persons to change their position. It is to be presumed that, if the master of the Marshall knew that, no matter what he said to McDonald, his vessel would be held by the libelants for the supplies, he would have gone elsewhere to get them.

But the libelants' knowledge of the charter does not rest on McDonald's information alone. They knew that the Potts Company had paid for the monthly supplies of the Marshall during that season of 1890, and for some part of 1889. They knew that the company was doing a most extensive business, in which it was necessary for it to charter steamers. They knew that, for two seasons before and during the season of 1890, the company had paid for the monthly supplies of other steamers. They could reasonably infer from this knowledge that not only was the Marshall chartered by the Potts Company, but also that it was bound to furnish the supplies. The denial by the libelants that they knew of the charter and its provisions was doubtless based on the absence of any direct and positive information in regard to it, rather than upon ignorance of facts from which its existence and effect could be reasonably inferred. They were certainly put upon inquiry as to whether the Potts Company was running the vessel, and paying for its supplies. In other words, they were put upon notice that the Potts Company was pro hac vice the owner of the Marshall. That being the case, the home port of the Marshall, for the purposes of this discussion, was Detroit, and no lien under the general maritime law can be allowed for supplies furnished in that port.

The second question is whether, under the statute of Michigan, the libelants are entitled to a lien on the vessel. That statute provides (How. Ann. St. § 8236) "that every water craft above five tons burthen used or intended to be used in navigating the waters of this state shall be subject to a lien thereon, first, for all debts contracted by the owner or part owner, master, clerk, agent, steward, of such craft on account of supplies and provisions furnished for the use of such water craft." It is contended on behalf of the libelants that this gives any material or supply man furnishing a vessel, at the request of its master, with materials or supplies, an absolute right to a lien on the vessel, without regard to the question whether credit was given to the vessel by the material or supply man, and without regard to the question whether the master had authority to purchase the supplies and hypothecate his vessel therefor. The language of the statute is broad enough to warrant the construction placed upon it by counsel for the libelants, but we do not think the construction is a correct one. The supreme court of the United States has decided that it is within the power of a state legislature to make by statute a lien on vessels, which the courts of the United States will enforce in their admiralty jurisdiction. *The Lottawanna*, 21 Wall. 579. It also decided that the jurisdiction of the United

States courts in admiralty is exclusive, and that no state court can enforce such a lien against a vessel in rem. The United States courts do not adopt the statute in all respects, but they enforce the lien therein given as a part of the local maritime law, which, as courts of admiralty, they may administer. As is well said by the learned judge below:

"It is because the contract for supplies is maritime that the court has and exercises its jurisdiction in enforcing the lien given for its security. The court does not have jurisdiction of it as an independent thing, that is to say, dissociated from the contract. The lien is an incident to the debt, and is inseparably connected with it, reflecting its qualities."

Into such a statute, therefore, must be imported the limitations which are always applicable to liens of this general class under the admiralty laws. This result would follow, whatever was the intention of the state legislature in passing the lien law. But it is clear that no intention is to be presumed on the part of the state legislature to avoid the limitations of the maritime law in the enforcement of the liens created by it, except the limitation as to the foreign character of the vessel. The lien given is *jus in re*, differing in many respects from liens at common law. A lien at common law is generally maintained and kept alive either by possession of the res or by something equivalent thereto, which shall give notice to third persons of its existence, as by recording or registering it in a public office. An equitable lien has no force as against any one not having notice of its existence. A maritime lien, however, is preserved in the thing itself, without regard to notice to third persons, whether bona fide purchasers or not. This is a peculiarity of the maritime lien which characterizes no liens in any other branch of the law. See the opinion of Mr. Justice Curtis in *The Young Mechanic*, 2 Curt. 404. In coming to construe a statute conferring a lien upon a vessel, therefore, the question naturally arises, shall the lien conferred by the statute be *jus in re*, so that its existence shall not be affected by sales, executions, or mortgages, or shall it be a lien good only against the owner on whose behalf supplies are furnished, and not good against any person acquiring an interest in the vessel without notice thereof? In the absence of any provision that such a lien shall be recorded for the information of the public and possible future purchasers, it would be reasonable, in construing the statute, if it is to be construed according to common-law principles, to hold that the lien be given no force against bona fide purchasers without notice. But this result would certainly not be in accord with the purpose of the legislature in creating such a lien. It is a well-known fact in the history of admiralty law in this country, that, after the decision in *The General Smith*, 4 Wheat. 443, where it was held that a lien for supplies did not attach at the home port of the vessel, many of the states sought to obviate the apparent and perhaps real injustice to their citizens, growing out of the exception, by passing laws which should create a lien also at the home port. The character of the lien thus created was presumably intended to be such that a resident of the home port of the vessel would be put on an equality, in respect to the lien to be secured,

v.54f.no.2—26

with the citizens of a foreign state. In other words, the state legislatures were providing a maritime lien, and intended that it should have the peculiar characteristics of a maritime lien, and should be *jus in re*, as distinguished from *jus ad rem*, a lien the existence of which depended neither upon the possession nor notice to the public. It would be unreasonable to hold, therefore, that when they were creating a maritime lien, the legislatures did not also intend that it should have all the other peculiar characteristics that maritime liens of that class had under the general admiralty law. It should be said that the same conclusion must be reached, without respect to the legislative intention, because courts of admiralty have no jurisdiction to enforce liens except as admiralty liens, i. e. under the limitations ordinarily attaching to such liens.

It follows from what we have said that, inasmuch as a maritime lien acquired on a ship at a foreign port, by furnishing supplies, is only secured where the credit is given to the vessel, there must be the same limitation upon similar liens, secured by virtue of local statutes. We are aware that Judge Hammond, in this circuit, in the case of *The Illinois, White and Creek*, in 2 Flip. 383, in an elaborate and interesting opinion, reached the conclusion that liens on a vessel in favor of a supply or material man created by statute did not have imposed upon them, when enforced in admiralty, the limitations of the general maritime law, and that the supply man need not show, when the statute did not require it, that the credit had been given the ship. After a careful examination of that opinion, in connection with later authorities, we are unable to give it our approval. In the case of *The Young Mechanic*, in 2 Curt. 404, Mr. Justice Curtis, after a learned examination into the origin of the maritime lien and the purpose of the local statutes giving a lien in the home port for supplies furnished, concludes that the intention of the legislatures must be presumed to be that a lien thus given shall have all the attributes and limitations of a lien under the admiralty law; and in this circuit Mr. Justice Matthews and Judge Baxter, in *The Guiding Star*, 18 Fed. Rep. 263, held that statutory liens, when enforced in admiralty, were to be regarded as of the same character as liens conferred under the general admiralty law. In the latter case the question was whether the priority between liens should be determined under the state statute, as that statute had been interpreted by the supreme court of the state, or whether they should have priority according to the general principles governing priorities of liens in admiralty law. Upon this question Mr. Justice Matthews spoke as follows, (page 268:)

"The rule of priority adopted in courts of common law, '*qui prior est tempore, potior est jure*,' does not govern in admiralty causes, but often it is just the reverse; as it frequently happens in case of salvage, and of repairs and supplies, that the last liability in point of time is the first in point of merit, as having served to preserve the very subject which supports the lien for all. So that, in enforcing the statutory lien in maritime causes, admiralty courts do not adopt the statute itself, or the construction placed upon it by the courts of common law or of equity, when they apply it. Everything required by the statute as a condition on which the lien arises and vests must, of course, be regarded by courts of admiralty, for they can only act in ex-

forcing a lien when the statute has, according to its terms, conferred it; but, beyond that, the statute, as such, does not furnish the rule for governing the decision of the cause in admiralty as between conflicting claims and liens. The maritime law treats the lien, because conferred upon a maritime contract by the statute, as if it had been conferred by itself, and consequently on the same footing as all maritime liens, the order of payment between them being determinable upon its own principles. For this reason it ignores altogether liens given, even by the same statute, for contracts and liabilities not maritime in their character, such as those for labor and materials supplied in the construction of the vessel, and for material or supplies, whether in a foreign or the home port, furnished not on the credit of the vessel itself, and also liens given by the owner of the vessel, as in the case of mortgages. If the maritime quality of the contract was not imparted to the lien given to secure it by the statute, it would follow either that a court of admiralty could have no jurisdiction to enforce it at all, or else that, having such jurisdiction, it was bound to enforce all liens given by the statute, according to its terms, whether upon maritime or nonmaritime contracts and obligations. The other alternative, which is here adopted, is that the statutory lien given for maritime liabilities is, of itself, in the nature of a maritime lien, to be enforced as such in admiralty courts, according to their rules and practice, that quality being imparted to it by the maritime character of the contract and liability which it is given to secure."

It follows from these authorities that the courts of admiralty will not enforce a maritime lien against a vessel for supplies created by a state statute unless the supplies were furnished on the credit of the vessel, for that is indispensable to the existence of maritime liens of this class. This was clearly the opinion of Mr. Justice Bradley when, in discussing the effect of the restoration of the twelfth admiralty rule, as adopted in 1844, wherein the United States district courts were given power to enforce liens against vessels by proceedings in rem for supplies furnished in the home port, he said:

"Of course this modification of the rule cannot avail where no lien exists, but where one does exist, no matter by what law, it removes all obstacles to a proceeding in rem, if credit is given to the vessel."

The next question, then, is whether the supplies in this case were furnished on the credit of the vessel. The learned judge below found that the supplies were not furnished on the credit of the vessel, but on the credit of the Potts Company, and in this we agree with him. The fact that the supplies were charged against the vessel on the books of the libelants is evidence only of a self-serving practice, which has no particular weight in the determination of this question. As was suggested in the cases of *Beinecke v. The Secret*, 3 Fed. Rep. 665, 667; *The Francis*, 21 Fed. Rep. 722; *The Suliote*, 23 Fed. Rep. 919; and *The Mary Morgan*, 28 Fed. Rep. 196-201,—such practice is not infrequently followed in order that the person who furnishes the supplies may not deprive himself of the lien, if he otherwise is entitled to it. This coal had been furnished to the Marshall during the entire season. Coal had been furnished to two other vessels chartered by the Potts Company in the two previous seasons, and had always been paid for by the Potts Company. It is useless now for the libelants to claim that they did not know the business which the Potts Company was doing, and did not know that it had chartered this vessel, and was running it and paying for

its supplies. The Potts Company was a concern whose credit was excellent, and there was nothing in the circumstances which would lead the libelants to seek other security. It is quite possible that they may have thought they had a lien, no matter whom they trusted; but this was not giving credit to the vessel. Their subsequent course in regard to the payments is conclusive evidence that they were looking to the Potts Company for payment, and not to the vessel. They knew that the Potts Company was not the actual owner of the vessel, and yet they were willing to delay the payment of the bills for coal, and receipt them in full, when given the acceptances of the Potts Company. If they had credited the vessel, is it reasonable to suppose that they would have accepted the obligations of third persons delaying the time of payment? More than this, they had notice of facts from which they ought to have inferred that the charter under which the Potts Company was running this steamer required them to pay for the fuel used by it in the operation of the steamer, and that it had no power to hypothecate the steamer for the payment of such fuel. Having reason to believe this, therefore, is it likely that the libelants would credit the steamer, and thus subject it to a hypothecation by the master, when that was beyond his authority? We are not at liberty to suppose so, for a presumption of this kind would impute fraud, or something very like it, to the libelants. It is true that, under certain circumstances, the master of a vessel, under a charter, where the charterer is the owner *pro hac vice*, may hypothecate his vessel for supplies, contrary to the terms of the charter party, but this is where there is dire necessity to save the vessel, or to bring her home within the reach of the owners. No such case is here presented. This was the home port of the charterers. The necessity was only that of going on the voyages for which the vessel was chartered, and not to bring the vessel home to its owners, or to save it from injury or loss. We think that on neither ground can a lien for the coal furnished be asserted against the vessel. We are therefore not called upon to consider the question whether a lien against the vessel was waived by the libelants taking the acceptances of the Potts Company, and receipting in full therefor.

The decree of the court below is affirmed, with costs.

THE STATE OF CALIFORNIA.

THE PORTLAND.

SIMPSON et al. v. THE STATE OF CALIFORNIA.

PACIFIC COAST STEAMSHIP CO. v. THE PORTLAND et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1893.)

1. COLLISION—MEASURE OF DAMAGE.

The measure of damages to a vessel injured by collision with another vessel wholly or partially in fault is the value of the use of the injured vessel during the time of the actual, necessary detention; and such value can be determined by evidence showing the number of days lost while

undergoing repairs, the average daily earnings for a period six months prior and six months subsequent to the collision, from which the court can determine the vessel's capacity, and the condition of the trade in which she was engaged, as well as from expert testimony.

2. **SAME.**

That another vessel belonging to the same owner was substituted for the disabled vessel during her detention will not affect the right to compensation, nor is it a cause for awarding less than if such substitute was not available.

3. **SAME—COMMISSIONER'S REPORT.**

On a libel for damages caused by collision, where both vessels were found in fault, the damages and costs ordered to be divided equally, and the assessment of damages referred to a commissioner, an appellate court will not assume that the commissioner awarded interest to one vessel and not to the other, where no indication or intention to discriminate appears in the record, and by a prior report he awarded interest to both vessels.

4. **SAME—COST OF REPAIRS.**

The bill for services of a part owner, who voluntarily and without request devotes a portion of his time to overseeing repairs to a vessel injured by collision, is not a part of the cost of repairs, for which award should be made, where it does not appear that there was any necessity for such services, that they were of any value, or that the bill had been paid, or payment thereof promised by his co-owners.

5. **SAME—DAMAGE TO CARGO—EVIDENCE.**

By a collision at sea, a vessel with a cargo of lumber became water-logged, was towed into port, beached, and, in consequence of being grounded on the flats, her cargo was stained by muddy water, slime, and mud. *Held*, that vague and indefinite evidence, which failed to show any necessity for beaching the vessel before discharging her cargo, or with any precision even approximately showed what portion of the cargo was damaged, though competent witnesses were available and not called, no reason being given for the omission, was insufficient as a basis for an award.

6. **SAME—COMMISSIONER'S REPORT—EVIDENCE.**

Testimony as to damages sustained by a collision, taken on the first trial, and considered on the second, is sufficient, without recalling the witnesses to repeat their testimony, to sustain the findings of a commissioner to whom the computation of damages has been referred, where the parties have had the benefit of their legal rights in the matter of exceptions to the evidence.

7. **SAME—APPEAL—COSTS—MANDATE.**

In a collision case, the failure of the circuit court of appeals to decree costs to appellants on their appeal, even if intentional, affords no ground for complaining of a subsequent decree of the district court, for the error, if any, should have been corrected by motion in the appellate court before the mandate issued.

Appeal from the District Court of the United States for the Northern District of California.

In Admiralty. Libel by A. M. Simpson and others, owners of the barkentine Portland, against the steamship State of California, for damages resulting from a collision. Cross libel by the Pacific Coast Steamship Company, owner of the State of California, against the Portland, for damages sustained in the same collision. The libel against the steamship was dismissed in the district court, and at the same time an interlocutory decree was entered against the Portland on the cross libel, and the cause was referred to a master to ascertain the damages. 46 Fed. Rep. 877. An appeal was then taken from the decree dismissing the

libel against the steamship, which decree was affirmed by the circuit court. An appeal was thereupon taken to the circuit court of appeals. The case against the Portland remained in abeyance until the decree of the circuit court, and thereafter the order of reference to ascertain damages was carried out, and a final decree entered against the Portland. From this decree an appeal was taken by her owners direct to the circuit court of appeals. The causes were heard together in the circuit court of appeals, which held that both vessels were in fault, and that the case was one for divided damages, and entered the following decree:

"The decree of this court will be that the decrees in the cases of the Portland and the State of California are both reversed, and that they both be remanded to the district court, and there consolidated and tried as one case, upon the question of the amount of damage sustained by the Portland and State of California, respectively, by reason of the collision; and that, if either is shown to have sustained more damage than the other, the lesser sum, with the costs of libelant in such case, shall be deducted from the greater sum, with costs, and the party sustaining the greater loss shall have a decree for the one half of the remainder." 49 Fed. Rep. 172.

The causes were accordingly remanded, and were again heard in the district court, which entered a decree in favor of the owners of the California in the sum of \$2,371.69. From this decree the claimants of the Portland now appeal. Affirmed.

E. W. McGraw and Charles Page, for the Portland and A. M. Simpson et al., claimants.

George B. Merrill, for the State of California and Pacific Coast Steamship Company, claimants.

Before GILBERT, Circuit Judge, and HANFORD and HAWLEY, District Judges.

HANFORD, District Judge. This case comes before this court a second time by appeal from the district court for the northern district of California, this court having upon the former hearing remanded it for the purpose of assessing the damages to both vessels. Upon the last hearing in the district court no new evidence relating to the damages sustained by the State of California was offered in behalf of either party, and upon the evidence taken prior to the former appeals the court awarded the same amount of damages as by its first decree, with accrued interest and costs, amounting to the total sum of \$16,050.43. The court received evidence as to the damages sustained by the Portland, and determined the amount thereof, with interest and costs, to be \$11,307.05, and decreed that the Pacific Coast Steamship Company, owner of the State of California, recover from the claimants of the Portland the sum of \$2,371.69, being one half the difference between the amounts above stated.

The questions now to be considered relate entirely to items allowed in favor of the State of California and to items claimed by the owner of the Portland which were disallowed by the district court, no appeal having been taken by the claimant of the State

of California. The items in dispute are all stated in the assignment of errors, and they will be disposed of in the order therein set forth.

The first assignment specifies no error, and the second is unimportant. Both may be passed without further consideration.

The gist of the grievance alleged in the third assignment is that the evidence does not warrant an allowance for demurrage to the State of California for her detention while undergoing repair, and in the argument it is insisted that the amount allowed was arrived at by an improper rule for estimating demurrage. The right to compensation for loss sustained by actual detention of a vessel in consequence of a collision with another vessel found to be wholly or partially in fault is settled by numerous decisions and the uniform practice of the courts of this country, and it is our opinion that the value of the use of the injured vessel during the time of actual, necessary detention is the proper measure of the amount to be allowed. While the evidence in this case does not contain opinions or estimates of the value of the use of the steamship during the time of her detention of persons having knowledge qualifying them to testify as experts, it does show the facts as to the number of days lost while the damages caused by the collision were being repaired, and shows the average daily earnings of the vessel for a period extending from six months prior to the end of six months subsequent to the date of the collision, from which the court could as well determine the capacity of the ship and the condition of the trade in which she was then engaged, and make a fair estimate of the value of her use during the time of her detention, as from expert evidence. The fact that another vessel belonging to the same owner was used as a substitute for the disabled steamer during the time of her detention should not militate against the right to compensation, nor afford just cause for awarding less than would be allowed if the owner, from lack of enterprise or inability, failed to have an available substitute for use in such an emergency. Upon consideration of the evidence, we are satisfied that the amount allowed for demurrage is reasonable.

The fourth, fourteenth, and seventeenth assignments are general, and specify no error.

The fifth, thirteenth, and fifteenth assignments relate to the interest allowed on disbursements for repairs to the steamer, and they are inconsistent with each other. In the fifth the complaint is that the court erred in overruling an exception to the report of the commissioner, who, under an order of reference, took the evidence, and made findings as to the amount of damages sustained, which exception is on the ground that the commissioner allowed interest on disbursements. The thirteenth specifies as error that it appears by the report of the commissioner, "that the damage suffered by the State of California was \$11,876.05, where said decree recites it as being \$16,050.43." In his argument the proctor for the appellants concedes that the difference between the two amounts can be accounted for by adding to the lesser sum

costs and interest, and attacks the interest item, not on the ground of inaccuracy in the computation, nor because interest in such a case is unlawful, but because, as he asserts, the commissioner discriminated by allowing interest on disbursements for repairs to the Portland, and allowed no interest to the appellee, and in justifying the report as construed by him he uses the following language in his brief:

"Now, in cases of collision, interest is not a matter of right. It does not necessarily follow from an award of damages. It is a matter of discretion, to be awarded or not awarded, according to the equities of the case; and where both vessels are in fault the degree of fault is to be considered in awarding interest. The *North Star*, 44 Fed. Rep. 492; The *Alaska*, Id. 498. The commissioner, exercising his discretion, awarded interest to the Portland, and not to the State of California. That report, not having been excepted to by respondent, and having been confirmed by the court below, is not open to exception or impeachment by the respondent in this court."

This is quite ingenious, but may be well answered in two ways: First. The record shows that by a supplemental report filed May 10, 1892, the commissioner submitted the testimony taken, and his report made on the first hearing, relating to the damages to the State of California, and the order of the court based thereon, by which it appears that interest on disbursements from dates of payments was allowed in the same words as in his award of interest to the appellants as per his last report; and there is in the record no indication of an intention on the part of the commissioner to discriminate by disallowing interest to the appellee. On the contrary, he did award interest as stated in the fifth assignment. Secondly. This court decided that both vessels were in fault, and ordered that the damages and costs be divided between them equally. We will not presume that the commissioner, upon a subsequent reference of the case to him, disregarded the rule for apportioning the losses promulgated by that decision, and distinctly set forth in the mandate.

The sixth assignment specifies error in disallowing a bill of \$100 in favor of Capt. Trask, a part owner of the Portland, for his services in superintending the repairs to said vessel. We hold that this item was properly disallowed. The evidence shows that Capt. Trask voluntarily devoted a portion of his time to overseeing the repairs, without being requested to do so by his co-owners, although it was the business of Capt. R. W. Simpson, as the ship's husband, to superintend the repairing of the vessel; and it is not shown that there was any necessity for the assistance alleged to have been rendered by Capt. Trask, nor that his services were of any value, nor that his bill has been paid, or payment thereof promised, by his co-owners.

The seventh assignment is for alleged error of the court in refusing to allow any sum for damages to the Portland's cargo of lumber. If, in fact, injury to the cargo resulted from the collision, compensation therefor should have been awarded. There is testimony that the value of part of the lumber was impaired by mud and sand. The collision occurred at sea, and by reason of her injuries the Portland became water-logged. She was towed into the

port of San Francisco and beached, and it is in consequence of being grounded on the flats in the harbor that muddy water, slime, and sand got into the vessel, and stained the lumber, causing the damage complained of. The evidence does not show that it was necessary to beach the vessel before discharging her cargo, and the court has no right to take it for granted. The evidence does not show with anything like precision, or even approximately, what portion of the cargo was damaged, and, although witnesses cognizant of the facts, and presumably able to give the figures, were in San Francisco when the evidence was taken, they were not called, and no reason has been assigned for this omission. The only evidence in the record to support this claim is too vague and indefinite to warrant anything more than a mere surmise as to the amount of the loss, if any, sustained by damage to the cargo. Having failed to support their claim as to this item by necessary proof, the appellants cannot reasonably expect the court to base an award to them upon mere speculation as to the amount of the loss to be compensated for.

The eighth and twelfth assignments relate to costs, and are without merit, for it affirmatively appears that in the decree rendered by the district court the costs of both parties were taxed and included in the allowance made to each respectively, and our attention has not been directed to any item of costs claimed by the appellants and disallowed by the district court, or any item improperly allowed to the appellee.

The ninth, tenth, and eleventh assignments relate to the method of procedure by which the district court arrived at the amount of damages to the State of California, and it is therein assumed that the mandate of this court required the district court to disregard the evidence taken previous to the first appeals, relating to the damages sustained by the State of California, and to call the witnesses again before the court to repeat their testimony. The testimony upon the first trial of the case was reported, and is preserved in the record, and, having been duly offered and considered on the second trial in the district court, we regard it as sufficient evidence to sustain the findings as to the damages sustained by the State of California. In the consideration which we have given to the particular objections made to the several items allowed to the appellee, the appellants have had the benefit of all their legal rights in the matter of exceptions to said evidence.

By the sixteenth assignment the appellants complain that the district court erroneously refused to allow them full credit for their costs upon their first appeals to this court. This is based upon the assumption that this court, upon the former hearing, by its decrees, awarded costs to them. The decrees, however, do not go to the extent of awarding costs, except by directing that the costs in general of the litigation should be added to the damages, and divided between the parties. Under the rules the appellants were entitled to recover the full amount of costs taxable in this court, unless the court ordered otherwise; but the failure of this court to decree that the appellants should recover costs on their appeals, if inten-

tional, would afford no ground for complaining of error in the decree of the district court, and, if due to a mere inadvertence in drafting the decree, the error should have been corrected by a motion in this court before the mandate issued. The question is not open to discussion upon the present appeal.

We affirm the decree of the district court, with costs to the appellee, and direct that the cause be remanded to the district court for further proceedings to execute said decree.

THE YOUNG AMERICA.

CAMPBELL v. THE YOUNG AMERICA.

(District Court, S. D. New York. January 20, 1893.)

COLLISION—BROKEN WEARING IRON—WEAK BOAT.

The wearing iron of a tug was broken and rough, and, coming in contact with libellant's canal boat, it ripped off three stern planks; but, defendant's evidence showing that the bolt fastenings of the canal boat's stern planks were mostly rusted off, *held*, that such defect contributed equally to the loss, and the damages should be divided.

In Admiralty. Libel by James Campbell against the steam tug Young America for collision. Decree for divided damages.

Carpenter & Mosher, for libellant.

Robinson, Biddle & Ward, for claimant.

BROWN, District Judge. Whatever may have been the character of the mark left upon the side of the libellant's canal boat, the fact is proved that the rake iron, which ran perpendicularly down the extreme after end of the planking on the side, was torn up, broken, and left hanging and swinging from the uppermost fastening. This fact seems to me to prove conclusively that there was some defect in the claimant's tugboat, probably in the rupture and projection of her wearing iron, which distinguishes this case altogether from those of contacts in the usual course of navigation, and shows that the damage in this case was caused by the rough impact of the tug's broken wearing iron. Had the stern planks of the libellant's boat been rotten, their edges, across which this projecting iron passed, would naturally have given way, without other damage. The stern planks, however, were ripped off by the impact. But from the mark left upon the side of the boat, even to the depth sworn to by the libellant's witnesses, it would not seem that there was a contact of sufficient depth, breadth or force to have carried away those three stern planks by merely passing across the edge of one of them, had they been fastened securely across the stern. The evidence of the claimant in that respect is very direct and positive that most of those bolt fastenings were rusted off between the planks and the timbers inside. I must regard such a proved defect as a cause equally contributing to the loss; and the damages must, therefore, be divided. The *Syracuse*, 18 Fed. Rep. 828; The *Atalanta*, 34 Fed. Rep. 918; The *N. B. Starbuck*, 29 Fed. Rep. 797. Decree accordingly.

THE HAVANA.

THE MARY ADELAIDE RANDALL.

WIERK et al. v. THE MARY ADELAIDE RANDALL.

RANDALL et al. v. WIERK et al.

(District Court, D. Connecticut. March 8, 1893.)

No. 907.

1. COLLISION—RIGHT OF WAY—CHANGE OF COURSE—LOOKOUT.

If a schooner, having the right of way, held her course, it is all an approaching steamer had a right to require, and whether she had a proper lookout or not is immaterial. *The Fannie*, 11 Wall. 243, followed.

2. SAME—WEIGHT OF EVIDENCE.

The rule is that the testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to greater weight than that of witnesses on other boats, who judge or form opinions merely from observation. *The Hope*, 4 Fed. Rep. 89, followed.

3. SAME—STEAM AND SAIL—DUTY TO STOP AND REVERSE.

Where a steamer and a schooner are half a mile apart, and the master of the steamer sees there is danger of collision, it is his duty to slacken her speed, or stop and reverse, if necessary.

4. SAME—ERROR IN EXTREMIS.

Where a vessel, by her own negligence, or the breach of a statutory rule, places another in great peril, the latter will not be held guilty of negligence because at the last minute she did something that contributed to the collision, or omitted to do something that might have avoided it.

In Admiralty. Cross suits for damages by collision.

H. D. Hotchkiss, for libelants.

Samuel Park, for claimants.

TOWNSEND, District Judge. These are cross libels for damages caused by a collision. There is no disputed question of law. There is the usual conflict of testimony as to the material questions of fact. It is agreed that the collision occurred in the lower bay of New York, in the main channel, between Swinburn island and the bell buoy at the head of the swash channel; that the four-masted schooner Randall struck the fishing steamer Havana; that the time of the collision was December 21, 1891, about half past 3 in the afternoon; that the day was clear; that the wind was blowing about 40 miles an hour from the northwest; and that there was a strong ebb tide. When the vessels were about three miles apart, the Havana was coming up the bay, and was close to the bell buoy, and the Randall was going down the bay, was about in the center of the channel, and abreast of Swinburn island, and was headed S. by W. There were no vessels or shoals to interfere at any time with the free movement of either vessel.

The claim of the libelants, the owners of the steamer Havana, is as follows: When the vessels were three miles apart, they were virtually coming head on; the course of the steamer being N. by E. The courses of the vessels remained unchanged until they got within about a mile of each other, when the steamer, having reached

buoy No. 10, hauled to the eastward about a point or a point and a quarter, or to a course of N. N. E. $\frac{1}{2}$ E., so as to go to the leeward of the schooner. The steamer had only gone on this course for a few seconds when the schooner also commenced to change her course, and swung off to the eastward, taking a course about S. E., so that nearly all of her starboard side was visible. Thereupon the captain of the steamer starboarded his wheel until she came around to a course about N. by W., and her bow cleared the line of the schooner. The schooner then again began to change her course, and luffed from S. E. to the westward; the vessels then being about half or three quarters of a mile apart. The steamer again starboarded her wheel, and blew two whistles to signify that she was going to port; but the schooner continued to luff, in spite of the alarm signals from the steamer, and, when heading about W. by S., struck the steamer, which was heading about W. or W. by N., aft the paddle box.

The claim of the cross libelants is as follows: The schooner was sailing over the land at the rate of 14 or 15 knots, and through the water at the rate of 10 or 11 knots. The course of the steamer was about N. N. W., and she did not change her course to N. N. E. The schooner kept straight on her course, S. by W. down the channel, and did not change it to S. E., or in any other way, until it became evident that a collision was inevitable, when, the vessels being 500 to 800 feet apart, the schooner's wheel was put hard down, bringing her into the wind until she headed W. $\frac{1}{2}$ N., minimizing the blow, and avoiding more serious results.

Each of these theories is supported by the evidence of several witnesses, some of them on each side, being apparently disinterested and competent. For the purpose of determining the questions involved, I have divided the inquiry into two parts: First, as to the original alleged changes of course towards the eastward; second, as to the conduct of the respective vessels just prior to the collision.

I assume that the burden of proof is on the steamer to show that the schooner, having the right of way, changed her course towards the eastward to get out of the way of the steamer. It is agreed that when abreast of Swinburn island the course of the schooner was S. by E. Her master, first officer, second officer, steward, lookout, and Wersebe, a passenger on board the steamer, all deny that she changed her course towards the eastward. The manager, pilot, and captain of the steamer testify that the schooner did so change her course. Their testimony is supported by that of Canning, an experienced navigator, a passenger on board the steamer. Dexter, a Sandy Hook pilot, testifies that he was on board of a steamer about a mile and a half away, and saw the schooner on the steamer's starboard bow, luffing very fast towards the steamer until she struck it. It is claimed that the vessels could not have been in the positions alleged by the witness unless the schooner had previously shifted her course to the eastward. The other witnesses fortify their statements in support of the schooner's alleged change of course by the claim that they noticed that she swung off until her head sails were becalmed.

It is further shown that the witness Peterson, the only seaman who is shown to have been on the forward deck of the schooner, was ignorant and incompetent. It does not appear that he understood he was expected to act, or did act, as lookout. But inasmuch as all hands, nine in number, were on the deck of the schooner, and the captain and first and second officers saw the steamer when she was from a mile and a half to three miles off, and the captain gave particular attention to her course from the time she was a full mile away, and, fearing the danger of a collision, gave orders to keep on a straight course, I think the want of a more experienced lookout is immaterial, and did not contribute to the collision. "If the schooner held her course, it was all that the steamer had a right to require, and, whether she had a proper lookout or not, it was her duty to do precisely what she did." Mr. Justice Strong in *The Fannie*, 11 Wall. 243. Upon the question of probabilities, the counsel for the steamer call attention to the claim of the witnesses for libelants that the tendency of their schooner was to eat to the windward, and to the fact that the helmsman, Schmidt, was not called as a witness, and argue that she had probably got so far out of her course towards the westward that the helmsman changed her course to southeast in order to bring her back into the middle of the channel.

Counsel for libelants further attempt to show, by mathematical demonstration, that the captain of the schooner was mistaken in his statement of the course and location of the steamer when first sighted by him. I have tried to give to the evidence in support of these claims its proper weight, in a consideration of the whole question, but it has failed to satisfy me that there was any such change of course, for the following reasons:

1. The officers and men on the schooner deny any such change of course. "The established rule is that the testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to greater weight than that of witnesses on other boats, who judge or form opinions merely from observation. *The Hope*, 4 Fed. Rep. 89; *The Erastus Wiman*, 20 Fed. Rep. 248, 249; *The Alberta*, 23 Fed. Rep. 807," etc. *The Alexander Folsom*, 52 Fed. Rep. 411, 3 C. C. A. 165. I have not overlooked the fact that the helmsman was not called on this point, but I do not regard this fact as so important, inasmuch as it appeared that the first officer was stationed with him at the wheel. Furthermore, the significance which might otherwise be given to his absence is diminished by the explanation that, although the collision occurred on December 21, 1891, the libel was not filed until February 22, 1892, and the helmsman was discharged about a month after the collision, and before any claim had been made for damages.

2. The witnesses on both sides agree that the course of the schooner was S. by W. when the vessels were three miles apart, and so continued until she was within a mile of the steamer. They also agree that this was the proper course to pursue in sailing down the bay. No reason, except the possible change by the helmsman to get back into the channel, which was not proved, is suggested

why the schooner should have changed her course. The captain of the steamer admits that he cannot assign any reason for the change, unless it was to cross the bow of his steamer to avoid her, and that he cannot understand what occasion there was for that. He admits that he did not think she was going out through the east channel, and that the natural course of the schooner was S. by W. down the main channel, where there was plenty of water, and no danger of collision.

3. There is a serious conflict of testimony between the witnesses for the libelants as to the respective positions of the vessels when they were first sighted. Canning and Schrader, two witnesses for libelants, contradict the master and pilot, their two other witnesses. This conflict, and the necessary uncertainty as to the location of the two vessels during the time they were approaching each other, deprive the mathematical demonstrations by counsel for libelants of much of the value which they might otherwise have in supporting the claim of libelants.

4. There is another circumstance to be considered. Up to the day of the collision, a log of each cruise had always been kept on the steamer by the pilot, but, although the pilot remained on the steamer for some days after the collision, the log for that cruise was not written up.

5. In support of the claim of cross libelants, it was shown by the testimony of the captain of the steamer that she was about 30 years old, and that the water was smooth, and the current less strong, on the west bank of the swash channel than in the middle. From this it was argued that with the wind blowing southwest at the rate of 40 miles an hour, and a strong ebb tide, the steamer would naturally steer a west course in order to avoid the current.

6. It was further argued that as the schooner was light, with the wind on her quarter, she necessarily yawed more or less in attempting to hold her course, and that this yawing was what led the captain of the steamer to think that, for a few seconds, she changed her course to the eastward.

7. The testimony of the captain of the steamer, especially as to her speed on the day of the collision, was not altogether satisfactory. He seemed to have overlooked or miscalculated the effect of the strong head wind and tide.

8. Counsel for the cross libelants argue with much force that by reason of this miscalculation, having shaped his course across the main channel, leaving, as he supposed, ample room for the schooner to cross his stern, she, sailing swiftly, was close upon him before he realized his danger, and that when he whistled, and put his wheel to starboard, it was too late to avoid the collision.

9. The claim of the libelants, that when the vessels were three miles apart the steamer changed her course from N. by E. to N. N. E. $\frac{1}{2}$ E. a few seconds before the alleged change of course of the schooner from S. by W. to S. E., is not supported by the evidence. Out of 11 witnesses examined on this point, only 2, the captain and pilot of the steamer, swear positively and satisfactorily to this change. Schrader, the manager of the steamer, admits he did not

take notice, and cannot tell, although he was at the wheel. He says the first change he noticed in the course was when the captain put the wheel to starboard; that is, to make the other change to westward. Furthermore, he contradicts the testimony of the pilot and captain of the steamer by locating the schooner as being on the steamer's starboard bow, and in this statement he is corroborated by Canning, the other witness for the libelants on the steamer. Canning further testifies to but one change of course on the part of the steamer, namely, to the westward. Wersebe and Haur, two disinterested witnesses on the steamer, swear that, during all the time they saw the schooner, she was on the starboard side of the steamer.

For these reasons, after careful consideration of the testimony, the appearance of the witnesses, and the comparative probabilities of the case, I have reached the conclusion that the steamer did not change her course to the eastward, and that the schooner kept on her course of S. by W., and did not go to the eastward.

The captain of the steamer testified that, when the vessels were from a half to three quarters of a mile apart, he commenced to starboard his wheel, and to bring the steamer around to the westward, and that about the time he made this change the schooner commenced to luff to the westward. He says he then thought there was danger of a collision, but he still kept going as fast as he could towards the westward, while the schooner continued to luff in the same direction. If this testimony is true, the duty of the master was clear. "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary." International Regulations, 23 St. at Large, March 3, 1885, c. 354, art. 18. See, also, *The Adriatic*, 107 U. S. 515, 2 Sup. Ct. Rep. 355. "The two vessels were still a half a mile apart. * * * He should have waited a moment, * * * or, if the peril was impending, and the danger too immediate to justify any delay on the occasion, then he should have slackened his speed, or, if necessary, stopped and reversed, as required by the sixteenth sailing rule." *The Sea Gull*, 23 Wall. 177; *The Excelsior*, 38 Fed. Rep. 271.

The situation of affairs just prior to the collision was as follows: The two vessels had drawn steadily together, end on, the schooner yawing somewhat with a following wind; the steamer forcing her way against a 40-mile wind and a strong ebb tide. Almost before they realized their peril, they were so close that a collision seemed inevitable. The schooner commenced to luff to the westward. The captain of the steamer put his helm hard to starboard, and immediately blew two whistles, indicating that he would go to port, following it almost instantly by three danger whistles. The steamer brought her head to W. N. W. The schooner luffed into the wind till she was headed about west, and, running under diminished headway, struck the after part of the paddle box of the steamer.

It is claimed that the schooner changed her course to the westward after the steamer had changed her course to the westward to get out of the way of the schooner, and that, if the schooner had held her course, no collision would have occurred. Such a claim can

only be supported upon the theory of a deliberate attempt on the part of the schooner to run the steamer down, or of a supposed imminent danger of collision, calling for such change of course. Whether the collision would or would not have occurred if the schooner had held her course, it is impossible to determine. I find that the captain of the schooner, placed in extreme peril by the failure of the steamer either to steer out of the way of the schooner, or to back and stop, believed that if he kept his course he would sink the steamer, or cut her in two. The steamer was loaded with passengers returning from a fishing excursion. He could not afford to run any risk, or to speculate as to how far or how fast she might go to starboard. He had no right to hold his course, if to do so would cause a collision. He was bound to use his best judgment, and, if he made a mistake, it was made in extremis, and was not a fault. The soundness of the judgment of the captain of the schooner is supported by the fact that the injuries to the steamer were so slight as to enable her, without stopping, to return to New York at her usual rate of speed.

As is said by Judge Wallace in *The E. A. Packer*, 49 Fed. Rep. 98:

"I understand the rule to be well established that in every case where a vessel, by her own negligence, or the breach of a statutory rule, places another in great peril, the latter will not be held guilty of negligence because at the last moment she did something that contributed to the collision, or omitted to do something that might have avoided it. It has often been held by the supreme court that a vessel which by her own fault causes a sudden peril to another cannot impute to the other, as a fault, a measure taken in extremis, although it was a wrong step, and but for it the collision would not have occurred, and that a mistake made in the agony of the collision is regarded as an error for which the vessel causing the peril is altogether responsible."

See, also, *The Schmidt v. The Reading*, 43 Fed. Rep. 816; *The Eliza S. Potter*, 31 Fed. Rep. 687, 35 Fed. Rep. 220.

The claims of the libelants that when the schooner was a half to three quarters of a mile away, she commenced to luff towards the steamer, and that if the steamer had then stopped the schooner would have cut her in two, are unsupported by the preponderance of testimony, and are contrary to all the probabilities of the case, as gathered from the surrounding facts.

For the reasons stated I find that the schooner *Randall* was not in fault, but that the steamer *Havana* was in fault, and that such fault was the cause of the collision.

Let a decree be entered accordingly.

JOHNSON et al. v. MEYERS et al.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1893.)

No. 239.

APPEAL—TIME OF TAKING—CIRCUIT COURT OF APPEALS.

When the last day of the six months within which an appeal may be taken, or writ of error sued out, to review in the circuit court of appeals a decree or judgment rendered below, falls on Sunday, the appeal cannot be taken, or writ sued out, on any subsequent day.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri. Dismissed.

A motion was made to dismiss this appeal on the ground, among others, that the appeal was not taken within six months after the entry of the decree sought to be reviewed. The decree in the court below was rendered May 27, 1892. November 27, 1892, was Sunday. The appeal from the decree was allowed, and the bond on appeal approved, November 28, 1892.

James P. Wood and F. L. Schofield, for the motion.

Wm. P. Harrison and George A. Mahan, opposed.

Before CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge. When the last day of the six months within which an appeal may be taken, or a writ of error sued out, to review in this court a decree or judgment below, falls on Sunday, may the appeal be taken, or the writ sued out, on the succeeding day? This is the question presented by this motion. The act of March 3, 1891, creating the circuit courts of appeals, (section 11, c. 517, 26 St. p. 826,) provides "that no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit court of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed." As the decree sought to be reviewed here was entered May 27, 1892, the last day within the six months after its entry was November 27, 1892. November 28, 1892, the day on which the appeal was taken, was obviously not within the six months after the entry of the judgment. Missouri, and many other states, have provided by statute that "the time within which an act is to be done shall be computed by excluding the first day, and including the last. If the last day be Sunday, it shall be excluded." Rev. St. Mo. 1889, § 6570. But congress has made no such general provision, and has in no way indicated any intention that the time within which an appeal may be taken under this act should be extended beyond the six months on account of the last or any of the Sundays or holidays that fall within the time fixed for the appeal. By the act of March 2, 1867, (chapter 176, § 48, 14 St. p. 540; section 5013, Rev. St. tit. "Bankruptcy,") congress provided that "in all cases in which any particular number of days is prescribed by this title, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this title, for the doing of any act, or for

any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first, and inclusive of the last, day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the president of the United States as a day of public fast or thanksgiving, or on the 4th of July, in which cases the time shall be reckoned exclusive of that day, also." By the act of September 24, 1789, (chapter 20, § 23, 1 St. p. 85; section 1007, Rev. St.,) congress provided that "in any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation."

These provisions clearly indicate that it was the understanding and intention of congress that all Sundays should be counted as part of the time limited within which an act is to be done under their legislation, unless they are excluded by express provision. Where the time limited for the performance of an act is less than seven days, where the unit of its measurement is the day, and there is reason to suppose that juridical days were intended by a statute or act of congress, there is reasonable ground for the holding that Sundays and legal holidays falling within such time should be excluded. *Hales v. Owen*, 2 Salk. 625; *Rex v. Elkins*, 4 Burrows, 2130; *Thayer v. Felt*, 4 Pick. 354. But where the time limited is such that one or more Sundays must fall within it, and there is no statute or act excluding any of them, it is certainly not the province of the court to extend the time fixed by excluding the last, the first, or any intermediate Sunday or holiday. *Alderman v. Phelps*, 15 Mass. 225; *Ex parte Dodge*, 7 Cow. 147. Moreover, where the unit of measurement of the time limited is not the day, but is the month or year, there is still less reason to hold that any day that falls within the month or year can be excluded by the court. There are Sundays in every month. They are as much a part of the month as Saturdays, or any of the other days of the week; and where the time limited is measured by the month, and there is no statute excluding any day, there is no more reason for excluding the last Sunday of the last month from the six months limited by act of congress for taking an appeal, when the last day of the six months falls on Sunday, than there is for excluding the first Sunday of the first month, when the first day of the six months happens to fall on Sunday, or all the Sundays in the six months, for that matter; and, if they were all excluded, the time limited would be extended nearly another month. The result is that when the last day of the six months within which an appeal may be taken, or writ of error sued out, to review in this court a decree or judgment below, falls on Sunday, the appeal cannot be taken, or writ sued out, on any subsequent day. The motion is granted, and the appeal is dismissed, with costs.

WEST et al. v. IRWIN et al.

(Circuit Court of Appeals, Seventh Circuit. February 18, 1893.)

No. 87.

1. APPEAL—JURISDICTION—CITATION.

Where an appeal is allowed after expiration of the term at which the decree appealed from is rendered, a failure to have a citation issued, returnable at the same term as the appeal, causes the appellate court to lose jurisdiction.

2. SAME—PRACTICE—ENLARGING TIME TO FILE RECORD.

Under rule 16 of the circuit court of appeals for the seventh circuit, (47 Fed. Rep. viii.) providing that the judge who signed a citation on appeal, or any judge of the circuit court of appeals, may enlarge the time for filing the record, such an order made by a district judge who is not a member of the circuit court of appeals, and who did not sign the citation, is void.

3. SAME.

An order extending the time for filing the record on appeal, made after the time has expired, is ineffective.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

In Equity. Suit by John N. Irwin and others against James J. West and others to foreclose a mortgage. Complainants obtained a decree. 50 Fed. Rep. 362. Defendants appeal. Appeal dismissed.

William Brown, for appellants.

William Burry, for appellees.

Before WOODS, Circuit Judge, and BUNN, District Judge.

PER CURIAM. We are asked to dismiss this appeal because the requisite citation was not issued and served, because the record was not filed in this court in due time, and because the parties against whom the decree was entered did not all join in the appeal. The decree was for a foreclosure of a mortgage on real estate, and was entered January 25, 1892, by Judge Blodgett, before whom, except as otherwise stated, the steps designed to effect an appeal were taken. Those steps were taken at a subsequent term of the court, and were as follows: On July 22, 1892, an appeal was prayed and granted, and an order made, giving until September 24th to file the record in this court. On the 23d of July, an appeal bond, not intended to operate as a supersedeas, was approved and filed. On the 21st of September the time for filing the record was extended by Judge Gresham to the 24th of October; and on October 10th a citation issued, signed by Judge Gresham, and made returnable the 7th of November, and on October 13th was served. On the 24th of October the time for filing the record was extended by Judge Blodgett to November 14th, and on November 12th was again extended by Judge Gresham to November 24th, and on November 23d the record was filed.

The last clause of the eleventh section of the act creating the circuit courts of appeal makes the practice in respect to appeals and

writs of error in the supreme court applicable to appeals to this court, (1 C. C. A. ix.) and under that practice it is settled that "except in cases of appeals allowed in open court, during the term at which the decree appealed from was rendered, a citation returnable at the same term with the appeal or writ of error is necessary to perfect our jurisdiction of the appeal or the writ, unless it has been in some proper form waived." *Hewitt v. Filbert*, 116 U. S. 142, 6 Sup. Ct. Rep. 319, and cases cited. And, an appeal having become void for want of a citation, a subsequent citation is without avail, because there is no subsisting appeal. *Castro v. U. S.*, 3 Wall. 43. Rules 35 and 36 of the supreme court do not change the practice in this particular. By the fifth clause of the fourteenth rule of this court, (47 Fed. Rep. vii.) appeals, writs of error, and citations must be made returnable within 30 days from the signing of the citation. The present term of this court commenced on the 3d of October last; and whether the question be determined by the rule of this court, or by that applicable to the supreme court, the citation in question was not taken out in time, and the appeal prayed and granted became void.

It is insisted upon the authority of *Insurance Co. v. Mordecai*, 21 How. 195, that only the judge who allowed the appeal could sign the citation, but we need not consider that question.

In respect to the filing of the record, rule 16 of this court (47 Fed. Rep. viii.) provides that the judge who signed the citation, or any judge of this court, may enlarge the time, etc., and as Judge Blodgett did not sign the citation, and was not a member of this court when he made the order of October 24th, that order, it would seem, was a nullity; and consequently the subsequent order of November 12th, made by Judge Gresham, was ineffective, because not made until after the expiration of the time theretofore allowed for filing the record; and, that being so, the filing on the 23d of November was unauthorized.

In respect to parties, reference is made to *Hardee v. Wilson*, 146 U. S. 179, 13 Sup. Ct. Rep. 39; *Estis v. Trabue*, 128 U. S. 225, 9 Sup. Ct. Rep. 58; *Masterson v. Herndon*, 10 Wall. 416; *Feibelman v. Packard*, 108 U. S. 14, 1 Sup. Ct. Rep. 138; *Hedges v. Oil-Cup Co.*, 50 Fed. Rep. 643, 1 C. C. A. 594,—but that question need not be considered. The appeal should be dismissed, at the cost of the appellants, and it is so ordered.

N. K. FAIRBANK & CO. v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. October 26, 1892.)

No. 50.

L. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—DISTRICT OF RESIDENCE.

Under Act Cong. Aug. 13, 1888, (25 St. at Large, p. 434.) which declares that no civil suit shall be brought in the circuit court in any district except that in which the defendant resides, "but, when the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either

the plaintiff or the defendant," a suit between corporations organized in different states may be brought in the district in which the plaintiff is incorporated.

2. ACTIONS AGAINST CORPORATIONS—SERVICE OF SUMMONS—AGENTS.

Under Rev. St. Ill. 1891, c. 110, § 5, which provides that in suits against corporations, in the absence of the president, summons may be served on any agent of the company found in the county, does not authorize service of summons against a foreign railroad company upon persons employed by such company for the sole purpose of soliciting business for the company, without authority to sell tickets or make contracts for the company, even though such company supplies them with desk room in an office occupied in part by other companies, upon the window of which office the company's name is painted. Woods, J., dissenting.

3. PRACTICE—OBJECTIONS TO SERVICE OF SUMMONS—WAIVER.

Where a defendant appears specially for the purpose of moving to quash the return on the summons, the fact that, in such motion, it also prays judgment whether it should be compelled to plead, for the reason that it is a nonresident corporation, does not constitute a waiver of the objection to the service. Woods, J., dissenting.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Assumpsit by N. K. Fairbank & Co., a corporation, against the Cincinnati, New Orleans & Texas Pacific Railway Company. The case was dismissed on defendant's motion. Plaintiff brings error. Modified.

Oliver & Showalter, for plaintiff in error.

Geo. W. Stanford and C. S. Harmon, for defendant in error.

Before HARLAN, Circuit Justice, and GRESHAM and WOODS, Circuit Judges.

GRESHAM, Circuit Judge. This action was brought by N. K. Fairbank & Co., a corporation organized under the laws of Illinois, in the district of its residence, against the Cincinnati, New Orleans & Texas Pacific Railway Company, an Ohio corporation, owning and operating a line of railway extending from Cincinnati, in the last-named state, to Chattanooga, in the state of Tennessee, to recover the value of a car load or more of cotton oil which was lost by the defendant, while in its possession as a common carrier. The first summons was returned, not served, by order of the plaintiff, and an alias writ was issued, which the marshal returned:

"Served by delivering a copy to C. S. Henry, northwestern agent of defendant, November 15, 1890; the president of defendant not being found in this district."

On December 16, 1890, the defendant, by its counsel, made the following motion:

"The Cincinnati, New Orleans & Texas Pacific Railway Company, named defendant in the above-entitled cause, appears specially for the purpose herein set forth, and for no other purpose, and hereby moves the court to set aside the return of the marshal upon the summons issued in said cause, for the reason that said return is untrue in fact, and to disregard it for the reason that it is insufficient in law, and hereby prays the judgment of this court whether it should be compelled to appear herein, or plead to the declaration filed herein, for the reason that it has not been served with process herein,

and is not compellable to appear or plead to the said declaration, and has not accepted, and does not accept, service herein, nor waive due service of process upon it, and for the further reason that the defendant is not doing business in said district, nor within the state of Illinois, and was not found within said district, or within the state of Illinois, and because said defendant is a non-resident corporation."

This motion remained pending until February 15, 1892, when the plaintiff caused a pluries summons to issue, which was returned by the marshal:

"Served on the 15th of February inst. by delivering true copies to Hartwell Osborn, general agent of defendant, and W. K. Northam, contracting agent of the defendant; the president of the defendant not being found in this district."

A motion was made to quash this return for the same reasons assigned against the validity of the other return, and both motions were heard at the same time.

It appeared from the evidence, (affidavits in support of and against the motions,) and the circuit court found, that the persons mentioned in the returns were employed by the defendant, at the time of the alleged service of the writs, for the sole purpose of diverting freight and passengers destined south to such railroads leading out of Chicago as had running connections with the defendant's line at Cincinnati; that they had no authority to sell tickets, or make contracts or rates, for the transportation of freight or passengers over the defendant's road; that, to better enable them to thus serve the defendant, it supplied them, at its own expense, with desks in a room in Chicago which was occupied in part by employes of other railroad companies, and that when the suit was commenced, and the process served, as stated, the defendant's principal office was in the state of Ohio, and it had no office, and owned no railroad or other property, in Illinois. Judgment was entered, quashing both returns, and dismissing the suit, for want of jurisdiction, and this writ of error was prosecuted by the plaintiff.

The action was brought by an Illinois corporation, in the district of its residence, against an Ohio corporation, to recover a sum of money in excess of \$2,000. The jurisdiction of the court over the subject-matter was clear, and the suit was properly brought. The act of August 13, 1888, (25 St. p. 434,) declares that no civil suit shall be brought in any circuit court of the United States against any person in any other district than that whereof he is an inhabitant; "but, when the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." It is now settled that, when the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides. *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. Rep. 982; *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. Rep. 935.

Was the service on the persons named in the returns binding upon the defendant? Section 5 of the Illinois practice act (Rev. St. 1874) provides that, in all cases where suit is brought against any

incorporated company, process shall be served upon the president, if he resides in the county, and if absent from, or he does not reside in, it, the summons shall be served by leaving a copy thereof with any clerk, cashier, secretary, engineer, conductor, or any agent of the company found in the county. In *Railway Co. v. McDermid*, 91 Ill. 170, it was held that this section embraced foreign corporations having property in Illinois, and doing business in the state by local agents, and that such corporations might be brought into court by the service of process on such agents. In *Railroad Co. v. Crane*, 102 Ill. 249, it was held that a railroad company organized under the laws of Missouri, with its office and principal place of business and its tracks in that state, but running trains regularly over the bridge across the Mississippi river at Quincy, Ill., where it had a local agent authorized to make contracts for the transportation of freight and passengers, could be sued in Illinois, and brought into court by the service of process on such local agent. In their facts, these cases are widely different from the one now before this court. The defendant had no agent or other representative in Illinois, authorized to bind it by any kind of contract. It had no property or officer, and no office for the transaction of business, in the state. The room occupied in part by the persons mentioned in the marshal's returns was not an office, and those persons were mere solicitors of business, and not officers or agents of the defendant, within the meaning of the statute. In *Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. Rep. 36, the court, speaking by the chief justice, said:

"Where a foreign corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation, and representing it in the state, it cannot be said that the corporation is within the state, so that service can be made upon it."

It was urged by the plaintiff that, in praying the judgment of the court whether it should be compelled to plead, the defendant appeared to the action, and waived its right to object to the returns of service, if they were invalid. This position is untenable. The motion was that the returns be set aside because they were untrue in fact, and therefore did not oblige the defendant to plead. The appearance was solely for the purpose of making that motion. It was the validity of the returns, and not the jurisdiction of the court over the subject-matter of the suit, that was challenged. The court was not asked to dismiss the suit for want of jurisdiction, or for any other reason. The motion simply stated the reasons why the defendant had not been made subject to the court's jurisdiction, and prayed judgment whether or not, on the facts stated, it was bound to plead to the merits. The judgment of the circuit court quashing the service of the process is affirmed, and so much of it as dismissed the action for want of jurisdiction is reversed.

WOODS, Circuit Judge, (dissenting.) The marshal's returns show service—first, upon "C. S. Henry, northwestern agent of the defendant company;" and, second, upon "Hartwell Osborn, general agent of said company, and M. K. Northam, contracting agent of said company." According to the defendant's showing, Henry's "authority

was limited to conveying information concerning existing rates and facilities for handling business received from other lines, possessed by said defendant;" and, "to aid said Henry in said soliciting, he was provided with desk room in an office of another railway company in Chicago, the expense whereof, as well as the compensation of said Henry, was paid by this defendant and other railroad companies in the south for whom said Henry likewise solicited." The same showing is made in respect to Osborn and Northam, on whom the second service was made; and, in addition, the affidavit of Miller, the traffic manager of the company, states that they "are employed by defendant, in affiant's department of said city of Chicago, for the purpose of influencing shippers, * * * and that the office expenses and compensation of said Osborn and Northam are paid by defendant, and other railway companies for whom they solicited business." According to the showing made in behalf of the plaintiff, the office occupied by the defendant's agents was one third of a room 25 by 80 feet in size, on a level with the street, at 193 Clark street, the rental value of which was about \$7,000 per annum. The portion occupied by the defendant's agents was inclosed by railings and counters, so as to form a business place devoted exclusively to the occupant thereof; and the office so described was leased for the purposes aforesaid, and was occupied by the defendant company as of right, and not by license of any other railway company. These things, though stated in part upon information, are not denied. It is further shown that on the south window, on Clark street, appeared the initials of the defendant's name, in large letters, and in the room, over the railing and counter, besides the initials of the company, the names "H. A. Cherrier, Northwestern Passenger Agent," "Hartwell Osborn, General Agent," and "M. K. Northam, Contracting Freight Agent," were displayed. This, it is to be presumed, was done with the knowledge and consent of the company. Other undisputed circumstances of like significance are shown.

The defendant, being a business corporation, could have in its employ only business agents. It had an office in Chicago, for the use of which it made contracts, for any breach of which it was liable to be sued. It put into that office agents who, besides the appearance of general authority with which they were clothed, doubtless had power to contract for office supplies. On those contracts the company was liable. If these agents had committed waste upon the leased premises, the company would have been liable to an action therefor. These agents were authorized to convey information concerning defendant's existing rates and facilities. If, upon information so conveyed, a shipper was induced to forward freights, the defendant was bound to receive and carry the same at a rate not exceeding that stated by the agent. If these agents made false representations in respect to defendant's facilities or rates, to a shipper's injury, the defendant was liable to an action on that account. By the Illinois statute, service may be had upon an incorporated company, in the absence of the president from the county, upon "any clerk, cashier, secretary, engineer, conductor, or any agent of the company found in the county." In *Insurance Co. v. Warner*, 28 Ill. 429, it was held that a similar statute, being remedial, "should be

most liberally construed." Under this statute it is, as it seems to me, entirely immaterial whether the agent had authority to make contracts. "Any clerk, * * * engineer, * * * or any agent," are expressions too comprehensive to admit of such limitation. The doctrine is familiar that, when a foreign corporation comes into a state, it submits itself, in respect to the service of process and the jurisdiction of the courts, to the law of the state. This company saw fit to extend the department of its traffic manager into this state, and to establish a permanent agency of that department in the city of Chicago. It ought, therefore, to be liable to suit, and to the service of process, here.

If the defendant were a domestic corporation, with its principal office at Cairo, and its lines of road extending from that point southward, this agency, I doubt not, would be deemed sufficient to warrant service in Cook county; and it is none the less so because the defendant is a nonresident—the plaintiff being a resident—of the state. The quotation from *Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. Rep. 36, justifies this service, because these agents were here "transacting business for the corporation, and representing it in the state." The case is essentially the same as *Block v. Railroad Co.*, 21 Fed. Rep. 529, in which the service was held good. The court below did not pass upon the validity of the service, but held that the defendant was not an inhabitant of Illinois, in the sense of the decision of Justice Harlan in *U. S. v. Southern Pac. R. Co.*, 49 Fed. Rep. 297, and "could not, therefore, be legally served with process." Upon that view of the case, there was nothing to do but dismiss the suit; and accordingly, as the bill of exceptions shows, "plaintiff, by counsel, expressly conceded that the dismissal of the suit was appropriate to said rulings of the court." By that concession, therefore, the right of appeal was not waived.

The last ground of the defendant's motion to set aside the service of process was "because said defendant is a nonresident corporation." The meaning of that is that, no matter what service, or upon what agents, service of process may have been had, the defendant, being a nonresident corporation, was not subject to process or suable in the state; and so the court held, and dismissed the suit. It is contended, and I am inclined to the opinion, that, by invoking the judgment of the court upon that question, the defendant waived all objections to the particular service of process made upon it. See *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. Rep. 982; *Jones v. Andrews*, 10 Wall. 327; *Carlisle v. Weston*, 21 Pick. 537. But, upon the view that the service returned is good, the question of waiver is unimportant.

CRABTREE et al. v. MADDEN.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1893.)

No. 184.

1. CIRCUIT COURT OF APPEALS—JURISDICTION TO DETERMINE JURISDICTION OF LOWER COURTS.

The circuit court of appeals has jurisdiction to determine the jurisdiction of the United States court in the Indian Territory on a writ of error which brings up the whole case, whether the record presents the single question of such jurisdiction, or that with other questions. *McLish v. Roff*, 12 Sup. Ct. Rep. 118, 141 U. S. 661, followed.

2. UNITED STATES COURT FOR INDIAN TERRITORY—JURISDICTION.

The United States court in the Indian Territory has no jurisdiction, either under the act of March 1, 1889, (25 St. at Large, p. 783,) or the act of May 2, 1890, (26 St. at Large, p. 90,) to entertain an action for the collection of taxes imposed by the laws of the Creek tribe of Indians upon citizens of the United States residing in such territory.

3. TAXATION—NATURE OF TAX.

A tax is not a debt, and does not rest upon any contract, express or implied, but is imposed by the legislative authority without regard to the will of the individual taxed.

In Error to the United States Court in the Indian Territory. Affirmed.

Statement by SANBORN, Circuit Judge:

This is a writ of error to reverse a judgment sustaining a demurrer to a complaint and dismissing an action brought in the United States court in the Indian Territory by the Creek tribe of Indians and William F. Crabtree, as their national tax collector, plaintiffs in error, against William A. Madden, the defendant in error, to collect a tax imposed on him by that tribe. The allegations of the complaint are that William F. Crabtree is a member and the national tax collector of the Creek tribe of Indians, and that it is his duty to collect all the taxes due the tribe; that William A. Madden is not a member of the tribe, but is a citizen of the United States, who resides in the tribe, and carries on the business of a builder of houses and manufacturer of furniture as a licensed trader therein; that an annual tax of \$200 is imposed by law for the use of the tribe upon all persons not members thereof who do the business of licensed traders therein, and that the defendant has conducted his business in the tribe for a year, and refuses to pay the tax. The prayer of the complaint is for a judgment for the amount of the tax. Three grounds of demurrer were stated: That the complaint did not state facts sufficient to constitute a cause of action; that the court had no jurisdiction of the subject-matter or the parties; and that the plaintiff had no legal capacity to sue. In this court the defendant in error moved to dismiss the writ on the ground that the only question presented by the record is the question of the jurisdiction of the court below, and that the jurisdiction of the supreme court of the United States to review that question is exclusive.

George E. Nelson, for plaintiffs in error.

N. B. Maxey, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Two principal questions are presented by this record: Has this court jurisdiction to review the judgment below? and has the United States court in the Indian Territory jurisdiction to entertain an

action for, and to enforce by its judgment the collection of, a tax imposed by a tribe of Indians residing in that territory, upon a citizen of the United States residing in the tribe?

As to the first question, section 13 of the act of March 3, 1891, creating the circuit courts of appeals, (26 St. p. 826,) provides that writs of error may be taken and prosecuted from the decision of the United States court in the Indian Territory to the supreme court of the United States or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States under that act. Section 5 of the act provides that appeals or writs of error may be taken from the district courts or the existing circuit courts direct to the supreme court in six classes of cases, one of which is "in any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." Section 6 of the same act provides that the circuit court of appeals shall "exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section, unless otherwise provided by law."

The contention of counsel for defendant is that the jurisdiction of the court below is the only question in issue in this case; that the supreme court has exclusive jurisdiction to hear and determine that question under section 5, and hence this court has no jurisdiction to consider it. It is proper to notice that this is a writ of error to review a final judgment; that it brings up the entire case; and that, if this court was of the opinion that the court below had jurisdiction of the subject-matter and the parties, there would remain for determination the question whether or not the complaint states facts sufficient to constitute a cause of action; so that it can hardly be said that the question as to the jurisdiction of the court below is the only question here in issue. But if it was, and the question was clearly presented whether or not this court has jurisdiction to determine that question when a writ of error or appeal from a final judgment or decree, which brings up the whole case, presents to this court the single question of the jurisdiction of the court below, the decision of the supreme court has settled that question adversely to the contention of the defendant. In *McLish v. Roff*, 141 U. S. 661, 668, 12 Sup. Ct. Rep. 118,—a case from the United States court in the Indian Territory,—in which all the provisions of the act creating this court that are material in this case were carefully considered, that court declared the right and privilege of the defeated party upon the entry of a final judgment in the court below to be as follows:

"When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case. If the latter, then the circuit court of appeals may, if it deem proper, certify the question to this court."

The result is that when the party against whom a final judgment has been rendered in a district or circuit court of the United

States elects to take his writ of error to a circuit court of appeals upon the whole case, that court has jurisdiction to determine it, whether the question of the jurisdiction of the court below is the sole question or but one of many questions in issue under the writ. The plaintiffs in error have made their election to take their writ of error to this court upon the whole case, and the motion to dismiss the writ is denied.

The second question is whether the court below had jurisdiction of this action. The plaintiff Crabtree had no better right to maintain the action than the Creek tribe of Indians. The complaint alleges that the tax was imposed for the use of the tribe, and that Crabtree was its collector, hence he was not the real party in interest in the action; and, if the tribe could not maintain it, he could not, because he had no right he did not derive from the tribe. The connection of Crabtree with the case will not, therefore, be further noticed, and the only question is, can a tribe of Indians residing in the Indian Territory maintain an action in the federal court in that territory to collect a tax imposed by the tribe upon a citizen of the United States who resides therein? Before the jurisdiction of that court to entertain such an action can be maintained, two propositions must be clearly established: First, that congress has granted to the court below the authority to entertain and determine actions of this character, because that court, in common with all the federal courts, is limited in its jurisdiction to the cases and proceedings which congress has granted it authority to consider and act upon; and, second, that the Creek tribe of Indians has expressly or by clear implication prescribed an action at law in the federal court as the method of enforcing the tax here in question.

The limits of the jurisdiction conferred by congress on the court below are prescribed by the acts of March 1, 1889, (25 St. p. 783, c. 333, § 6,) and of May 2, 1890, (26 St. p. 93, c. 182, § 29.) So far as it is material here, the former act provides "that that court shall have jurisdiction in all civil cases between citizens of the United States who are residents of the Indian Territory, or between citizens of the United States, or of any state or territory therein, and any citizen or of person or persons residing or found in the Indian Territory, and when the value of the thing in controversy or damages or money claimed shall amount to one hundred dollars or more." The latter act, so far as it is material to the determination of this question, provides that that court, in addition to the jurisdiction conferred thereon by the former act, shall "have and exercise within the limits of the Indian Territory jurisdiction in all civil cases within the Indian Territory, except cases over which the tribal courts have exclusive jurisdiction; and in all cases on contracts entered into by citizens of any tribe or nations with citizens of the United States in good faith and for valuable consideration, and in accordance with the laws of such tribe or nation, and such contracts shall be deemed valid and enforced in said courts." The law of the Creek tribe under which this tax was imposed is not set forth in the complaint, nor is there any allegation therein tending to show what remedies for its collection the laws of the tribe have prescribed. The Creek tribe of Indians is a dependent domestic nation. It is a distinct

political society, capable of managing its own affairs and governing itself. As such a nation the United States has maintained treaty relations with it for more than a century. By the treaty of March 24, 1832, (7 St. p. 368, art. 14,) between the United States and that tribe, it was stipulated that "the Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians; nor shall any state or territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves so far as may be compatible with the general jurisdiction which congress may think proper to exercise over them." By the treaty of August 7, 1856, (11 St. p. 703, art. 15,) it was stipulated that, "so far as may be compatible with the constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property within their respective limits, excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe; and all persons not being members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes respectively, (assisted, if necessary, by the military,)" with the exception of certain classes of persons, one of which is, "all persons peaceably traveling or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States."

By the treaty of June 14, 1866, (14 St. p. 788, art. 10,) it was stipulated that "the Creeks agree to such legislation as congress and the president of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory: provided, however, [that] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs." The act of May 2, 1890, enlarging the jurisdiction of the court below, recognizes the existence and exclusive jurisdiction in some cases of the tribal courts and the validity of contracts made according to the laws of the tribe. These treaties and this legislation demonstrate that this tribe has carefully preserved its separate political identity, and that it is still managing its own affairs, and exercising, through officers of its own selection, legislative, executive, and judicial functions within its territorial jurisdiction. The tax which it is sought to collect by this action was imposed by the laws of this tribe. If the tribe had lawful authority to impose it, it had equal power to prescribe the remedies and designate the officers to collect it. The presumption is that it has done so, and that it has provided some of the remedies usually prescribed for that purpose. It is seldom that an action at law is authorized for the collection of a tax, and the general rule is that, where remedies are provided, and such an action is not named as one of them, a common-law action to recover the tax will not lie, even in the courts of the sovereignty which imposed them, much less in the courts of another state. *Meriwether v. Garrett*, 102 U. S. 472, 515; *Peirce v. Boston*, 3 Metc. (Mass.) 520;

City of Faribault v. Misener, 20 Minn. 396, (Gil. 347;) Cooley, Tax'n, p. 16, note 3.

Thus, in *Meriwether v. Garrett*, supra, Justice Field, in speaking of the jurisdiction of the federal court to enforce the collection of taxes that had been levied under a state law through its receivers, as compared with the power of the legislature of the state to provide a different method for their collection through its ministerial officers, said:

"In the distribution of the powers of government in this country into three departments the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government through all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to provide the means by which the tax shall be collected and to designate the officers through whom it will be enforced."

And in *Peirce v. Boston*, the supreme court of Massachusetts, speaking of taxes imposed in that commonwealth, said:

"They do not partake of the nature of judgments. The imposition and collection of them are ministerial acts, and are the proper subjects of inquiry as to the measure of their assessment and the mode of their enforcement in the judicial forum; and for the collection of them no right of action is given, (with a few special exceptions, growing out of the death of parties, or their removal out of the collector's precinct, or on the marriage of females,) nor can they be turned into judgments."

An action at common law, then, is not the usual method of enforcing the collection of a tax, even in the courts of the sovereignty imposing it. Nor is it generally the province of the courts of one state to enforce the revenue laws of another. If they sometimes do so, it is in rare cases, from the necessity of the case, and on the principle of international comity. The statement is frequently found in the books that the revenue laws of one state are without force in another, and, if that statement is too general, it seems to be well settled that such laws have not sufficient force in the courts of a foreign state to prevent the enforcement in those courts of contracts there made to be performed in a neighboring sovereignty in violation of those laws. Bish. Cont. § 1387, note 1, and cases cited.

If the court below has jurisdiction of this class of actions it must necessarily construe, determine the effect of, and eventually draw to itself the controlling power over the enforcement of the laws of the Indian tribes within its territorial jurisdiction relating to the taxes and revenues of those nations imposed on and derived from persons not members of the tribes. If it has this jurisdiction, the extraordinary spectacle will be presented of a political society, authorized to impose taxes for the support of its government and the protection of its subjects, appealing to the courts of another sovereignty to enforce the collection of its taxes against persons and property within its own territory. The diligence of counsel has called our attention to no case, nor have we been able to discover any, that forms a precedent for such an anomaly.

Chief Justice Marshall, speaking for the supreme court in *Cherokee Nation v. State of Georgia*, 5 Pet. 1-20, where he stated that these Indian tribes might be called "domestic dependent nations,"

and that they were capable of governing themselves and managing their own affairs, declared that they were not foreign nations or states in the sense of the constitution, and that they could not, as such, maintain actions in the federal courts. The federal courts have no general power to enforce the revenue laws of the states and municipalities within their territorial jurisdiction. They exercise such power only in cases in which it is expressly granted to them, or impliedly given, because it is necessary to the enforcement of their judgments. *Cooley, Tax'n, 744*. In the acts granting jurisdiction to the court below there is no express grant of authority to entertain actions or proceedings instituted by the Indian tribes to enforce the collection of their taxes. It seems incredible that congress could have intended to confer upon that court a jurisdiction so unusual, so unprecedented, without clearly expressing that intention.

The considerations to which we have adverted, and especially the conviction that, if congress had intended to confer on the court in the Indian Territory a jurisdiction so extraordinary in its character and so far-reaching in its effects as that here claimed, it would not have failed to clearly and unmistakably express that intention, have forced us to the conclusion that it never did intend to confer that jurisdiction. Nor do we find in this case any foundation on which to base the conclusion that the Creek tribe itself has either expressly or by implication prescribed or consented to so unique a method of enforcing its revenue laws.

The counsel for plaintiffs attempts to escape from this conclusion by the argument that this tax is a debt; that it arises upon an implied contract; that the court has jurisdiction to enforce such contracts, and hence of this action. This position is not tenable. Taxes are not debts. They do not rest upon contract, express or implied. They are imposed by the legislative authority without the consent and against the will of the persons taxed, to maintain the government, protect the rights and privileges of its subjects, or to accomplish some authorized, special purpose. They do not draw interest, are not subject to set-off, and do not depend for their existence or enforcement upon the individual assent of the taxpayers. *Meriwether v. Garrett, 102 U. S. 472, 513; Lane County v. Oregon, 7 Wall. 71, 80; In re Duryee, 2 Fed. Rep. 68; Peirce v. Boston, 3 Metc. (Mass.) 520; Perry v. Washburn, 20 Cal. 318; Webster v. Seymour, 8 Vt. 135, 140; Johnson v. Howard, 41 Vt. 122, 125.*

The claim that the authority of the interior department and the Indian agents to remove from the territory of the Indian tribes licensed traders who refuse to pay taxes lawfully levied upon them by the tribes, and thus to enforce their payment, which was exercised before the establishment of the court below, has been withdrawn, because jurisdiction was conferred upon that court to enforce the collection of such taxes, is unfounded, because no such jurisdiction was conferred upon that court, and the remedy for the enforcement of lawful taxes through the Indian agents remains in the same condition in which it was before that court was created. In addition to this, every licensed trader is required by section 2128, Rev. St., to give a bond, conditioned that he "will faithfully observe

all laws and regulations for the government of trade and intercourse with the Indian tribes, and in no respect violate the same."

Our conclusion is that the court below had no jurisdiction of this action, and the judgment below is affirmed, with costs.

CRABTREE et al. v. BYRNE et al.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1893.)

No. 185.

In Error to the United States Court in the Indian Territory.

Action by William F. Crabtree, national tax collector of the Creek nation of Indians, and said nation, against P. J. Byrne and R. J. Gentry, executors, substituted for A. A. Engart, deceased, to recover the amount of a tax imposed by the laws of the nation. Judgment for defendants sustaining a demurrer to the complaint, and dismissing the action. Affirmed.

George E. Nelson, for plaintiffs in error.

N. B. Maxey, for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. The facts and questions in this case are the same as in No. 184, (*Crabtree v. Madden*, 54 Fed. Rep. 426.) For the reasons stated in the opinion in that case the motion to dismiss the writ of error is denied and the judgment below is affirmed, with costs.

REMER v. McKAY et al.

(Circuit Court, N. D. Illinois. May 3, 1892.)

1. QUIETING TITLE—JURISDICTION—LAND IN ANOTHER STATE.

A suit to remove an alleged cloud from the title to land may be brought in another state, since the decree compelling the defendant to release the cloud operates only in personam.

2. JUDGMENT—VALIDITY—CONSTRUCTIVE SERVICE—JURISDICTION OF DEFENDANT'S PERSON.

A decree rendered upon constructive service declaring the holder of the legal title to land to hold the same in trust for his grantor's creditors is void for want of jurisdiction. *Arndt v. Griggs*, 10 Sup. Ct. Rep. 557, 134 U. S. 316, distinguished.

3. CLOUD ON TITLE—JUDICIAL SALE.

Where a decree ordering the sale of the interest of a man in land held by his wife is rendered by a court that has no jurisdiction of her person, and a sale is made thereunder purporting to convey the entire estate in the land, such sale constitutes a cloud upon the wife's title.

In Equity. Suit by Chester K. Remer against Duncan McKay and others. A demurrer to the bill was heretofore overruled. 35 Fed. Rep. 86. Decree for complainant.

O. F. Woodruff, for complainant.

Fry & Babb, for defendants.

BLODGETT, District Judge. This is a bill to remove an alleged cloud from the complainant's title to a tract of land in Monona county, in the state of Iowa, the material allegations being that on

the 30th day of July, 1886, complainant purchased the land in question, for a valuable consideration, from Janet R. Remer, and the same was conveyed to him by the said Janet R. Remer and Adam Remer, her husband, whereby complainant became the owner in fee of said land; that on or about the 10th of December, 1881, the said Janet Remer became the owner of said land by virtue of a warranty deed to her, of that date, from one Leander Smith, which deed was duly recorded upon the records of land titles of said county; that, after said Janet had so become seised in fee of said land, Duncan McKay, who was the original and sole defendant in this case, (he having since died, and his executors and heirs having been made defendants by bill of revivor,) caused an attachment suit to be brought in the district court of Monona county against Adam Remer and said Janet Remer, and by the complaint filed in said suit it was charged that said Adam was indebted to the said McKay, upon a promissory note, in the sum of \$497.37, and that said Janet was the wife of said Adam; that on or about the 10th day of December, 1881, said Adam sold a farm to one Leander Smith, and took in part payment therefor the tract of land in question, and that said Smith, by request of said Adam, conveyed the land in question to the defendant Janet; that the conveyance to said Janet was without consideration and void, and was caused to be so made with intent to hinder and delay the creditors of said Adam, he (the said Adam) being then deeply involved in debt, wherefore it was prayed that judgment might be rendered against the said Adam for the amount so due, with interest and costs, and that the title to said land be decreed to be held in trust by said defendant Janet, and subject to the payment of said judgment against said Adam; that at the time of so instituting said suit the said plaintiff, Duncan McKay, and the defendants, Adam and Janet Remer, were nonresidents of Iowa, and all resided in the same town in Whiteside county, in the state of Illinois; that, after the commencement of said suit, the said plaintiff, McKay, caused notice to be published requiring defendants to appear and defend at a term of said court to be held on the 18th of September, 1883, and that, unless they did so appear and defend, judgment would be entered by default, which was the only service of process in said suit, and that afterwards, and on the 19th of September, 1883, default was entered in said cause, and a judgment rendered against said Adam for \$508.62 and costs, and a special execution ordered to issue for the sale of the interest of defendant Adam in said land; that, in pursuance of said judgment, a special writ of execution, bearing date the 29th of September, 1883, was issued to the sheriff of said county, by virtue of which said sheriff, on the 1st day of November, 1883, sold the said land, and the said Duncan McKay became the purchaser thereof for the sum of \$552.21; and that afterwards, and on or about the 3d day of November, 1884, said land not having been redeemed from said sale, the said sheriff made a deed by which he purported to convey said land to said Duncan McKay,—of all which proceedings, it is averred, said Janet had no knowledge until about the 1st of August, 1886. It is also charged that complainant, after acquiring title to said land by a deed from Janet, sold the same for a valuable consideration, and

conveyed the same by a warranty deed to the purchaser, and that said McKay now threatens to take possession of said land under the said sheriff's deed to him, and that, by reason of such threats, the purchaser from complainant threatens proceedings against complainant on his covenants of warranty to said purchaser; that said McKay is not, and has never been, in the possession of said land, but that he refused to release his claim to the same, and that said sheriff's deed is a cloud upon complainant's title, which should be removed for the protection of said complainant against his said covenants of warranty; that said land is vacant and unoccupied, and said McKay, or those claiming under him, have never been in actual possession thereof. The prayer of the bill is that a decree may be entered declaring that the proceedings in said suit of Duncan McKay are void and inoperative as against Janet R. Remer, the owner of said land; that the said deed to Duncan McKay is a cloud upon the title of complainant; and that the sale under said judgment and execution be annulled and set aside; and for general relief. Defendant Duncan McKay demurred to the bill, which demurrer was overruled, and afterwards an answer was filed by leave of court, to which complainant filed a replication, and the case has been brought to hearing upon a stipulation as to the facts which substantially admits the allegations of the bill to be true. The questions raised by the pleadings and submitted by the stipulation are (1) whether this court has jurisdiction to hear and determine this case; (2) whether the district court of Monona county, Iowa, did, in the suit of Duncan McKay against Adam and Janet Remer, by publication only, and without the appearance of the said Janet Remer, acquire such jurisdiction of her in the suit as to authorize the divesture of her title to the land in question; (3) whether, by reason of the defects in said proceedings, the deed to McKay can be attacked by this proceeding; or whether said defects render such deed voidable, and only subject to attack in the court where such proceedings were had or an appellate court.

As to the question whether this court has jurisdiction of the controversy. I can see no reason why the jurisdiction is not complete. The stipulation states that complainant is a citizen of Iowa, and the original defendant a citizen of Illinois, and that the heirs at law and executors of said original defendant are also citizens of different states from that of complainant; and it is also stipulated that the value of the lands in question exceeds \$2,000. The decree sought is only to operate in personam upon the defendants, and compel the release of the cloud upon the title to the land in controversy. Although the subject-matter of the controversy is land situated in another state, "while there can be no contention that a court of equity can bind land in a foreign country by its decree, yet it can bind the conscience of the party in regard to land, and compel him to do equity, and to act in good faith." Story, Eq. Jur. §§ 743, 744; *Massie v. Watts*, 6 Cranch, 148; *Briggs v. French*, 1 Sum. 504.

As to the second question,—whether the district court of Monona county, Iowa, acquired such jurisdiction in the suit of McKay vs. Adam and Janet Remer, by publication of notice only, and without any personal service of process or notice to said Janet, that it could,

by its judgment or decree, in such cause and proceedings thereunder, divest the said Janet of her title to the land in question. Some consideration was given to this question when the case was before the court on demurrer, (35 Fed. Rep. 88,) and the conclusion there arrived at stated as follows:

"Under the showing made by this bill, the Iowa court had no jurisdiction of Mrs. Remer in the suit, and its judgment and proceedings could not operate to divest her of her interest in this property. While there is no doubt that, if a debtor residing in Illinois holds property, real or personal, in his own name in Iowa, a creditor may attach such property, and, under the provisions of the Iowa statute for constructive service by publication of notice, may clothe the court in which such attachment is brought with jurisdiction to adjudge such property subject to the debts of such owner, yet I know of no judicial proceedings where the apparent owner of property can have his title divested, and his property applied to the payment of another's debt, without personal jurisdiction."

At the time I passed upon this case on demurrer, I was guided by and relied upon *Pennoyer v. Neff*, 95 U. S. 714; but defendants' counsel now attacks that conclusion, on the authority of *Arndt v. Griggs*, since decided, and reported in 134 U. S. 316, and 10 Sup. Ct. Rep. 557. I have given the latter case a careful study, and do not think, when considered in the light of its own facts and the Nebraska Code, under which it arises, it disturbs the rule I followed on the demurrer. That was a case brought under the Nebraska Code by a citizen of Nebraska, claiming paramount title to lands in that state, to remove a cloud upon his title, and the defendant holding the title which was alleged to be a cloud on complainant's title was brought into court only by publication of notice, as required by the statute of Nebraska; the statutory provision being as follows:

Section 57, c. 73: "An action may be brought and prosecuted to final decree, judgment, or order by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate."

Section 58: "All such pleadings and proofs and subsequent proceedings shall be had in such action now pending or hereafter brought as may be necessary to fully settle or determine the question of title between the parties to said real estate, and to decree the title to the same, or any part thereof, to the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment, or order into effect."

Section 77, Code Civil Proc.: "And service may be made by publication in the following cases: * * * Fourth. In actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a nonresident of the state or a foreign corporation."

Section 82: "A party against whom a judgment or decree has been rendered without other service than by publication in a newspaper may, at any time within five years after the date of the judgment or order, have the same opened, and be let in to defend."

The whole tenor of the argument, in the vigorous opinion of Mr. Justice Brewer, speaking for the court in that case, is that the power to provide the mode by which conflicting titles to land shall be settled rests in the state within which such lands are situated;

that the state of Nebraska had exercised its right in that regard, and provided how such conflicts of title can be settled in that state; and that the case made by the record came clearly within the provisions of that statute. That case, therefore, as it seems to me, fails to furnish any new rule for the decision of the one now before this court. It may well be that a person holding a title or lien in any form, to land situate in a state, of which he is not a resident, may be held bound to take notice of, or, at least, be on his guard for, an assertion of title to that land by another, as most, if not all, conflicting titles are in some form matters of public record. A nonresident owner of land in a state is also bound to know that his land is liable to be sold for taxes, assessments, or other burdens imposed upon it by the laws of such state, and is chargeable with notice of the public records of land titles where his land is situate, and is thereby put on his guard to watch the proceedings of courts there. But the case before me here is not one of conflicting titles. Janet Remer held the legal title to this land by a conveyance regular upon its face. Whether she held it in fraud of her husband's creditors was a question of fact which did not involve a conflict of title, but involved the question of whether she held her title (the only one extant, so far as this court knows) for her own use, or for the use of her husband or his creditors. In the very nature of the case, it presented a case in personam, where she had the right to be heard in a forum of conscience, which should decide whether her title did or did not originate and rest in fraud. Under the laws of Illinois, a husband may become a debtor to his wife, and, if unable to pay all his creditors, may prefer one to another. So that the mere fact that Adam Remer was heavily involved in debt at the time he caused the conveyance of this land to be made by Leander Smith to his wife does not raise the presumption of fraud; but, even if it did, she had the right to a personal hearing on that question, and the opportunity to explain away any presumption or appearance of fraud before her title could be divested. So far as the principle involved in this case goes, the fact that Janet Remer was the wife of Adam Remer makes no difference, and no different question in law arises here than would have arisen if the title had been made to an entire stranger to Adam Remer. If this proceeding in the Monona district court can be sustained, any person holding lands in the state of Iowa is liable to have his title divested by just such proceedings as this, behind his back. It would be, indeed, presumptuous in me to dissent from the decision of the supreme court in *Arndt v. Griggs*, and I do not intend to be so understood; but I insist that that case does not furnish the rule for this case. That a state can provide the way in which conflicting titles to land, within its territory, can be settled, and bring non-resident holders of conflicting titles before its courts by constructive service, was substantially settled before *Arndt v. Griggs*, as is clearly shown by Justice Brewer in his opinion in the late case.

As to the third question submitted. I understand it to be merely this: whether defects or errors in the proceeding in the Iowa court can be reviewed or corrected by this bill. I confess I am somewhat at a loss as to how to answer this question, in view of the way it is treated in defendants' brief, where it is said:

"The very fact of the court having ordered the sale of the interest of the defendant Adam Remer in the said premises, necessarily involves the conclusion that the court found and decreed that Janet R. Remer held said premises in trust for Adam Remer, for the use of his creditors; otherwise, there would have been no interest of Adam Remer in the said premises to be ordered sold."

I will, however, say that if Janet Remer was not brought before the court by publication of notice, so as to divest her of her title to the property, then the judgment against Adam Remer, and the order that the land attached be sold to satisfy that judgment, gave the purchaser, Duncan McKay, no title to the land in question; for, by the laws of Iowa, the husband has no interest in the lands of his wife which can be sold on execution during his wife's life; but the execution goes further than the judgment, and directs the sheriff to make the amount of the judgment and costs out of the lands attached, and the sheriff's deed purports to convey the land in question to McKay,—not Adam Remer's interest in it,—so that this sheriff's deed is a cloud upon the title of the land, even if the judgment or decree only directed the sale of Adam Remer's interest in it, because the sheriff, who was McKay's agent, sold and conveyed more than the judgment directed. There was no decree for the sale of the land or Janet Remer's interest therein, but only a decree for the sale of Adam Remer's interest in the land; and hence the sheriff's deed, purporting to convey the land to Duncan McKay, is, in my estimation, not voidable for error, but is wholly void, as not being founded on any decree or judgment. But there is this further reason why this deed should be set aside: Duncan McKay and Adam and Janet Remer lived in the same town in Illinois. McKay could have brought suit on her note, and if he recovered a judgment against Adam Remer, and could not collect it by execution, he could have filed a creditors' bill against Mrs. Remer, and, by personal service, brought her into a court of equity, and had the question determined whether she held this land by a conveyance so unconscionable as to make it chargeable with her husband's debts. But the secret proceeding resorted to so shocks the sense of justice as to require this deed to be set aside on that ground alone. A decree may be entered in accordance with this opinion.

HULL et al. v. CHAFFIN et al.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1893.)

No. 168.

1. RES JUDICATA—TRUSTS.

In 1840, for a consideration paid by the husband of C., a deed of land was executed to a trustee in trust for C., which by mistake vested only a life estate in C., remainder to her children, or, in default of children, to her right heirs; the intention being that a fee should be vested. Thereafter an action was brought to reform the deed, in which the trustee and other parties to the deed, but not the contingent remainder-men, were made parties. Before final decree therein, the husband of C. died. *Held*, that the trust became executed by the statute of uses, and the trustee had no further duties to perform, and the decree thereafter entered was not binding on the contingent remainder-men; they not being represented in the action. 49 Fed. Rep. 524, affirmed.

2. RESULTING TRUSTS—FRAUD OF AGENT.

H., while acting as confidential agent in charge of property, both under C. and the trustees under C.'s will, acquired full information of a defect in C.'s title, and the intention of C. and of the trustees to acquire the outstanding title, or to contest its validity, but secretly purchased such title in the name of another, and by his connivance caused the tenants of the property to attorn to the person to whom the outstanding title had been conveyed. *Held*, that he would not be allowed to profit by his purchase, but would be treated in equity as holding the title for his principals. 49 Fed. Rep. 524, affirmed.

3. SAME.

Nor will the heirs of an attorney who was jointly interested with H. in the purchase, and conducted all the negotiations with full knowledge of H.'s relations to C., stand in any better position than H. 49 Fed. Rep. 524, affirmed.

4. TRUSTEES—DUTIES AND LIABILITIES.

The testamentary trustees under C.'s will were given full power to sell, mortgage, and lease, and reinvest the proceeds, in their discretion. *Held*, that they had power to buy in an outstanding claim as a cloud on their title, and could maintain the action against H. and the others to charge them as constructive trustees, and in such action defendants would be charged with the rents and profits, and credited with all expenditures for taxes, insurance, and improvements, and the sums expended in purchasing the outstanding interests. 49 Fed. Rep. 524, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri. Affirmed.

Statement by SHIRAS, District Judge:

The proceedings in this case were brought in the United States circuit court for the eastern district of Missouri, for the purpose of settling the title to certain realty forming part of block 144, in the city of St. Louis; the complainants, John C. Chaffin and Edwin O. Childs, trustees under the will of Edwin Chaffin, and Caroline A. Chaffin, claiming that the realty, in right and equity, belonged to Edwin Chaffin in his lifetime, and that whatever apparent title thereto was held by Leon L. Hull, William Clark, or the widow and heirs of Samuel Hermann, deceased, was in fact held by them in trust for complainants, who represented the right and interest of Edwin Chaffin. Upon the final hearing of the case in the circuit court, it was decreed that all the right, title, and interest acquired by Leon L. Hull, William Clark, or Samuel Hermann to the realty in the bill described was obtained and held by them in trust for the complainants, John C. Chaffin, and Edwin O. Childs, testamentary trustees under the will of Edwin Chaffin, deceased, and that, upon reimbursing the defendants for all sums of money paid by them in procuring the execution of the conveyances to them, the complainants should be entitled to a decree vesting the title held by said defendants in complainants; it being further held that the defendants should account for all rents and profits by them received, and be credited for all expenditures for taxes, insurance, repairs, and improvements in connection with the property. An accounting was had before a master, who found that there was a balance due to the defendants amounting to \$738.55; and, this sum being by complainants paid into court, a final decree was rendered, in effect, vesting the title of the realty in the complainant trustees, to reverse which the defendants took an appeal to this court.

Joseph S. Laurie and Seneca N. Taylor, for appellants.
Edward Cunningham, Jr., for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge, (after stating the facts.) The questions at issue between the parties to this suit have been very fully and

ably presented by counsel in the briefs and arguments before this court, and, with the assistance thus afforded us, we have considered the several errors assigned on behalf of appellants, but we find therein no sufficient ground for reversing the decree appealed from. We concur in the views expressed by the circuit court of the facts and the law applicable to the case, and these are so clearly and aptly stated in the opinion filed in that court, and reported in 49 Fed. Rep. 524, that we deem it unnecessary to enter upon a restatement thereof. Affirmed.

LEAVITT v. WINDSOR LAND & INVESTMENT CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1893.)

No. 181.

1. PARTNERSHIP—WHAT CONSTITUTES—CONTRACT.

Where a contract provides that one of the parties shall contribute the use of a theater building, and is to pay certain expenses incident to the use thereof, and the other party shall contribute his time and skill in the management and conduct of the business, and is to pay a fixed sum per month for lighting and heating the building, a fixed sum for rent, and the "lessor" is to receive "as additional rent one half of the net annual profits accruing from the business of the theater," and each party is to pay one half of the losses of the business, this contract constitutes them partners, notwithstanding that it uses the terms "lessor" and "lessee."

2. SAME—EQUITY JURISDICTION.

One partner may obtain an injunction in equity to restrain his copartner from violating his rights under the contract of partnership, even when the dissolution of the partnership is not asked.

3. CONTRACTS—CONSTRUCTION—ACTS OF PARTIES.

The court will follow, in construing a contract, the construction placed on the contract by the parties themselves; and, where a contract provides that a theater should be operated as "a strictly first-class place of amusement," the court, in order to determine whether there has been a breach of this condition, will take, as a standard of "first-class attractions," one which the parties themselves thought first-class.

4. SAME—PERFORMANCE.

A contract between the lessor and lessee of a theater, in effect, made them partners in the theater business; the lessee, however, to have sole management thereof, and the lessor to have "no control, authority, or voice" therein. Held, that it was no breach of the contract, justifying a re-entry by the lessor, that the lessee did not personally attend to the management of the theater building, but was looking after the business elsewhere.

5. SAME—ESTOPPEL.

The lessor could not question the efficiency of the local manager and treasurer, who had immediate charge of the theater, when, having re-entered for alleged breach of the conditions of the lease, he had himself retained them in their positions.

6. SAME.

It was no breach of the contract, justifying a re-entry, that the lessee's employees did not, on one occasion, open the box office for an hour after the advertised time, or that they, on one occasion, without his knowledge, speculated in seats, by selling tickets outside the box office, accounting for them at the price fixed by the manager for that attraction, especially when such employees had been appointed on the recommendation of the lessor, and were also retained by him after his re-entry, with a full knowledge of the facts.

7. ARBITRATION AND AWARD—DECISION.

At common law, all those named as arbitrators must act, and they must all act together, and they must all concur in the award, unless the parties have agreed that it may be made by less than all; and this is the law in Colorado, except in certain cases specified in the Code.

Appeal from the Circuit Court of the United States for the District of Colorado.

In Equity. Suit by Michael B. Leavitt against the Windsor Land & Investment Company, William H. Bush, Frank C. Young, and Edward W. Rollins, for a mandatory injunction restoring complainant to the possession of a certain theater building from which he had been ousted, and for other relief. The circuit court dismissed the bill. Complainant appeals. Reversed.

Statement by CALDWELL, Circuit Judge:

On the 27th day of September, 1889, William H. Bush, in contemplation of the erection by him of a theater building in Denver, Colo., entered into a contract with Michael B. Leavitt whereby the latter acquired the right to the use and occupation of the theater building so to be erected, and the exclusive management, conduct, and control of the theater business therein, for the term of five years from the date of its completion. The building was completed, and possession delivered to Leavitt under the contract, on the 18th day of August, 1890. The provisions of the contract material to the case are as follows:

"And the party of the first part, [Leavitt,] in consideration of the before-mentioned covenants to be performed by the party of the second part, agrees, for himself, his heirs and assigns, to pay to the party of the second part, as rental for the premises hereinbefore described, the sum of eight thousand (\$8,000) dollars per year for the first three years of the said term of five years, and the sum of nine thousand (\$9,000) dollars per year for the last two years of the said term of five years; and if, as is hereinafter provided, said party of the first part shall continue as lessee of said premises an additional five years, the rental for the said term shall be as the parties may agree hereafter. All rents received under this lease shall be paid monthly, in advance, beginning on the day possession shall be given to the party of the first part, and on the corresponding day of every month thereafter during the continuance of this lease. And the party of the first part, for himself, his heirs, executors, and assigns, does further agree to pay to the party of the second part, his heirs, executors, and assigns, as additional rent for the above-described premises, annually, during the term of this lease, a sum equivalent to one half of the net annual profits accruing from the business of the theater, and a full, complete statement and settlement of such business shall be made each week during the continuance of this lease, and payment shall be made at the same time. It is further covenanted and agreed between the parties hereto that the percentage to be paid to the companies performing at this theater shall be fair and reasonable, and, if possible, no greater than the percentages paid at other first-class theaters in the cities of New York, Chicago, and St. Louis. It is further stipulated and agreed between the parties hereto that the salaries of the manager and treasurer of said theater shall be such reasonable amounts as will be paid to such officers in the cities of New York, Chicago, St. Louis, and San Francisco. * * * Said party of the first part further agrees to pay the sum of three hundred and fifty dollars per month, for each and every month during the continuance of this lease, for electric light and heating; payments to be made to party of second part. The party of the second part, however, agrees to defray all expenses for engine and firemen, fuel, and repairs of steam and electric plants, and the party of the first part to keep the globes and lamps in the theater and entrance in good repair. The party of the first part further agrees to maintain and operate the theater as a strictly first-class place of amusement, and that no attractions shall be booked at the said theater of a questionable character, or such as would not be regarded as first-class by the managers of

the following theaters: The New Broadway or Wallack's, A. M. Palmer's or the Lyceum, of New York; McVicker's, Hooley's Chicago Opera House, or the Columbia Theater, of Chicago; the Olympic or Grand Opera House, of St. Louis. The party of the first part agrees to keep the theater in perfect repair, at his own cost and expense, during the continuance of this lease, and to deliver possession at the termination thereof in as good order as when possession was given to him, ordinary wear and tear incident to theaters, and incidents from fires, storm, or the act of God, only excepted. * * *

It is further understood and agreed that the party of the second part shall have no control, authority, or voice in the conduct, management, or affairs of said theater business, but this shall be exclusively under the control of the party of the first part. It is further understood and agreed that, upon the expiration of the five years for which said premises are demised, said party of the second part, his heirs, executors, and assigns, agree that they shall be obliged to give the party of the first part, his heirs, executors, and assigns, the preference and first choice to take a new lease for five years or more, and, until said party of the first part shall decline to take such lease, said party of the second part shall not be at liberty to lease said premises to any other person. And it is hereby agreed that the rental for the second term of five years shall not exceed fifteen thousand dollars per annum rental, and fifty per cent. of the profits of the business. The acceptance or rejection of this second five years shall be made six months prior to the termination of this lease for the five years aforesaid. And it is further agreed that the party of the second part shall have placed at his disposal a private box in said theater, for the use of himself and friends, rent free; the selection to be made by said second party before the said theater is open. And it is further agreed that, should there be any losses in carrying on of the said theater during this lease, that the same shall be borne by the said parties hereto in equal portions, i. e. the said first party, fifty per cent.; and the said second party, fifty per cent. Finally, it is agreed by the parties that, should the party of the first part fail to perform any of the covenants herein required to be by him performed, then this lease shall be null and void, and the party of the first part empowers and authorizes the party of the second part, his heirs or assigns, to re-enter without process of law, and take possession of the premises, and have and hold the same, as though this lease had not been made. In witness whereof, the parties have hereunto set their hands and seals the year and day first above written.

"M. B. Leavitt. [Seal.]

"Wm. H. Bush. [Seal.]"

During the year 1890 the lessor, Bush, sold and conveyed the leased premises to the Windsor Land & Investment Company, which succeeded to all the rights and obligations of the lessor, Bush, under the lease. On April 9, 1891, the appellee, the Windsor Land & Investment Company, by and through its agent, Bush, took forcible possession of the theater building, and excluded the lessee, Leavitt, and his agents, therefrom. Thereupon the original bill in this case was filed in the court below by the lessee, Leavitt, against the Windsor Land & Investment Company and against William H. Bush, Frank C. Young, and Edward W. Rollins, who were in possession of the building, managing and controlling it, as agents of the Windsor Land & Investment Company. The bill set out the contract, averred that the complainant had performed the covenants thereof on his part, and that the defendants had, with force and arms, ejected him from the leased premises, and taken possession thereof, and prayed, specifically, "for a mandatory writ restoring complainant to the possession" of the premises, for an injunction restraining the defendant from interfering with the lessee's possession or the management of the property, and for a specific performance of the contract. The defendants answered the bill, denying that they entered upon the leased premises by force, and alleged that they entered peaceably and lawfully, for breaches of the covenants of the lease on the part of the lessee, for which they were entitled to re-enter by the terms of the lease. Upon the hearing of the motion for an interlocutory injunction the lower court restored the lessee to the possession of the premises, and enjoined the defendants from interfering with such possession. On

June 4, 1891, the defendants filed a cross bill alleging that the lessee Leavitt had forfeited all rights under the lease by violating its terms and conditions in the following particulars: (1) That he had devoted a very small portion of his time to the management of the Broadway Theater, but had turned over to his employes almost the entire management and control of the same. (2) That the box office was not kept open at the hours and times it was advertised that it would be open, and when it should have been open. (3) That Leavitt's representatives and agents in the management of the theater refused to sell tickets for popular attractions at the box office, but put them on sale with outside parties at prices much higher than the regular rates, and converted the receipts in excess of the regular rates to their own use. (4) "That the said Leavitt hath utterly and wholly failed to observe and perform that clause of said contract which provides that none but first-class troupes shall be permitted to occupy the said theater, and, on the contrary, your orators allege the truth to be, in that regard, that many inferior attractions and troupes, and troupes and attractions of a questionable character, have been permitted to occupy the said theater, and to perform thereat, and many troupes and attractions which would not be regarded as first-class by the managers of the theaters designated in the said contract of lease; and your orators state that the following are some of the attractions which have appeared at said theater, which are not first-class, and which would not be so regarded by the managers of said theaters so designated in said contract, to wit: Hearts of Oak, Hubert Wilke, Adelaide Moore, Joseph Grismer, Daniel Sully, Two Sisters, Kajanka, Hallan & Hart, and the Fakir. That each of said attractions, together with others of a like character, occupied the said theater for a space of one week, and that in contracting for the production of each of said attractions the said Leavitt violated the said contract for the production of only first-class attractions at said theater. And your orators state that they have inspected a list of attractions which it is proposed by the said Leavitt to produce at said theater in the future, and that many of them are not first-class; that many of them are of a questionable character, and that the production of said attractions at said theater will necessarily result in great loss, damage, and injury to your orators, as the owners of the said premises, by reason of the fact; and that the production of attractions of such class and character at said theater will necessarily injure the reputation of said premises as a first-class place of amusement." The cross bill prayed for a cancellation of the lease, and the restoration of the plaintiffs therein to the possession of the leased premises.

Upon the final hearing of the cause, the lower court entered a decree dismissing the original bill for want of equity, and upon the cross bill decreed that the lease be canceled, but that Leavitt, the defendant in the cross bill, should retain possession of the premises, under the terms and conditions of the lease, until the 1st day of July, 1893, when he should yield up the possession to the complainants in the cross bill. From this decree, Leavitt, the complainant in the original and the defendant in the cross bill, appealed to this court.

James B. Belford and Alvin Marsh, (George H. Kohn, on the brief,) for appellant.

Charles Hartzell, (J. McD. Patterson, on the brief,) for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge, (after stating the facts.) The contract between the parties, in legal effect, is a contract of partnership. By its terms one party contributes to the business of the partnership the use of the theater building, and is to pay certain expenses incident to the use thereof, and the other party contributes his time and skill in the management and conduct of the business, and is to pay a fixed sum per month for lighting and heating the building,

and in addition thereto a fixed sum for rent, and the lessor is to receive, "as additional rent, * * * one half of the net annual profits accruing from the business of the theater," and each party is to pay one half of the losses of the business. This constitutes them partners. If the agreement between the parties was a lease, simply, the cause would not, upon the allegations of the original bill, be one of equitable cognizance; for, divested of the element of partnership, it would have been a bill for a summary proceeding in the nature of a forcible entry and detainer, or an action of ejectment, and must have been dismissed upon the ground that the complainant had a plain, speedy, and adequate remedy at law. But, in view of the partnership relation created by this contract, the jurisdiction of equity to entertain the original bill seems to be clear. The case of *Marble Co. v. Ripley*, 10 Wall. 339, 350, is an authority directly in point. That case shows that the contract in the case at bar is, in the language of Mr. Justice Strong, "in a very practical sense, a contract of partnership." The case is also an authority for the rule that equity will interfere by injunction to restrain one partner from violating the rights of his copartner, even when the dissolution of the partnership is not contemplated. The reason for this rule is thus stated by Vice Chancellor Wigram in *Fairthorne v. Weston*, 3 Hare, 387:

"If that were the rule of the court, if a bill would in no case lie to compel a man to observe the covenants of a partnership deed unless the bill seeks a dissolution of the partnership, it is obvious that a person fraudulently inclined might, of his own mere will and pleasure, compel his copartner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract."

This doctrine is well settled. High, Inj. § 1330, and cases cited.

It is not controverted that the defendants in the original bill ejected the complainant's manager and employes, and took possession of the leased premises, if not forcibly, certainly against their will and vehement protest. The contract gives the lessor the right to re-enter without process of law for a breach of any of its covenants by the lessee; and the material question, and the one upon which the case hinges, is, did the lessee fail to perform any of his covenants contained in the lease, for the breach of which the lessor was entitled to re-enter? The right to re-enter is rested chiefly on alleged breaches of the following clause of the contract:

"The party of the first part further agrees to maintain and operate the theater as a strictly first-class place of amusement, and that no attractions shall be booked at the said theater of a questionable character, or such as would not be regarded as first-class by the managers of the following theaters: The New Broadway or Wallack's, A. M. Palmer's or the Lyceum, of New York; McVicker's, Hooley's Chicago Opera House, or the Columbia Theater, of Chicago; the Olympic or Grand Opera House of St. Louis."

The proper construction of this clause of the contract is not entirely free from difficulty; but, in the light of the testimony in the case, we have had no difficulty in arriving at a satisfactory conclusion. We have read the testimony very carefully, and are not satisfied that the complainant did not "maintain and operate the theater as a strictly first-class place of amusement," or that he booked for the theater attractions "of a questionable character," as these phras-

es must have been understood by the parties to the contract. In construing the contract of the parties, regard is to be had to the geographical location of Denver, and the character of the theatrical attractions which it is practicable to procure and produce there, and which are commonly produced there. These are considerations which must have been present in the minds of the parties when they entered into the contract. For illustration, there are what are known as "stock theaters," and "combination theaters." The former produce plays with their own companies the year round. The plays change, but the companies are the same. The stock theaters are confined to the large cities, which are in the center of dense populations and easy of access. The combination theaters play traveling companies entirely. The parties in this contract obviously understood they were contracting with reference to a combination, and not a stock, theater. The theatrical season at Denver is about 40 weeks, and there is a different attraction every week, which involves the employment of at least 40 different theatrical troupes during the season. Usually these troupes have to be engaged months before the time they are to play, and the engagement is most commonly made in New York city. It will be seen at a glance that it is no easy task to secure a season's attractions at a theater in Denver. Experience, energy, taste, and judgment in that line of business are essential to its successful accomplishment. The testimony satisfies us that the complainant displayed a fair degree of all these qualities, and that attractions which he booked for this theater were of a character that might well be booked for a "first-class place of amusement," and were not "of a questionable character," within the meaning of these phrases as they were understood by the parties to this contract. Those terms are probably incapable of any very exact and precise definition, as applied to theatrical attractions. No general definition can be given which would enable every one to classify with precision and unerring accuracy every theatrical attraction. Theatrical managers of experience, and play-goers of intelligence, do not differ much in their general definitions of these terms. The difficulty and difference of opinion begins when they come to classify a long list of attractions. Then the fact is disclosed that an attraction which one manager ranks as first-class in the opinion of another manager falls below that standard. In this matter we think the parties should be bound by the practical construction which they themselves put upon their contract before this litigation began. That the term "first-class attractions," as used in this contract, was not intended by the parties to restrict the attractions to those plays, only, which occupy a high plane in dramatic literature, and are played by artists of the highest repute, and patronized chiefly by people of culture and refinement, is made apparent by the letter of Mr. Bush to the complainant, of date October 12, 1890, in which he says:

"I think you have done a very good thing in securing the 'Clemenceau Case,' Margaret Mather, and Sullivan, [John L. Sullivan, the prize fighter.] While some people may say that the Sullivan attraction is not just the right thing, still I am satisfied that it cannot hurt the house, and it will certainly draw a large amount of money. * * * I believe the 'Clemenceau

Case' attraction will be a tremendous hit. The fact of its having been advertised as it has been in New York will certainly draw tremendous houses for a few nights, pique the curiosity of the vulgar, and even the educated, and you are sure of drawing money out of their pockets."

It is quite clear from the testimony that no attractions were booked for this theater which did not, in point of dramatic excellence and moral tone, equal the attractions which Mr. Bush, in his letter, specially approved and indorsed. Assuming, as we must, that both parties to this contract regarded these attractions as first-class, and not of a questionable character, then it is apparent that no attraction was produced at the Broadway Theater by the complainant which was an infraction of the contract, according to the standard erected by the parties themselves. Mr. Bush is not the only witness who makes the box receipts, and not the moral tone and dramatic excellence of the play, the test of its being a first-class attraction. But, undoubtedly, this test cannot be accepted as the best and only one. An attraction of the highest dramatic excellence may be played at a loss, and one of a highly questionable character at a profit. Plays which unite the highest dramatic excellence with large profits are, in the opinion of theatrical managers, ideal first-class attractions. Yet they all agree that plays which fall below this ideal standard are nevertheless ranked as first-class attractions. But it is said that the contract commits the decision of this question to the managers of certain named theaters. If this is true, in the sense that their determination of the question is to be binding upon the parties and the court, it is because the parties have by their contract constituted them arbitrators for that purpose. Assuming, but not deciding, that this fluctuating body of managers are constituted arbitrators, and that under the contract they are the sole arbiters of this question, then it is very clear the defendants have failed to establish the alleged breach of the covenant by the complainant, upon which the right to re-enter is rested. At common law, all those named as arbitrators must act, and they must all act together, and they must all concur in the award, unless the parties have agreed that it may be made by less than all. The authorities to this effect are uniform in England and in this country. Russ. Arb. 216; Morse, Arb. 151, 162. The defendants have produced no award of the arbitrators, and have not shown, in any mode, a concurrence of opinion among them, that a single attraction produced at the Broadway Theater under the complainant's management was not first-class, or was of a questionable character. The Colorado Code has not made any change in the common-law rule on this subject which affects this case. The Civil Code of that state of 1887 (section 285, p. 180), provides that "any arbitrator may administer oaths to witnesses, and, when there are three arbitrators, two of them may do any act which might be done by all." This clause has no application to the case at bar, because under this contract there must be at least four arbitrators, and may possibly be ten, depending upon the construction placed upon the clause of the contract under consideration.

Whether the contract constitutes the managers of the named theaters arbitrators, or whether the case is to be determined on the

weight of testimony, or upon the practical construction given to the contract by the parties themselves, the result is the same,—the defendants have not shown any breach by the complainant of the covenants we have been considering. We attach no importance to the claim that the complainant did not attend personally to the management of the theater building. It is quite obvious that his time and services in New York and elsewhere were more valuable to the business than they would have been in Denver. Besides, his local manager and treasurer, who had immediate charge of the theater, seem to have been competent persons for the work. It is not open to the defendants to question their competency and efficiency; for, when they re-entered and took charge of the theater, they themselves retained these employes in the same positions they had occupied under the complainant.

The complainant's employes, upon one occasion, did not open the box office for an hour after the usual and advertised time, and this action seems to have been the immediate cause of the re-entry; but it is plain that it did not justify it. The contract expressly provides that the lessor "shall have no control, authority, or voice in the conduct, management, or affairs of said theater business, but this shall be exclusively under the control of the" lessee. Under this clause the complainant had the undoubted right to open the box office at such hours of the day as he deemed best, and a failure to open it on a single morning, at the hour advertised, did not work a forfeiture of the lease, or give the lessor a right to re-enter.

Upon the occasion of the Bernhardt attraction, the complainant's employes, without his knowledge or consent, speculated in the seats by selling tickets, or causing them to be sold, outside of the box office. This was done by employes whose appointment had been recommended by Mr. Bush, and for one of whom he was surety, and both of whom he retained in their positions, with full knowledge of the facts, after his re-entry. The partnership lost nothing by the speculation, because every ticket sold was accounted for at the price fixed by the manager for that attraction. It is needless to say that upon these facts that transaction afforded no ground for re-entry. The conclusion reached upon the original bill makes it unnecessary to consider the cross bill.

The decree of the circuit court is reversed, and the cause remanded, with direction to dismiss the cross bill for want of equity, and to enter a decree on the original bill to the effect that the complainant is entitled to the occupation and possession of the leased premises, under the terms and conditions of the lease, so long as he observes the covenants thereof, and enjoining the defendants from taking possession of the leased premises, or in any manner interfering with the complainant's possession thereof, for any alleged breaches of the covenants of said lease by the complainant which happened prior to the filing of the cross bill in this case.

UNITED STATES v. HENDY.

(Circuit Court, N. D. California. February 6, 1893.)

No. 10,828.

1. PUBLIC LANDS—TITLES DERIVED FROM STATES—PROCEEDINGS TO CANCEL—PARTIES.

The state of California is not a necessary party to a bill by the United States to recover the possession of certain public lands listed by mistake to that state under 19 St. at Large, p. 267, and by it sold to respondent. *Williams v. U. S.*, 11 Sup. Ct. Rep. 457, 138 U. S. 514, followed.

2. SAME—THE LAND OFFICE—FINDINGS OF FACT.

The listing and certification of certain lands to the state of California under 19 St. at Large, p. 267, is not conclusive upon a federal circuit court as to the findings of fact implied by the approval of the land office, but such court can set it aside for inadvertence or mistake. *Williams v. U. S.*, 11 Sup. Ct. Rep. 457, 138 U. S. 514, followed.

3. SAME—RELIEF OF BONA FIDE PURCHASERS.

A person who, prior to the passage of act March 1, 1877, (19 St. at Large, p. 267,) applied to purchase from the state of California certain lands listed to that state by mistake, but who did not make his first payment thereon until many years after the enactment of such statute, was not entitled to purchase the lands from the United States under the first proviso of section 2 of that act; for this proviso does not include mere applicants to purchase, nor could such person be considered as an innocent purchaser, within the meaning thereof. *Durand v. Martin*, 7 Sup. Ct. Rep. 587, 120 U. S. 366, applied.

In Equity. Suit by the United States against George Hendy to cancel a listing of certain lands to the state of California, and to estop respondent to assert title thereto. Heard on demurrer to the bill. Overruled.

Chas. A. Shurtleff, Asst. U. S. Atty.

Chas. E. Wilson, for defendant.

McKENNA, Circuit Judge. This is a bill in equity to cancel a listing to the state of California of the N. E. $\frac{1}{4}$ of section 23, and estop respondent from asserting title thereto under purchase from the state. That the listing of the said N. E. $\frac{1}{4}$ of section 23 was a mistake, and it is alleged, therefore, to have been void. That the mistake was first discovered by the commissioner of the general land office on the 30th of June, 1883, and he immediately advised the surveyor general of the state thereof, and requested him to notify any purchaser of said land, and that he would be requested to perfect his title under sections 2 and 3 of the provisions of the act of congress of March 1, 1877, (19 St. p. 267,) and upon failure to do so the land would be disposed of in a manner provided by law. That the surveyor general replied that the land had not been sold, and requested the commissioner to cancel the listing, which the commissioner did on the 30th of June, 1883, under provisions of section 2 of said act of March 1, 1877. That one Charles M. Compton, being qualified to make a pre-emption settlement, settled on said land, and afterwards, to wit, on the 22d of July, 1883, filed his declaratory statement in the proper land office, in due form of law, and such proceedings were duly and regularly had that he made his final

proof, and paid the purchase price therefor, and received from the officers of the land office a final certificate for said land, No. 9,677, but no patent has issued therefor. That on the 14th of October, 1876, respondent applied in due form to the surveyor general of the state to purchase said land, and, there being other applicants, the applications were referred by the surveyor general, under the laws of the state, to the proper state court for determination; and said court duly adjudged respondent entitled to purchase said land, in preference to said other applicants. That on July 31, 1885, respondent, acting upon his said application of October 14, 1876, and the said judgment of June 26, 1885, paid to the state 20 per cent. of the purchase money of said land, and that on the 19th of August, 1885, a certificate of purchase was duly issued to him by the registrar of the state land office. That on the 7th of May, 1886, the respondent made application to the proper land office of the United States under the provisions of said act of March 1, 1877, as an innocent purchaser of said land from the state of California, and that said application was refused, the said officers deciding that he was not entitled to purchase said land as an innocent purchaser, or at all, and that the said Compton was entitled to a patent therefor.

Respondent demurs to the bill for want of equity, and that there is a defect of parties respondent, in this: that the legal title to the land is alleged to be in the state of California, which title is sought to be defeated, and that the state is a necessary and indispensable party respondent, and is not and cannot be made a party.

The last ground of demurrer is answered and decided by the case of *Williams v. U. S.*, 138 U. S. 514, 11 Sup. Ct. Rep. 457. In this case certain lands were certified to the state of Nevada under an act of congress. The certification was based on a formal application of the state. After certification the appellant in the case applied to purchase, and a contract was entered into with him to sell him the land; he at the time paying one fifth of the purchase money, the balance to be paid in installments. A bill was filed against the appellant alone, to cancel the contract between him and the state, and to adjudicate that he had no title or interest in the land. The general scope of the allegations of the bill was that the lands were improperly certified to the state; that in equity it had no title, and its contract with appellant conveyed no title or interest to him. A decree was entered by which the title of appellant was divested, and he directed to surrender up to the state for cancellation all contracts or agreements he had with the state for the lands. The supreme court affirmed the decree. The court held that the state of Nevada and the appellant had, respectively, the legal and equitable titles; and to the objection that only one action could be joined to divest these titles, in which both parties should be joined, the court say:

"The proposition is not sound. A court of equity has jurisdiction to divest either one of the adverse holders of his title in a separate action. Doubtless the court has power, when a separate action is instituted against one, to require that the other party be brought into the suit, if it appears necessary to prevent wrong and injury to either party, and to thus fully determine the title

in one action; but such right does not oust the court of jurisdiction of the separate action against either. It has jurisdiction of separate actions against each of the adverse holders, and there is no legal compulsion, as a matter of jurisdictional necessity, to the joinder of both parties as defendants in one action. There are special reasons why this rule should be recognized in this case. It may be that the circuit court would not have jurisdiction of an action against the state; that an action against a state, on behalf of the United States, can be maintainable only in this court; and that, when brought in this court, no other party than the state can be made defendant."

In support of the first ground of demurrer, counsel contends, among other things, that the listing and certification of the land in controversy to the state of California cannot be canceled or set aside by this court, because, in the absence of fraud, the findings of fact implied by the approval of the proper officers of the United States are conclusive, and their decision was final, and has become res adjudicata. *Williams v. U. S.* is also a complete reply to this:

"The second contention is that the court erred in finding that there was fraud or wrong by which the title was taken away from the general government. The allegations of the bill are of fraud and wrong, but they also show inadvertence and mistake in the certification to the state; and it cannot be doubted that inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to divest a title acquired thereby. This is equally true, in transactions between individuals, and in those between the government and its patentee. If, through inadvertence and mistake, a wrong description is placed in a deed by an individual, and property not intended to be conveyed is conveyed, can there be any doubt of the jurisdiction of a court of equity to interfere, and restore to the party the title which he never intended to convey? So of any other inadvertence and mistake, vital in its nature, by which a title is conveyed when it ought not to have been conveyed. The facts and proceedings attending this transfer of title are fully disclosed in the bill. They point to fraud and wrong, and equally to inadvertence and mistake; and if the latter be shown the bill is sustainable, although the former charge against the defendant may not have been fully established."

This leaves only for consideration what right respondent acquired under the act of March 1, 1877. The act is as follows:

"Be it enacted by the senate and house of Representatives of the United States of America, in congress assembled, that the title to the lands certified to the state of California, known as 'Indemnity School Selections,' which lands were selected in lieu of sixteenth and thirty-sixth sections, lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by said state, is hereby confirmed to said state, in lieu of the sixteenth and thirty-sixth sections, for which the selections were made.

"Sec. 2. That where indemnity school selections have been made and certified to said state, and said selections shall fail, by reason of the land in lieu of which they were taken not being included within said final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States: provided, that if there be no such sixteenth or thirty-sixth section, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person: provided, that if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof, and make payment for such land, it shall be subject to the general land laws of the United States.

"Sec. 3. That the foregoing confirmation shall not extend to the lands settled upon by any actual settler claiming the right to enter, not exceeding the

prescribed legal quantity under the homestead or pre-emption laws: provided, that such settlement was made in good faith upon lands not occupied by the settlement or improvement of any other person, and prior to the date of certification of said lands to the state of California by the department of the interior: and provided, further, that the claim of such settler shall be presented to the register and receiver of the district land office, together with the proper proof of his settlement and residence, within twelve months after the passage of this act, under such rules and regulations as may be established by the commissioner of the general land office."

This act has received full interpretation in *Durand v. Martin*, 120 U. S. 366-375, 7 Sup. Ct. Rep. 587. The court say:

"This statute was, in our opinion, a full and complete ratification by congress, according to its terms, of the lists of indemnity school selections which had been before that time certified to the state of California by the United States as indemnity school selections, no matter how defective or insufficient such certificates might originally have been, if the lands included in the lists were not of the character of any of those mentioned in section 4, and if they had not been taken up in good faith by a homestead or pre-emption settler prior to the date of certificate. * * *"

The respondent claims to be within the first proviso of section 2. As to cases there mentioned the court say:

"* * * In lieu of confirmation, bona fide purchasers from the state were given the privilege of perfecting their titles by paying the United States for the land at a specified price."

"Is the respondent a bona fide purchaser from the state? Or, rather, was he a bona fide purchaser from the state at the time of the passage of the act of 1877? It appears to be assumed by counsel that the act had an indefinite future operation, or that a purchase after the act would relate to, and attach itself to, a prior application. But applications to purchase are not saved. It is prior purchases for valuable considerations which are saved; that is, completed purchases. There could be no object in protecting those who had paid nothing, nor can they be held to be described by the term, "innocent purchasers for a valuable consideration."

The demurrer is therefore overruled.

MERRILL v. ROKES.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1893.)

No. 129.

1. EXECUTION—DISTRIBUTION OF PROCEEDS—REDELIVERY BOND.

M. and R. were the joint assignees of a judgment. The judgment had been collected by execution, and the money paid to the clerk of the court, to remain until certain liens, claimed by other parties on the money, were finally decided. Pending the litigation concerning the liens M. gave a restitution bond, conditioned to return the money in case he was so ordered by the court, and the clerk paid the money to him, to be held in trust for the bondsmen until a decision was rendered. *Held*, that R. was not entitled, during the time the restitution bond remained in force, to recover from M. his share of the money.

2. PLEADING AND PROOF—VARIANCE.

In an action to recover damages for defendant's conduct in advising and influencing the clerk of the court not to pay money claimed to be due plaintiff, and for damages for negligence in failing to collect a judgment,

it is not competent, without further pleading and notice, to recover as for money had and received, by showing that defendant, since the action was begun, collected the judgment.

B. PRINCIPAL AND AGENT—RIGHTS INTER SE.

M. was agent of R. to collect certain notes. He traded the notes to the makers for a stock of goods, being all their property. Subsequently other creditors of the makers attached and sold the goods, the proceeds being paid into court. At the sale M. purchased and paid for part of the goods, and operated a store therewith, making other small purchases to replenish the stock. Shortly afterwards the stock was burned without insurance. In the mean time M., as agent of R., had drawn from the clerk part of the proceeds of the sale, and now, as against his principal, claims a lien thereon for the amount he paid for the goods, and the expenses of the store. *Held*, that if he purchased the goods for himself he was not entitled to any lien; but if he purchased for his principal, to prevent a sacrifice of the property, and to collect R.'s claim, and operated the store for that purpose, and R. acquiesced therein, then M. was entitled to retain the purchase price and expenses.

In Error to the Circuit Court of the United States for the District of Kansas.

Action by Leander Rokes against N. C. Merrill to recover damages for negligence in failing to collect money due plaintiff. Judgment for plaintiff. Defendant brings error. Reversed.

Statement by SANBORN, Circuit Judge:

This is a writ of error to reverse a judgment in favor of the plaintiff, who is here the defendant in error, and against the defendant, who is here the plaintiff in error, rendered in an action brought to recover damages for the alleged negligence of the defendant as an agent in collecting moneys due to the plaintiff, his principal. The plaintiff set forth three causes of action in his petition. The first was for money had and received; the second was for damages for the negligence of the defendant, as his agent, in failing to collect two promissory notes, which amounted in the aggregate to \$1,925, made by one Mooney, and payable to the order of the plaintiff; and the third was for damages for advising and influencing the clerk of the district court of Ness county, Kan., to refuse to pay to the plaintiff \$887.21, which had been deposited with him to abide the result of a litigation over it, pending upon a writ of error in the supreme court of Kansas between certain creditors of one Peters and one Topping in an action in which a judgment had been rendered in the district court in favor of Topping and against Peters for \$1,206, and assigned to the plaintiff and defendant jointly, and for damages for the negligence of the defendant in failing to collect that judgment. The defendant denied the negligence, and pleaded that he had incurred attorneys' fees and expenses in his endeavors to collect these claims for the plaintiff, for which he sought allowance.

As to the third cause of action the facts were these: From 1885 until February 22, 1888, the defendant was a private banker at Ness City, Kan., under the name of the Ness County Bank. On that day the bank was incorporated, and the corporation, under the same name, succeeded to the defendant's bank business and assets. The defendant became, and has since been, its president, and one of its stockholders. In 1889 one Topping was owing the defendant or his bank, and also the plaintiff, and to secure them both he assigned to the plaintiff and defendant jointly a judgment of \$1,206 he had recovered against one Peters. A stock of goods which had been seized under process of the court in that action had been sold, and its proceeds, about \$800, paid to the clerk of the court to abide the result of a litigation between Topping and certain attaching creditors of Peters, (who claimed the right to this money,) which had been decided in favor of Topping in the district court, but was pending in the supreme court of Kansas on writ of error. There was no evidence that the clerk of the court was advised or influenced by the defendant to withhold this money from the plaintiff, or that the defendant was negligent in collecting it. This action between the

plaintiff, Rokes, and the defendant, Merrill, was commenced on August 13, 1890. Over the objection of the defendant the plaintiff testified that in March, 1891, the defendant collected from the clerk of the court \$800 on the Topping judgment. On the part of the defendant it appeared that the district court had ordered the clerk to pay this \$800 over to Topping upon his filing a bond conditioned to return the money in case the supreme court should reverse the judgment rendered below; that the Ness county bank procured such a bond to be given, signed by Topping as principal and the defendant and others as sureties, and on this order and bond the money was drawn from the clerk and paid over to the bank, to be held in trust for Topping, the bank, and the plaintiff until the final decision of the supreme court.

Upon this state of facts the defendant requested the court to instruct the jury with reference to this third cause of action—First, that they must return a verdict for the defendant; second, that if they found that the money on the Topping judgment was not drawn out until after this action was commenced, the plaintiff could not recover on this cause of action; and, third, that if they found that the money was drawn out by the defendant upon giving a restitution bond, and proceedings were still pending in the supreme court of Kansas to reverse the judgment in Topping's favor, the money might be retained by those who gave the bond, until the case was finally determined in the supreme court. The court declined to give either of these requests, charged the jury that no claim was made by the plaintiff on the first cause of action for money had and received; that they would not consider that cause of action, but that, if they believed under the evidence that the defendant had collected this \$800, he was liable to the plaintiff for his just proportion of it. The jury found for the plaintiff on this issue, and the defendant assigned the rulings stated as error.

Robert Dunlap, (George S. Redd and A. A. Hurd, on the brief,) for plaintiff in error.

Charles Blood Smith, (W. H. Rossington and E. J. Dallas, on the brief,) for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

1. One may not, in the trial of an action, without pleading or notice, prove and recover judgment upon a cause of action which did not accrue until after the action on trial was commenced. Rev. St. U. S. § 914; Gen. St. Kan. par. 4227; Porter v. Wells, 6 Kan. 453; 1 Greenl. Ev. § 51. Paragraph 4227 of the Kansas statutes provides that "either party may be allowed on notice and such terms as the court may prescribe to file a supplemental petition, answer, or reply alleging facts material to the case occurring after the former petition, answer, or reply," and the highest judicial tribunal of that state has held that it is reversible error to receive evidence on behalf of a plaintiff of material facts occurring after the filing of his petition, without such supplemental pleading, (Porter v. Wells, supra,) yet the cause of action on which the plaintiff recovered here without pleading notice or terms did not accrue until six months after the filing of his petition.

2. One may not bring and try his suit upon one cause of action and recover a judgment or decree upon another. A judgment, in order to be sustained, must be according to the allegations and the proofs. Burton v. Platter, 53 Fed. Rep. 901, (decided by this court at this

term;) *Taussig v. Glenn*, 51 Fed. Rep. 409, 413, 2 C. C. A. 314, 4 U. S. App. 524; 1 Black, Judgm. § 242. The reason of this rule, that the defendant may have ample opportunity, after notice of the nature of the claim against him, to plead his defenses and set-offs and procure his evidence in support of them, is obvious. The importance of adhering to it is well illustrated in the cases just cited and in the case we are considering. Here, upon a petition setting forth a cause of action for damages for wrongfully advising and influencing a third person and negligently failing to collect a judgment without proof to support it, a judgment is obtained without pleading or notice, upon a cause of action for money had and received that did not accrue until six months after this action was commenced.

3. The action for money had and received is founded on what the law terms an implied promise to pay what in good conscience the defendant is bound to pay; but the law never implies the promise to pay unless duty creates the obligation to pay. If the \$800 was withdrawn from the clerk of the court upon the restitution bond, and was held in trust by the defendant or his bank for the bondsmen, to be returned to the court in satisfaction of the bond in case the supreme court reversed the decision below, there was no duty imposed on the defendant or the bank to pay over any portion of this money to the plaintiff until that court rendered its decision. On the other hand, it was their duty not to pay it to him, but to hold it in readiness to discharge the trust imposed upon it. *Cary v. Curtis*, 3 How. 236, 240, 251. The bond of restitution and order of the court placed those who received the money under them in the shoes of the clerk himself. They were bound to return the money to the court, to be paid to the opposing creditors if the decision below was reversed, and bound to pay it to the owners of the Topping judgment if it was affirmed; but until it was reversed or affirmed neither party had any better cause of action against them than he would have had against the clerk if the bond had not been given. Any other rule might work great injustice, for, if the defendant holds this money in trust to respond to the final decision in the litigation in which it is involved, he would be bound to return it to the clerk of the court if the decision below is finally reversed, and in that event he would be compelled to pay that portion of it which the plaintiff would now recover on a judgment in his favor twice.

In the reception of plaintiff's evidence, in refusing to give any of the instructions to the jury requested by the defendant, and in the charge it gave relative to this third cause of action, the court below fell into the error of disregarding the rules to which we have called attention, and for this error the judgment in this case must be reversed.

The conclusion we have reached renders it unnecessary to consider the errors assigned relating to the second cause of action, but, in view of the probability of another trial, we deem it advisable to call attention to the question there in dispute as the record discloses it. Certain notes of Taylor and O'Brien which were pledged as collateral security for the Mooney notes were traded to that firm by the defendant, in an effort to collect them, for a stock of goods, which seems to have been all the property they had. The stock was put in

Mooney's possession, in trust, to secure his notes to the plaintiff. Other creditors of Taylor and O'Brien seized it under attachments. Mooney, under the defendant's direction, interpleaded in the attachment suits, claiming the goods, obtained a judgment declaring that he had a first lien on this stock of goods for \$4,000, which he assigned to the defendant to secure his notes to the plaintiff. On January 28, 1888, the stock was sold under the order of the court, and the proceeds—about \$2,600—was paid over to the clerk of the court. The judgment subsequently became final, and the defendant drew from the clerk on this judgment \$1,820.56. The only real controversy between the parties is whether the plaintiff is entitled to any part, and, if so, to what part, of this sum.

The cause of action pleaded was, indeed, for the negligence of defendant in failing to collect the two Mooney notes, but the verdict rests upon a cause of action for this \$1,820.56 money had and received by the defendant for the plaintiff. There was no evidence of any negligence of the defendant that caused the plaintiff any damages prior to the sale on January 28, 1888. That he delivered up the Taylor and O'Brien notes for their stock of goods, and took no chattel mortgage or other security from Mooney when he placed him in possession of it, caused the plaintiff no damage, because the notes of Taylor and O'Brien were only valuable to enforce against the stock, which was all the property they had. A chattel mortgage from Mooney would have been valuable only as a lien on the same stock, and the plaintiff received the full benefit of this entire stock through the possession of Mooney, and the \$4,000 judgment in his favor, which was assigned to the defendant for his benefit.

The plaintiff now insists that he is entitled to recover of the defendant all of this \$1,820.56. This is a portion of the proceeds of the Mooney judgment, and the defendant claims that to procure it he was compelled to incur and pay attorneys' fees and other expenses, and that he ought to be permitted to retain out of the proceeds the amounts he so expended. If in procuring the possession of the stock and obtaining the Mooney judgment he necessarily incurred any reasonable expenses and attorneys' fees, and the plaintiff asks to recover of him this money which these attorneys' fees and expenses earned, the defendant is obviously entitled to set off and retain them for his reimbursement. The principal cannot take the benefits and repudiate the burdens of his agent's acts. If he ratifies that which favors him, he ratifies the whole. *Gaines v. Miller*, 111 U. S. 395, 398, 4 Sup. Ct. Rep. 426; *Story*, Ag. §§ 335, 336; *Skinner v. Dayton*, 19 Johns. 513, 554. On July 28, 1890, the plaintiff served on the defendant a written notice, in which he claims that the Mooney judgment and its proceeds are his, and demands of the defendant "the said sum of \$1,820.56, so received out of the said Mooney judgment, and for all interest accruing for the same, to wit, interest at the rate of 10 per cent. per annum from January 28, 1888, less all legal claims which you may have against me for attorneys' fees or other costs justly incurred in the litigation connected with my said claim against the said Mooney." This demand, which was urged at the trial, and was the basis of the plaintiff's recovery, was a ratification of the acts of the defendant on his prin-

principal's behalf up to the sale on January 28, 1888, and left nothing in issue between the parties relative to their transactions prior to that date but the amount of the attorneys' fees and expenses the defendant had incurred in his principal's interest.

A more serious question relates to the transactions of the defendant at and after the sale. The plaintiff was absent from the state of Kansas from July, 1887, until February 12, 1888. At the sale the defendant bid in at about one third of their cost price, and paid for, goods which cost him \$1,230. With these goods he operated a store in charge of Mr. Mooney as his agent from that date until July 17, 1888, when the goods were burned without insurance. Meanwhile he paid some small amounts for staple goods to replenish the stock, and received the proceeds of the sales in the store. He claims the right to set off and retain from this \$1,820.56 this \$1,230 and the moneys he paid for staple goods for the store after crediting the proceeds which he received from the sales, and this right the plaintiff denies. The defendant claims that he was compelled to and did purchase these goods to prevent such a sacrifice of the stock at the sale as would have resulted in its realizing an amount far less than the plaintiff's claim; that he made the purchase and ran the store solely for the plaintiff's benefit; that in February, 1888, he informed the plaintiff that he had made the purchase and was operating the store for him, and he acquiesced in and ratified his acts; while the plaintiff insists that in the purchase of the goods and in the storekeeping the defendant was acting for himself, and not for his principal. If the defendant purchased these goods and operated this store for himself, he is not entitled to retain the moneys he advanced to purchase them or to replenish his stock, and the plaintiff is entitled to recover the money he drew from the clerk on the Mooney judgment, less the attorneys' fees and expenses incurred by the defendant, of which we have spoken; but if the defendant purchased these goods and paid for them for the plaintiff, to prevent a sacrifice of the property at the sale, and to collect the plaintiff's claim, then operated the store to convert the goods into money for the same person and purpose, notified the plaintiff before the fire that he had made the purchase and was operating the store for him, and the plaintiff made no objection, but acquiesced in his action, then the defendant is entitled to retain from this money, in addition to the attorneys' fees and expenses, the \$1,230 he paid for the goods and the moneys he expended in replenishing the stock, and the plaintiff is entitled to the proceeds of the sales made at the store which the defendant received. The judgment is reversed, and the case remanded, with instructions to grant a new trial.

MORGAN v. CITY OF DES MOINES.

(Circuit Court, S. D. Iowa, Central Division. March 9, 1893.)

1. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—LIMITATION OF ACTIONS—INFANCY.

Acts 22d Gen. Assem. Iowa, c. 25, § 1, barring any suit against a municipal corporation for personal injuries caused by defective streets after six months from the date of the injuries, unless, within 90 days from such date, plaintiff gives written notice, specifying place and circumstances of the injury, is binding upon an infant as well as an adult.

2. CONSTITUTIONAL LAW—TITLES OF LAWS.

The above statute, being entitled "An act limiting the time of making claims and bringing suits against municipal corporations, including cities organized under special charters," does not violate Const. Iowa, art. 3, § 29, which requires every act to embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. State v. Shroeder, 1 N. W. Rep. 431, 51 Iowa, 197, followed.

3. STATUTES—AMENDMENTS.

The above statute is an independent act, and not an amendment to Code Iowa, § 2529, which is the general statute of limitations; and the exceptions to the general statute provided by section 2535, among which is infancy, do not apply thereto.

4. SAME.

Code Iowa, § 38, providing that every statute passed in amendment of, or in addition to, the Code, shall contain, in its title, a reference to the number and name of the chapter of the Code which it amends or adds to, and if such reference be omitted the secretary of state shall supply the omission, is merely directory, and a law which does not contain such a reference is valid. State v. Shreves, 47 N. W. Rep. 899, 81 Iowa, 615, followed.

5. LIMITATIONS OF ACTIONS—EXCEPTIONS—INFANTS—LEGISLATIVE POWER.

It is wholly within the province of the lawmaking power to determine whether there will be any, and what, exceptions to the statute of limitations; and infants have no special right, beyond others, unless the statute itself gives them an exception from its operation.

At Law. Action by Allelia R. Morgan, by her next friend, against the city of Des Moines, to recover damages for injuries sustained through the alleged negligence of defendant in not keeping its streets in repair. Defendant demurs to the petition. Demurrer sustained.

Statement by WOOLSON, District Judge:

The plaintiff, a resident of the state of Oregon, and five years of age, by her next friend, brings this suit against the city of Des Moines to recover damages alleged to have been suffered by her on account of negligence of defendant in not keeping its streets in good repair. The petition alleges that plaintiff served no notice of said injury on defendant until July 22, 1892, but on that day notified the city of the place and time of the said injury, and claimed damages, etc. To this petition defendant demurs on the ground that said petition shows on its face that the cause of action therein averred was barred when suit was brought; said cause of action being for personal injury from alleged defective streets of defendant, and same being brought after six months from the time of the injury, and no notice specifying place and circumstances of the injury having been served upon defendant within 90 days of the injury, as required by the laws of Iowa.

Park & Odell, for plaintiff.

Brennan & Bailey, for defendant.

WOOLSON, District Judge. Section 1, c. 25, Acts 22d Gen. Assem. Iowa, (Sess. 1888,) reads as follows:

"That in all cases of personal injury resulting from defective streets or sidewalks, or from any cause originating in the neglect or failure of any municipal corporation, or of its officers, to perform their duties in constructing or maintaining streets or sidewalks, no suit shall be brought against the corporation after six months from the time of the injury, unless written notice, specifying the place and circumstances of the injury, shall have been served upon such municipal corporation within ninety days after the injury."

The injury is alleged to have occurred upon April 25, 1891. The petition herein was filed, and summons served upon defendant, over a year thereafter; and the petition avers that the notice contemplated in the foregoing statute was not served until July 29, 1892. Manifestly, then, if this statute is valid, and applies to the cause of action herein, the demurrer must be sustained, since the statute of Iowa, relating to practice, specially authorizes a demurrer where the petition, on its face, shows the cause of action to be barred by the statutes of limitation.

1. Is the statute valid? Counsel for plaintiff contend that the statute is invalid because it does not conform to section 38 of the Code of Iowa, which provides that "every act passed in amendment of, or in addition to, any chapter or section of this Code, or in amendment of, or in addition to, any previous act of the same kind, shall contain in the title thereof a reference to the number and name of the chapter so amended or added to; and, if such reference be omitted, the secretary of state shall, in preparing such act for publication, supply the omission." As published, (page 31, Laws 1888,) there is no such reference contained in the title of the statute under consideration. If the position assumed, and strongly insisted upon, by counsel for plaintiff, be correct, the statute is invalid. We do not understand counsel for plaintiff to dispute the proposition that, before a statute can be declared invalid, there must be clearly shown therefor such reasons as that the court is logically driven to the conclusion of its invalidity. In other words, if the court reasonably can, it will refuse to declare invalid a statute which has passed through the required legislative and executive forms leading up to and constituting enactment and approval. The court will solve all doubts in favor of the statute's validity. Aside from the authority of one legislative body to repeal or overthrow the enactment of its predecessor, whenever it so determines, (saving, of course, the question, not here involved, of impairment of contract obligations,) there are many reasons apparent for construing this section of the Code as directory, rather than mandatory. Indeed, the latter part of this section is practically such a construction, in providing that "if such reference be omitted [by the general assembly] the secretary of state shall, in preparing such act for publication, supply the omission." Manifestly, therefore, and by the very terms of the section, the omission of the title in the act—as passed by the general assembly and approved by the governor—of reference provided in the section will not invalidate the act; for the secretary of state is required to insert such reference, in preparing the act for publication. In the statute under consideration, as published, the secretary of state has not supplied the omission. Does this failure of the secretary to comply with the terms of section 38 invalidate the statute? This court is bound to adopt that construction of section 38 which has been made by the supreme

court of Iowa. In *State v. Shreves*, 81 Iowa, 615, 47 N. W. Rep. 899, section 38 was under consideration by that court. The court was called upon to determine this very question, as to the effect of the failure of the secretary of state to supply this omission, and held: "It is a provision merely in aid of ready reference, and the validity of the law cannot be affected by the omission of the secretary to perform a mere clerical act." We must therefore conclude that the omission in this statute to refer to the section or act which it affects, if it affects any, does not render the statute invalid.

2. It is further claimed by plaintiff's counsel that this statute (chapter 25, Laws 22d Gen. Assem.) is invalid because it violates section 29 of article 3 ("Legislative Department") of the constitution of Iowa, which reads: "Sec. 29. Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." The contention is that the statute in question amends or is connected with two subjects, viz. control of municipal corporations, and limiting actions against cities. But in fact only one subject is legislated upon in this statute, within the construction which the supreme court of Iowa has placed on this constitutional provision. That court has had frequent occasions to construe this provision, and its general construction has been uniform. Section 26, art. 3, ("Legislative Department,") of the constitution of Iowa, adopted in convention in 1846, and which was in force up to the adoption of the constitution now in force, is in these words: "Sec. 26. Every law shall embrace but one object, which shall be expressed in the title." It will be noticed that the present provision differs from that just quoted, in that the present phraseology is, "one subject, and matters properly connected therewith." *State v. Judge of Davis Co.*, 2 Iowa, 280, was a mandamus proceeding to compel the opening of a state road. The statute there under construction contained 66 sections, establishing some 46 roads, vacating others, providing for the relocation of yet other roads, and changing one or more roads from county to state roads. The title of the act is, "An act in relation to certain state roads therein named." The claim was pointedly made that the statute was unconstitutional, as violating said section 26, above quoted, of the old constitution. In holding the statute valid, the court say, (page 282:)

"The intent of this provision of the constitution was to prevent the union in the same act of incongruous matter, and of objects having no connection,—no relation; and, with this, it was designed to prevent surprise in legislation by having matter of one nature embraced in a bill whose title expressed another. It is manifest, however, that there must be some limit to the division of matter into separate bills or acts. It cannot be held, with reason, that each thought or step toward the accomplishment of an end or object should be embodied in a separate act. When we find in the revenue law provisions concerning the county treasurer's powers to levy upon and sell personal property as a constable, or concerning his fees, or relating to peddler's license, and when we see in the school law, provisions about the superintendent of public instruction, and the school-fund commission, and about school-district officers, and their bonds, and about state and county and district funds, we are not surprised, and no one suspects a breach upon the constitution. These things are congruous with the end proposed."

So in *Davis v. Woolnough*, 9 Iowa, 107, in considering chapter 210, Laws 1856, the supreme court of Iowa hold the act constitutional,

although the act, while revising and consolidating the laws incorporating the city of Dubuque, contains a new provision, establishing a city court in that city; and their reason for holding the act valid is that the provision establishing that court "is entirely germane with the object of the act." Coming down to cases involving the constitutional provision in force when the statute in question was enacted, we find in *State v. Shroeder*, 51 Iowa, 197, 1 N. W. Rep. 431, the supreme court of the state considering chapter 119, Act 17th Gen. Assem. This act, by its terms, prohibited sale at any time of malt or vinous liquors within two miles of the limits of any municipal corporation, and, upon the day of election, within two miles of where an election was being held, and extended, for the purpose of enforcing the act, the power and jurisdiction of such municipality two miles beyond the limits of the corporation, and provided penalties for violation, and methods of enforcement, and that a conviction under that act should, at the option of the landlord, work a forfeiture of a lease held by the convicted party, and gave to the landlord the right of action of forcible entry and detainer to evict such tenant, and that agents employed in selling in violation of the act should be punished as principals. The court hold the act constitutional, and say, (page 200, 51 Iowa, and page 433, 1 N. W. Rep.):

"The subject of the act under consideration is to prohibit and regulate the sale of malt and vinous liquors within certain specific territory. The extent of the prohibition or regulation, the territory over which the law extends, the periods of time when the law shall be operative, the punishment for its violation, the proceedings, and the court wherein they are to be tried, and the authority and territorial extent of the jurisdiction of cities to regulate and prohibit the sale of malt and vinous liquors under the act, are matters connected with the subject of the act. These matters relate to the means and manner of attaining the object of the act, or carrying into effect the policy of the law, and enforcing its provisions. They are not of the subject of the act. The statute confers authority upon courts to punish violations of its provisions, and upon municipal corporations to exercise the powers to regulate or prohibit the sale of liquors within certain prescribed limits, thus granting power to carry out the purpose of the law. Many statutes could be cited similar in character."

The subject of the statute under consideration relates to the bringing of suits against municipal corporations for personal injuries arising from certain named causes, and this subject is sufficiently expressed in the title. The statute must be held valid.

3. The petition, on its face, shows that plaintiff has not complied with the provisions of this statute with reference to giving notice of place, etc., of the alleged injury; and, unless the petition presents a case to which this statute is not applicable, the cause of action is barred, and the demurrer must be sustained. But plaintiff claims that the infancy of plaintiff excepts it from the operation of this statute.

The claim is made that the statute in question is in fact but an amendment to section 2529 of Code of Iowa, which is the section providing the general statute limiting actions in Iowa; that this section furnishes the general rule within the state; that section 2535, Code, provides the exception to this general rule, in that the last-named section extends, in favor of minors, the time limited for action under the general rule of the Code, so that the minor has one year after attain-

ing majority within which to bring the action; and that, as the statute under consideration is an amendment to said section 2529, the exception (section 2535) applies to it equally as to the original section. But the statute in question does not, by its terms, purport to be such amendment. It stands on the page of the Session Laws as an act independent, complete in itself; and we are not referred to any decision of the supreme court of Iowa, which has construed this statute as being an amendment, with the effect as claimed. In *State v. Shroeder*, supra, the claim was made that section 9 of the act there under consideration was, in effect, an amendment of the charters of cities, etc. The act did not, by its terms, purport to amend such charters, although it could not be denied that the operation of the act, of necessity, extended their power and jurisdiction. The supreme court held the position claimed was not sound. The contention of plaintiff that section 2535 of the Iowa Code applies to the statute under consideration is not well founded.

4. Lastly, plaintiff's counsel contend that the application of the statute under consideration to the case of plaintiff works an oppressive, most severe, hardship to plaintiff, in that it compels a child of but four years of age to give, within 90 days from the time she is injured, the notice which the terms of the statute require, and that, if this four years old child does not give such notice, she is to be deprived of all remedy against the city for a permanent injury suffered through the negligence of the city, and that under these circumstances this court should not impute to this infant a knowledge of this statute, and hold her responsible, as an adult might well be held responsible, for a failure to perform all its provisions as to giving notice. But this court is powerless, did it so desire, to repeal this statute, or to disregard its provisions, when a defendant entitled thereto calls on this court to award to it the benefit of such statute. The lawmaking power of the state is charged with the duty of legislating, which it has exercised in this instance; and, whether exercised wisely or not, (which this court is not called upon to decide,) such legislation is binding upon this court. "Unless congress has otherwise provided, state statutes of limitations are applied to controversies in the courts of the United States with the same effect as they would be if the controversy were pending in the courts of the state." *Martin v. Smith*, 1 Dill. 85. "That acts of limitation furnish rules of decision, and are equally binding on the federal courts as they are on state courts, is not open to controversy." *Bank v. Dalton*, 9 How. 522. "The lawmaking power of the state has enacted the statute in question without making or reserving an exception in favor of infants. The legislature having made no exception, the courts of justice can make none, as that would be legislating." *Bank v. Dalton*, supra. "Wherever the situation of the party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception, and it would be going far for this court to add to the exception." *McIver v. Ragan*, 2 Wheat. 29. "Though the court may think that the legislature would have excepted a case out of the statute of limitations, if it had foreseen it, the court cannot except it." *The Sam Slick*, 2 Curt. 480. "It is urged that, because the plaintiff in error was a minor

when this law went into operation, that it cannot affect her rights. But the constitution of the United States, to which appeal is made in this case, gives to minors no special rights, beyond others; and it was within the legislative competency of the state to make exceptions in their favor, or not. The exception from statutes of limitation usually accorded to infants and married women do not rest upon any general doctrine of the law, that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority, or after cessation of coverture, to secure their rights." *Vance v. Vance*, 108 U. S. 522, 2 Sup. Ct. Rep. 854. It is therefore ordered that the demurrer to petition be, and the same is hereby, sustained, and the clerk will make due record of this order.

LAKIN v. ROBERTS et al.

(Circuit Court of Appeals, Ninth Circuit. January 30, 1893.)

No. 28.

1. MINES AND MINING—WIDTH OF CLAIM—VALIDITY OF PATENT.

Under Rev. St. § 2320, a patent cannot be issued for a mining claim exceeding 300 feet in width, although the original location was wider, and was made under the law of July 26, 1866, by which the width of claims was regulated according to the custom of miners; and, where a patent is issued for the full width of such claim, it is void as to the excess, and Rev. St. § 2328, cannot be construed to preserve a right to the issuance of a patent covering the full width of the original location. 53 Fed. Rep. 333, affirmed.

2. LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE.

In an action of ejectment by the patentee of a mining claim, where it appears from a stipulation agreed upon by both parties that certain defendants, after the date of the patent, paid a small sum as rent for the privilege of occupying the premises, and it does not appear under what circumstances, nor for what premises, nor for what time, such payment was made, the relation of landlord and tenant is not established so as to estop defendants from denying the patentee's title. 53 Fed. Rep. 333, affirmed.

3. SAME.

An understanding that certain defendants who entered after the date of the patent without the patentee's permission did so without objection by the patentee, provided its use and enjoyment of the premises were not interfered with, is not sufficient to establish the relationship of landlord and tenant, so as to estop defendants from denying the patentee's title. 53 Fed. Rep. 333, affirmed.

4. SAME—APPEAL.

Where there are two classes of defendants, one of whom is not estopped to deny the patentee's title, and the classes are not distinguished, nor the defendants composing each class identified, the record does not enable the appellate court to apply a remedy as to those defendants who are not estopped, and the judgment below in favor of both classes should therefore be affirmed as to all.

In Error to the Circuit Court of the United States for the Northern District of California.

Action of ejectment by William H. Lakin against John H. Roberts and others. The circuit court gave judgment for defendants. 53 Fed. Rep. 333. Plaintiff brings error. Affirmed.

H. L. Gear, for plaintiff in error.

W. N. Goodwin. (Goodwin & Goodwin, on the brief,) for defendants in error.

Before McKENNA and GILBERT, Circuit Judges, and DEADY, District Judge.

McKENNA, Circuit Judge. This is an action of ejectment, brought by the plaintiff, against the defendants, who are severally in the possession of lots in the town of Johnsville, in the county of Plumas, state of California. The plaintiff claims title under the Mammoth Gold Mining Company, to which a patent was issued on the 18th of May, 1877. The patent purports on its face to have been issued in pursuance of the Revised Statutes of the United States upon an entry made by said mining company March 17, 1877. In fact, however, the land was applied for by John B. McGee and James M. Thompson August 30, 1867. The location, therefore, is claimed to have been made under the act of July 26, 1866. Under this act no location could exceed 200 feet in length along the vein for each locator, with additional claim to the discoverer. Laterally it could be extended to conform to local laws and customs, but in no case could cover more than one vein or lode. Subsequent laws confined the width to 300 feet. If the plaintiff's patent be so confined, it does not cover the lot in possession of defendants; hence the contention is as to the width plaintiff is entitled to claim.

The legislation in regard to the location of mining claims consists of the said act of July 26, 1866, and an act passed May 10, 1872, entitled "An act to promote the development of the mining resources of the United States," and chapter 6 of the Revised Statutes. The act of May 10, 1872, repealed that of July 26, 1866, and was itself superseded by the Revised Statutes. The latter, however, as the act of May 10th did, preserved the essential rights obtained prior thereto, but distinguishes, as the act of May 10th did, between the length and width of claims; the length by the following language: "That mining claims * * * heretofore located shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location;" the width by the following: "No claim shall extend more than 300 feet on each side of the middle vein at the surface. * * *" Section 2320. The provision for the width of claims is as clearly universal as the provision for the length, and each completes the other. Omit either, and there is defect.

Plaintiff's counsel contends that the provision for the width of claims applies only to subsequent locations, and that section 2328 of the Revised Statutes reserves to plaintiff the provisions of the act of July 26, 1866. Section 2328 of the Revised Statutes is as follows:

"Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the general land office; but in such cases where adverse rights are not affected thereby patents may issue in pursuance of the provision of this chapter, and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two."

It is not contended that plaintiff's interests were so far vested that by that act congress had no power to limit or vary them. We shall assume, therefore, that congress had this power, and, having it, we think it exercised it in the provisions we have quoted. The language of the section of the Revised Statutes must be confined to preserving the application, and of all rights except the size of the claim,—length and width of it. All the provisions of the statutes would not otherwise be given effect. The land department, therefore, had no power to issue a patent for a greater width of land than 300 feet, and the patent in this case in excess of 300 feet is void. *Doolan v. Carr*, 125 U. S. 624, 8 Sup. Ct. Rep. 1228, and the other decisions cited in the opinion of the learned judge who tried the case in the circuit court.

The plaintiff, however, urges that the defendants are his tenants, and therefore estopped to deny his title. If the fact is true, there is no doubt about the law, and we have no desire to weaken its firmness. The evidence was presented through the medium of a stipulation, from which it appears that there are three classes of defendants: First, those who, subsequent to the date of the patent, in the language of the stipulation, "paid a small sum as rent to the Sierra Buttes Company for the privilege of occupying said premises;" second, those who entered since 1883 with the express permission of said company; third, those who entered without asking permission, but with the understanding that said corporation did not object to the occupation of village lots, provided its use and enjoyment of the patented premises were not interfered with. The Sierra Buttes Company was the immediate predecessor of the plaintiff, and there is no proof that it ever had possession of the land which defendants occupy. As to the first class, it will be observed, they paid a small sum in 1883 as rent. For what period it does not appear, or under what circumstances, nor for what premises. Was it for past occupation, or for a future occupation? Was it for a period expired, or for one which has not yet expired? And for what premises? The defendants in this class were in possession at the time the small sum was paid, and we think the stipulation is too meager to justify the inference that they were tenants of plaintiff six years afterwards, and bound to yield a possession which they did not receive from him or those under whom he claims, and whom it does not appear they recognized afterwards, and who never had the title or right to possession. The defendants in the other two classes are not distinguished, and, as we cannot hold that a floating understanding that the company did not object to the occupation of town lots made it the landlord of all who took possession with a consequent estoppel to question its title, even if express permission would have that effect, we cannot reverse the judgment. It was appellant's duty to distinguish the classes, and to identify the defendants composing each. If there was error affecting plaintiff's rights as to any of the defendants, the record should enable this court to apply the remedy as to them. As the record does not do this, the judgment must be affirmed as to all. Judgment is therefore affirmed.

PINSON v. ATCHISON, T. & S. F. R. CO.

(Circuit Court, W. D. Missouri, W. D. March 18, 1893.)

1. COSTS—TAXATION—DEPOSITIONS.

Where a nonresident witness, whose deposition has been taken, attends in person and testifies on the trial, the costs for taking his deposition cannot be taxed.

2. WITNESS—FEES—MILEAGE.

It is a settled rule of practice for the federal courts to allow witnesses their mileage and per diem fees where they attend and testify at the request of one of the parties, although no subpoena was issued. The *Vernon*, 36 Fed. Rep. 113, followed.

8. SAME.

Where the witnesses come from without the state at a greater distance than 100 miles, they are entitled to claim for mileage for the distance of 100 miles, and no more, and also their per diems.

At Law. Action by George E. Pinson against the Atchison, Topeka & Santa Fe Railroad Company. Motion by plaintiff to retax costs. Sustained in part, and overruled in part.

Adams & Windiate, for plaintiff.

Gardiner Lathrop and S. W. Moore, for defendant.

PHILIPS, District Judge. This is a motion by plaintiff to retax costs. Objection is made to the taxation of costs for certain depositions of nonresident witnesses taken on behalf of the defendant. As it appears that these witnesses attended in person and testified on the trial, the objection is well taken, and the same is sustained.

The mileage and per diems of the following witnesses taxed against the plaintiff, to wit, S. L. Thomas, Bruce Davis, Thomas F. Jones, are objected to, on the grounds that the said witnesses did not attend in obedience to a subpoena from court, and because they did not attend for the number of days charged for, and for the further reason that said witnesses resided out of the state, and at a greater distance than 100 miles. It is a settled rule of practice for the federal courts to allow witnesses their mileage and per diem fees where they attend upon court and testify at the request of one of the parties, although no subpoena in fact was issued from the court. The *Vernon*, 36 Fed. Rep. 113; *Anderson v. Moe*, 1 Abb. (U. S.) 299; *U. S. v. Sanborn*, 28 Fed. Rep. 299.

In respect of the question raised as to the right of witnesses to mileage when they come from without the state a greater distance than 100 miles, there does not appear to have been any direct adjudication in this circuit. The statute (section 876) provides that "subpoenas for witnesses who are required to attend a court of the United States in any district may run into any other district: provided, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same." There is a diversity of opinion and ruling in the different circuits. In the first circuit it has been held for half a century that the successful party was entitled to have costs taxed for the mileage of witnesses, regardless of the distance they came, or of the fact that they came

from out of the district, (*Prouty v. Draper*, 2 Story, 199; *Whipple v. Manufacturing Co.*, 3 Story, 84; *Hathaway v. Roach*, 2 Woodb. & M. 63-73;) and the rule of that circuit was affirmed by Mr. Justice Gray in *U. S. v. Sanborn*, 28 Fed. Rep. 299. Mr. Justice Story, however, conceded that, under the state practice in Massachusetts, mileage for the witness could only be taxed from the line of the state. In the second district the opposite rule obtains. *Anon.*, 5 Blatchf. 134; *Beckwith v. Easton*, 4 Ben. 357; *Buffalo Ins. Co. v. Providence & S. S. S. Co.*, 29 Fed. Rep. 237; *The Leo*, 5 Ben. 486. This ruling has been followed in the ninth circuit. *Spaulding v. Tucker*, 2 Sawy. 50; *Haines v. McLaughlin*, 29 Fed. Rep. 70. This question was thoroughly considered in the case of *The Vernon*, supra, by Brown, J., now one of the associate justices of the supreme court, who maintains that, where the witness comes from without the state at a greater distance than 100 miles, he is entitled to claim for mileage for the distance of 100 miles, and no more, and, of consequence, his per diems. On consideration I am of the opinion that this is a proper and equitable construction of the statute. While it is true the party calling the witness has the right, under section 863 of the statute, to take his deposition *de bene esse*, he ought not, in justice, in every case to be held to that course at the risk of paying the entire cost of the witnesses for personal attendance. Every lawyer and court knows, from observation and experience, the importance and advantage, and sometimes the necessity, of the personal presence of the witness at the trial. It is sometimes difficult and impossible to get so full, explicit, and perspicuous statement of facts from the witness through a deposition as it is by his examination before court and jury. Questions and incidents of facts may arise on the trial, which could not be reasonably anticipated by the party taking the deposition in advance, which could be successfully and truthfully met by the witness when present in court. The party ought, as a matter of right, if he prefers to have the personal attendance of the witness, to be permitted to bring him at his own expense to the point of 100 miles distance from the court, and have the cost of mileage therefrom to the court taxed the same as if the witness resided within the 100 miles. It is also but a reasonable construction of this statute, perhaps, as suggested by Judge Brown, that the court, upon previous application, being satisfied of the imperative necessity of the presence of the witness in court, could authorize a subpoena to go for a greater distance than the 100 miles. Such practice would be the exception to the rule, and should be rarely, and always cautiously, applied.

There is no evidence before me in contradiction of the affidavits of the witnesses as to the number of days they attended upon the court. The objection, therefore, as to the mileage and per diems on these witnesses, is overruled, except as to the mileage beyond 100 miles.

Objection is finally made to the fees taxed as costs for the following witnesses, S. Marlow, John R. Rouse, S. D. Irwin, on the grounds that the witnesses did not attend for the number of days claimed for, and because they did not testify at the trial of the

cause, and because they did not attend court in obedience to its subpoena. There is no evidence in support of this motion to contradict the affidavits of the witnesses as to the number of days' attendance. The other two objections have already been met in the foregoing part of this opinion. Objections as to these witnesses are overruled.

SCHNEIDER v. NEW ORLEANS & C. R. R.

(Circuit Court, E. D. Louisiana. March 8, 1893.)

No. 12,162.

STREET RAILWAYS—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

It is not negligence, per se, for a passenger in a street-railway car operated by electricity according to the "trolley" system to rest her arm upon the sill of an open window.

At Law. Petition by Mrs. Elizabeth Schneider against the New Orleans & Carrollton Railroad to recover damages for injuries sustained. On exceptions to the petition. Overruled.

E. Howard McCaleb, for plaintiff.

John M. Bonner, for defendant.

BILLINGS, District Judge. This case is submitted upon the petition and exception of no cause of action. The suit is for violation of defendant's obligation as a carrier, in not carrying plaintiff safely upon a car operated by electricity. She avers that she was injured by her arm coming in contact with a post erected by the defendant in connection with the new "trolley" system,—the alleged fault in the erection of the post being that it was placed too near the car; and an additional fault is alleged in the construction of the switch. The position taken by the defendant in the attempt to maintain its exception is that the plaintiff having averred in her petition that she rested her arm upon the window sill, the window being open, she has averred negligence. The cause of the accident seems to have been contact with the trolley post. The negligence of the defendant is charged to have been too close proximity of the post to the car, and a badly constructed switch, whereby the post came in contact with the plaintiff's arm. The averment of the plaintiff is as follows:

"That the weather was warm, and the windows in said car were raised and open when the petitioner got in and took her seat, and afterwards she rested her arm upon the window sill."

The defendant is averred to be a corporation operating a street railway through and over the streets of the city of New Orleans. The question presented by the exception is: Is it negligence, per se, for the plaintiff, who was a passenger upon a street-railway car, to rest her arm upon the sill of a window which was open?

It is not necessary to consider whether it would, in law, make any difference if the car had been a steam-railway car; for the authority upon which I shall decide the question was a decision where the injured party was a passenger upon the latter, and the passenger upon a street car would be held to certainly no greater degree of

caution. The supreme court of Louisiana have decided that it was not contributory negligence in a plaintiff who, when a passenger upon a street-railway car, "rested his arms upon the sill of an open window, out of which his elbow projected a few inches." *Summers v. Railroad Co.*, 34 La. Ann. 139. It is to be observed that the *Summers* Case goes further than this case, for not only was the arm resting upon the sill, but the elbow projected a few inches. In *Railway Co. v. Underwood*, (Ala.) 8 South. Rep. 116, (page 117,) the cases are collated by the court, and the court are of opinion that the weight of authority is contrary to the *Summers* Case. The opinion in the *Summers* Case was delivered by one of the most learned judges who have sat on our supreme bench, Mr. Justice Fenner. It was with reference to street cars, and the ground of the decision is that street-railway companies were bound to know the habits of passengers; and where those habits were consistent with safety, provided the carrier had used the precautions usual and easily possible, the indulgence of them on the part of passengers was not negligence, *per se*. When the contract for carriage is for transportation within the limits of a city, upon a street railway which lies wholly within the city, I am inclined to the opinion that the decisions of the supreme court of the state within which the city was situated are a rule of property, within the act of congress, and would be obligatory upon the courts of the United States, with reference to similar contracts arising within the state. But it is unnecessary for me to decide whether the *Summers* Case would conclude this court, because this case is not the *Summers* Case, as no protruding or projecting of the arm outside the window is averred, but simply the resting of the arm upon the sill. It is true there could not have been the injury which was caused by contact with the trolley post or pole unless the arm, at the time of the accident, protruded outside the window; but the substance of the plaintiff's petition is that her act consisted of, and was confined to, resting her arm upon the sill of an open window, and that the contact of her arm with the post was the result of the negligence of the defendant. Of course her arm must, at the time of the contact, have been extended outside of the window, to have encountered the post; but this causing of the thrusting out of the arm was contributed to by her only to the extent of rendering it possible by her resting it upon the sill. Under the doctrine of contributory negligence, as established by the supreme court of Louisiana, this would not be negligence. If the decisions of the state court of last resort are conclusive upon the federal courts upon this question, then the act of the plaintiff was not, *per se*, negligence.

If, on the other hand, the question as to the meaning of the contract for transportation or carriage on street cars within a city wholly within a state belongs to that class of questions which are to be viewed as general, and not local, then the supreme court of the United States seems to have decided the precise question presented by the exception, and to have held that the resting of the arm upon the window sill of an open window is not contributory negligence. *Farlow v. Kelly*, 108 U. S. 288, at page 289, 2 Sup. Ct. Rep. 555, at page 556, the case is stated:

"Kelly [the plaintiff] was a passenger, and had a seat near an open window. Having a severe headache, he placed his right elbow on the sill or base of the open window, and rested his head upon his hand. The forward right-hand corner of the coach in which Kelly was riding struck a freight car, and jarred his elbow from the window sill outward over the window sill, and outside the car, bringing his forearm in contact with the freight car."

At page 291, 108 U. S., and page 557, 2 Sup. Ct. Rep., the court say:

"In our opinion, it was not contributory negligence for Kelley, under the circumstances, to ride with his elbow on the sill of the open window."

I think this last case so closely resembles the case made by the petition here as to be undistinguishable from it. True, Farlow v. Kelly was a case arising on a steam-railway car; but, when there has been a distinction attempted between negligent acts of passengers on steam cars and those on horse cars, given acts of exposure on the part of the steam-car passenger are, in the words of Mr. Bishop, (Bish. Noncont. Law, § 1116,) "deemed the more recriminatory," on account of steam power being more difficult of control than horse power. The measure of negligence on the part of passengers in taking this or that position could not be more exacting on electric cars than upon steam cars. My conclusion, therefore, is that, whether the law of this case is to be derived from the decisions of the state or the United States supreme court, the exception must be overruled.

SOUTHERN PAC. CO. v. HAMILTON.

(Circuit Court of Appeals, Ninth Circuit. January 30, 1893.)

No. 48.

1. TRIAL—MOTION TO INSTRUCT FOR DEFENDANT—WAIVER OF OBJECTIONS.

Where a defendant, at the close of plaintiff's testimony, moves for an instruction to the jury to find in his favor, and the court denies the motion, the subsequent introduction of testimony by defendant waives all objections which he might have made to the ruling. Railroad Co. v. Hawthorne, 12 Sup. Ct. Rep. 591, 144 U. S. 202, followed.

2. CARRIERS—EJECTION OF PASSENGERS BY CONSTABLE.

A passenger refused to sign his railway ticket, thus violating its provisions, and rendering it void, and drew a pistol to resist an effort on the part of the conductor to eject him. He was afterwards arrested, on complaint of the railway company, and removed from the train, by a constable, who after such removal kept him in irons for 20 minutes before procuring a warrant. The passenger was acquitted in a criminal prosecution wherein the railway company's agent swore to the complaint. In a suit by the passenger against the company the constable testified that he acted merely as a peace officer, and on information that a pistol had been drawn. *Held*, that an instruction that, if the company caused the arrest merely to eject the passenger from the train, the constable was its special agent for that purpose, for whose unnecessary violence the company would be responsible, was erroneous, since it failed to discriminate between the acts of the officer while removing the passenger, and afterwards; and where such passenger, having suffered no great bodily harm, recovers \$44,000 for his injuries, the verdict, although reduced by the trial judge to \$15,000, should be set aside, as influenced by the erroneous instruction, and a new trial ordered.

3. NEW TRIAL—VERDICT AGAINST EVIDENCE.

Where the evidence offered for the party for whom a verdict is rendered, conceding to it the greatest probative force to which, according to

the law of evidence, it is fairly entitled, is insufficient to support the verdict, the court should set aside the verdict, and grant a new trial. *Pleasants v. Fant*, 22 Wall. 120, followed.

4. EXCEPTIONS—BILL OF—WHEN AND HOW TAKEN.

Where a party's exceptions are reduced to form, and filed with the clerk at the trial, before the jury retires, and a formal bill of exceptions, filed within the time granted by the court, is afterwards settled and approved by the court as containing a correct statement of the case, the writ of error should not be dismissed because of a failure to comply with the rules of the trial court, for such court may suspend its rules, or except a particular case from them, to subserve the ends of justice. *U. S. v. Breitling*, 20 How. 252, followed.

In Error to the Circuit Court of the United States for the District of Nevada.

Action in the district court of Humboldt county, Nev., by Asa M. Hamilton against the Southern Pacific Company to recover for injuries inflicted in ejecting plaintiff from defendant's train. Defendant removed the cause to the federal circuit court, where judgment was given for plaintiff. Defendant brings error. Reversed.

Baker, Wines & Dorsey, for plaintiff in error.

J. H. Macmillan, (William Woodburn on the brief,) for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and KNOWLES, District Judge.

McKENNA, Circuit Judge. The defendant in error, Hamilton, purchased in Denver, of a broker, a first-class, unlimited ticket for San Diego, via San Francisco. The broker was not an agent of either of the companies over whose lines the ticket purported to be good for a passage. It was primarily issued by the Union Pacific Railroad Company, and was what is called a "Contract Ticket," which is explained as one issued for a continuous passage over two or more roads, as distinguished from a ticket issued by one road, and confined to it, the former only being good in the hands of the original holder, when attested by his signature, and the latter good in the hands of any holder, being transferable. There was a distinction made in the case between limited and unlimited tickets; the distinction, however, being one only of time; the latter being good until used. The ticket purchased by Hamilton had printed on it the following conditions, among others:

"(3) * * * If presented by any person other than the original holder, this ticket is void, and conductor will take up, and collect full fare. * * *
(6) The holder will write his or her signature when required by conductors or agents."

Immediately above the space marked for the signature of the holder are the following words:

"I hereby agree to all the conditions of the above contract."

The ticket was in the form adopted by the companies, and the enforcement of the condition requiring the signature of the holder by conductors or agents was necessary to enable the company who

accepted it, if other than the issuing company, to collect its share of passage money from the issuing company.

In regard to these conditions the court below held, and instructed the jury:

"That railroad companies have the right to adopt and enforce reasonable rules and regulations for the safe, convenient, and orderly conduct of their business. * * * If the holder of a valid railroad ticket refuses to comply with any reasonable rule or regulation, * * * when requested so to do by the agents or conductors of such company, the company has the right to eject him from the cars, using only such moderate force as may be necessary to secure his removal. You are instructed that the defendant, the Southern Pacific Company, and the Union Pacific Company, had the right to adopt the form of ticket to be sold and used over each other's lines, and that in selling the ticket in question the Union Pacific Company acted as special agent of the defendant, and the defendant was not bound to honor the ticket unless it was in the form, and issued in the manner, agreed upon by both parties, or by the defendant. In purchasing a ticket from a person who was not an agent of the railroad company, the plaintiff was bound to examine the ticket, to see if it was genuine, and to read the conditions printed thereon, and would be bound by the reasonable conditions and rules so printed. The fact that the ticket was purchased from a ticket broker, who was not authorized by the railroad company (defendant) to sell the same, does not confer upon the purchaser any greater right or privilege than if he had purchased a ticket from a regular or special agent of the railroad company."

And, construing the ticket, the court further said:

"So far as this ticket is concerned, it is a first-class, unlimited ticket, subject to the conditions which are printed on its face. The third,—and this is most material: 'If not so used, and if more than one date is canceled, or if presented by any person other than the original holder, this ticket is void, and conductor will take up and collect full fare.' That applies to the ticket in either form. If the ticket was used as a second-class or a limited ticket, and if more than one date is canceled, it would apply to certain conditions of the ticket; or, 'if presented by any person other than the original holder, this ticket is void, and conductor will take up and collect full fare.' That applies to the whole ticket. * * * The next condition is: 'The holder will write his or her signature when required by conductor or agent.' Then there is another clause which has not been referred to, and has no bearing. This ticket, you will notice, bears upon its face, first, a blank space, and then the word, 'Signature,' and it is signed by the agent of the Union Pacific Company. I instruct you that the testimony in this case is that that form of ticket was adopted by the two companies, and that they were required, in order to make that ticket good over other lines than their own,—the party selling it must require the purchaser to attach his signature. And, if he accepted the ticket without signing it, he, nevertheless, would be bound by that rule when he reached the line of the defendant company. It necessarily follows from what I have already said that the ticket which was presented by Hamilton at Ogden was not such a ticket as defendant, the Southern Pacific Company, was bound to honor. And if you believe that the agents of the company, at the time he went upon their train, notified him that the ticket, in that form, was not such as they were entitled to honor, and that unless he signed his name he would not be allowed to travel upon it, or, in other words, that he would have trouble with the conductor, the conductor had the right to request him, on the presentation of that ticket, to sign his name. That was the only objection made to it. If he had signed his name, the testimony is that he would have been allowed to travel upon that ticket as a first-class, unlimited ticket. If he refused to sign his name, pay his fare, or leave the train, then the conductors or agents of the defendant had the right to use as much force as was necessary, and no more, in order to remove him from the train."

These instructions state the law clearly and correctly, and the plaintiff in error finds no fault with them, but urges that the

court erred in refusing, at the close of the plaintiff's testimony, to instruct the jury on its motion to find a verdict for it, and again erred by submitting to the jury, as a mixed question of law and fact, the agency and circumstances of the plaintiff's removal from the train.

The first error claimed, however, was waived by defendant, by introducing testimony. To have availed itself of it, it should have rested its case. *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. Rep. 591, and cases cited.

To pass on to the second claim of error, needs a consideration of the testimony. The plaintiff was removed from the train at a town called Lovelocks, in the state of Nevada, by a constable acting on complaint of an agent of defendant; and if there is any evidence that the officer acted as agent of the company, in the sense stated in the instruction, the instruction must be sustained. The rule in an appellate court is stated by Justice Lamar in *Insurance Co. v. Ward*, 140 U. S. 91, 11 Sup. Ct. Rep. 720: "We have no concern" the learned justice said, "with questions of fact, or the weight to be given to the evidence which was properly admitted," citing a number of cases. But in *Pleasants v. Fant*, 22 Wall. 120, et seq. the court say, (Justice Miller rendering the decision:)

"That in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any, upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. * * * It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts, arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in rules of law by which that evidence is to be examined and applied; and finally, when necessary, by setting aside a verdict which is unsupported by evidence, or contrary to law. In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor,—not whether, on all the evidence, the preponderating weight is in his favor, (that is the business of the jury,) but conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court, after a verdict, to set it aside, and grant a new trial."

The charge excepted to is as follows:

"A peace officer who, in response to the invitation of the regular agents of the company, assists in ejecting a passenger, becomes a special agent of the company for that purpose, and is subject to the same rule in regard to excessive violence in executing the regulations of the company. The question as to the cause of plaintiff's arrest at Lovelocks is a mixed question of law and fact. If the jury believe from the evidence, from a consideration of all the attendant and surrounding circumstances, as testified to by the various witnesses upon this trial, that the agents of defendant caused the arrest of plaintiff to be made by a peace officer at Lovelocks simply as a means to the end of ejecting or removing plaintiff from the car, on the ground that he had refused to sign his name, pay his fare, or leave the car, then such officer should be treated as a special agent of the defendant, for that purpose, and the defendant would be liable for his acts in the same manner, and to the same extent, as if the officer's acts had been committed by a regular agent of the defendant."

What is the evidence as to the officer's agency, and as to the force he used, and the defendant's connection with it? The court left no other issues to the jury. Under its instructions the defendant had a right to remove him. Its responsibility was only for the manner and degree of it, to be judged of by the circumstances. Hamilton got on the train at Denver. "I was then on my journey," he testified "to Portland, Or., but I had business in San Francisco, and that is the reason I went that way. * * * I had no idea of going to San Diego, but I travel a great deal, and may go to San Diego at any time, or to any other portion of the country." He thought the price of a ticket to San Francisco was the same as he paid for the ticket to San Diego. His baggage was checked to San Francisco. The conductors of the Union Pacific Railroad Company did not object to the ticket, but the agent of the Central Pacific notified him before he boarded the train that he would have to sign the ticket; and conductors of the train not only requested him to sign it, but importuned him,—indeed, coaxed him,—one offering to do it for him when he said he could not write, but desisted by threats of arrest for forgery; and one showed him a telegram from T. H. Goodman, general ticket agent at San Francisco, which read, "Use passenger as if he had no ticket." Indeed, he was treated with exemplary consideration and patience. He was allowed to ride from Ogden to Lovelocks, was not disturbed at night, and he says, up to the time of the struggle with Mr. Derbyshire, the conductors were gentlemanly to him. Finally, Derbyshire, who was the third conductor from Ogden, told him he was going to put him off, telling him to put on his shoes; he then having his slippers on. The conductor and a brakeman attempted to remove him, but his resistance defeated them, and the conductor sent for other train hands. The plaintiff drew his pistol from his valise, and climbed up on the back of the seat, between the curtain rail, he says, and the top of the car; threw his arm over the curtain rail, with the pistol pointing to the ceiling. The train men came to the door. "At that time," plaintiff further testified, "I had my gun pointed at the ceiling. I said: 'I don't want any of you men to bother me. I have a right here, and I want you to keep away from here, or probably you will get hurt. I have been worked up and bothered about this until I don't know, hardly, what I am doing. Now, keep away,'—or words to that effect. That is about what it meant, but may be not the exact words."

But it is not necessary to detail the testimony. It shows clearly, and there is no contradiction, that it was his duty to sign the ticket; that he was repeatedly requested to do so, the consequence of refusal being plainly stated to him; that, for illegal purposes of his own, he refused; that he resisted, by force, efforts to remove him, and intended to so resist, and finally exhibited a pistol, saying "that he intended to protect himself against any further bother from you folks,"—meaning the train hands; that he was excited. "They seemed to have worked him up," one witness said. And he so far impressed the passengers that one of the passengers said, "My wife made to run out, * * * and everybody made a break to run." He turned around, and said, further signifying his purpose, "You

need not get frightened. I am not going to hurt you. I know how to handle a pistol, and I am going to protect myself." There was no further effort made by the conductor or train hands to remove him, but the conductor telegraphed to Mr. Whitehead, the division superintendent at Wadsworth, "that a man had pulled a pistol on him,—a six shooter, he thinks he worded it,—and asked to have him taken off at Lovelocks." And Whitehead telegraphed to the agent at Lovelocks as follows: "Conductor Derbyshire, on No. 4, wires me that a man on his train has drawn a six shooter on him. Have an officer on hand when No. 4 arrives." The agent at Lovelocks either showed the telegram to an officer at Lovelocks, by the name of Couzzins, and who was called as a witness by plaintiff, or told him its contents. He testified he acted on account of it, as an officer, selecting one Tifner as an assistant. Tifner was not an employe of the company. He armed himself because Derbyshire told him the man was a little wild, and had a six shooter about a foot long. He found Hamilton in the smoker, and arrested him by putting the handcuffs over his right hand, and grabbing him by the left, and by telling him that he (the officer) wanted him. He threw up his hands, and said, "Mr. Sheriff, I make no resistance whatever."

This is the testimony, and if it does not bring the case within the opinion of the supreme court in *Pleasants v. Fant*, supra, it does not leave it far without it.

If not a trespasser from the beginning, the plaintiff became one when he refused to sign the ticket. He resisted removal, drew a pistol, and said he was "going to protect himself." Protect himself against what? Presumably, against signing the ticket which it was his duty to sign; protect himself against his removal from the train, which the company had a right to require. Was he in earnest, or was he pretending? It is not material which. When a man draws a pistol, he risks all the constructions of his acts. Whatever his purpose, he, at least, cannot complain if it be taken to be what he tries to make it seem. Plaintiff's purpose seemed lawless, and supported the supposition that he refrained from worse because the company, which was right, yielded to him, who was wrong. It is difficult to imagine what duty the company omitted, what more it could have done than it did do, unless it be held that its rights disappeared with the appearance of plaintiff's pistol, and that the pistol gave him a claim to ride which his ticket did not. The company had either to submit to his imposition, or oppose force to force, or appeal to an officer of the law. It chose the latter. Did it do wisely, considering what was in its trust and responsibility? Or would it have been wiser to have met the challenge of plaintiff's pistol by counter weapons, and risked a tragedy on its train, rather than risk a shock to his sensibilities by being handcuffed and taken off by a peace officer? Whatever answer the testimony may justify to these questions, it seems clear to me that the court was not justified in assuming that there was evidence to justify a finding that the officer acted as agent of the company, in the sense of the instruction, or in the sense it was capable of being understood. The officer was plaintiff's witness, and he

expressly testified that he acted as an officer only, and from the statement that plaintiff had drawn a pistol on the conductor, which plaintiff had done. I do not mean to say that the company may not be liable for the acts of the officer induced by it, but I think that in this action there should have been a more careful discrimination of his acts in removing plaintiff from the train from his acts afterwards, and it is impossible to resist the conclusion that the jury felt impelled by the instruction to confound the distinction. Its verdict, which was for \$44,750, cannot otherwise be explained. The court reduced the amount to \$15,000, but, of course, this did not correct the grounds upon which it was based. That could only have been done by a new trial. How important the distinction was between the officer's acts when he removed plaintiff from the train, and his acts afterwards, is obvious from the testimony. He kept the plaintiff in irons for 20 minutes after the train departed, from his own volition, formally arrested him afterwards on a warrant issued by a magistrate on a complaint made by the agent at Lovelocks, and detained him until he was released on bail. We do not think that the company is liable in this action for these acts of the officers of the state of Nevada, even though the company's agent swore to the complaint, or because plaintiff was acquitted.

The defendant in error claims that the writ of error in this case should be dismissed "because no bill of exceptions or statement, as required by the rules of the circuit court for the district of Nevada, in support of the motion for a new trial, was ever made or presented to the judge of said court within the time required by the rules of practice thereof, or was ever filed in said court, or settled, until after the motion of the plaintiff in error for new trial was heard and denied." But the exceptions of the defendant were reduced to form and filed with the clerk at the trial, and before the jury retired, and a formal bill of exceptions filed within the time granted by the court. It was afterwards settled and approved by the court as containing a correct statement of the case. Besides, it is within the power of the court to suspend its own rules, or to except a particular case from them, to subserve the purpose of justice. *U. S. v. Breitling*, 20 How. 252. See, also, *Dredge v. Forsyth*, 2 Black, 568, and *Kellogg v. Forsyth*, Id. 573.

Judgment is reversed and a new trial ordered.

GULF, C. & S. F. RY. CO. v. JOHNSON.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 150.

1. RAILROAD COMPANIES—NEGLIGENCE—FIRES—EVIDENCE.

In an action against a railway company for the loss of hay and grass by reason of the negligent escape of fire from its locomotives, evidence is admissible that both before and after the injury complained of defendant's engines had set fire to grass and other combustible matter in the immediate vicinity of plaintiff's premises, and similarly situated.

2. SAME—SUFFICIENCY OF EVIDENCE.

Several of defendant's trains passed plaintiff's premises on the day of the fire, and defendant's testimony showed that some of its engines were in good and some in bad order. It also attempted to show that if any of them caused the fire it could have been only a particular one, which was provided with the most approved spark arrester, and was otherwise in good order and condition. *Held*, that the jury was justified in finding that the fire was caused by an engine other than the one specified.

3. SAME—CONTRIBUTORY NEGLIGENCE.

An occupant of land adjoining a railway is not bound to protect a haystack 250 yards from the line of road from sparks from passing engines, either by making fire guards or by plowing around it. Nor is it contributory negligence to leave the land between the stack and the railroad track in its natural condition.

4. SAME—INDIAN TITLE—INDIAN TERRITORY.

One occupying land under an eight-years contract with a citizen of the Chickasaw Nation may recover for loss of crops, occasioned by the negligent escape of sparks from a railway engine, although a law of the Nation may prohibit its citizens to grant lands for a longer term than one year; for occupancy and possession of land are sufficient to enable one suffering loss of crops by reason of the escape of sparks from passing engines to maintain an action therefor.

5. SAME—KILLING STOCK—DUTY OF ENGINEER.

Under the Arkansas laws in force in the Indian Territory it is the duty of a railway engineer to keep a lookout for stock upon the track, and to use reasonable care to avoid injuring or killing the same when discovered. *Railway Co. v. Washington*, 1 C. C. A. 286, 4 U. S. App. 121, 49 Fed. Rep. 347, followed.

6. APPEAL—REVIEW—GENERAL EXCEPTIONS TO INSTRUCTIONS.

Where a charge, or any part thereof, contains distinct propositions of law, a general exception to it will be overruled if any one of such propositions is unobjectionable.

7. SAME—DECISION—REMITTITUR.

For a trifling error in computing interest the court will not reverse, but will direct a remittitur.

In Error to the United States Court in the Indian Territory.

This action was commenced in the United States court in the Indian Territory, third division, by W. H. Johnson, the defendant in error, against the Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, to recover the value of a yearling alleged to have been killed by the negligent operation of the defendant's trains, and also to recover the value of two tons of hay and the grass growing on eighty acres of pasture land alleged to have been burned by fire negligently permitted to escape from the defendant's locomotives. The answer was a general denial. There was a trial and verdict, and judgment for the plaintiff, and the defendant sued out this writ of error. *Affirmed*.

E. D. Kenna, Adiel Sherwood, J. W. Terry, and C. L. Jackson, for plaintiff in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge. 1. The first seven assignments of error are based on the ruling of the court below allowing the plaintiff to prove that the defendant's engines had set fire to the grass and other combustible matter on the line of its road in the immediate vicinity of the plaintiff's premises, and similarly situated, short-

ly before and soon after the fire which burned the plaintiff's property. This was competent evidence to go to the jury as a circumstance "tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company." *Railway Co. v. Richardson*, 91 U. S. 454; *Railway Co. v. Gilbert*, 4 U. S. App. —, 52 Fed. Rep. 711. And see generally as to the great latitude allowed in the reception of circumstantial evidence, *Holmes v. Goldsmith*, (Oct. Term, 1892,) 13 Sup. Ct. Rep. 288.

Several of defendant's trains passed the plaintiff's premises on the day of the fire. The defendant attempted to show that, if the fire was set out by any of its engines, it was engine No. 53, and that that particular engine was provided with the most improved spark arrester, and was otherwise in good order and condition, and that it was operated skillfully while passing plaintiff's premises. But the plaintiff did not allege or admit that that was the engine which set out the fire. Whether it was or not was a question for the jury. The defendant's own testimony showed that some of its engines were in good and some in bad order. The jury may have found, notwithstanding the claim of the defendant at the trial, and the testimony offered in support of its contention, that engine No. 53 was not the one which set out the fire. They may have discredited defendant's testimony on that point. The case falls clearly within the rule laid down in the cases cited.

2. Three of the assignments of error relate to that part of the charge of the court in which it told the jury that it was the duty of the defendant's engineer to keep a lookout for stock upon the track, and to use reasonable care to avoid injuring or killing the same when it was discovered. The act of congress adopted for the government of the Indian Territory the body of the statute law of Arkansas. Congress doubtless put the Arkansas laws in force in that territory from a conviction that they were better adapted to the situation, habits, and customs of the people of that territory than the laws of any other state. Carrying out the policy indicated by the act of congress, this court has, in the determination of questions arising in that territory which depend for their solution upon the common law, adopted the exposition of that law, in like cases, by the supreme court of Arkansas. The supreme court of that state, in a well-considered case, (*Railway Co. v. Finley*, 37 Ark. 562, 570,) held: "It was certainly the duty of the engineer to keep a constant and careful lookout and watch for stock which might be upon the track." The doctrine of this case has been affirmed in later cases. *Railway Co. v. Holland*, 40 Ark., 336; *Railway Co. v. Monday*, 49 Ark., 257, 264, 265, 4 S. W. Rep. 782. It is true that the decisions of the supreme court of that state are not quite harmonious on this question, but we think the cases we have cited lay down the sound rule, which we have applied in several cases coming from that territory. *Railway Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, 49 Fed. Rep. 347; *Railway Co. v. Childs*, 4 U. S. App. 200, 1 C. C. A. 297, 49 Fed. Rep. 358; *Railway Co. v. Elledge*, 4 U. S. App. 136, 1 C. C. A. 295, 49 Fed. Rep. 356. The question can no longer be regarded as an open one in this court in cases coming from that territory.

In the brief of the learned counsel for the plaintiff in error it is said: "It is the universal rule that an engineer need not look out for human beings. Why should the defendant be required to exercise a higher degree of care in the case of a horse than in the case of a man?" This interrogatory is answered in a very satisfactory manner by Judge Smith in delivering the opinion of the court in *Railway Co. v. Monday, supra*. He said:

"Now, as railroads are not required to be fenced, it inevitably happens that these dumb creatures frequently stray upon a railroad track. And the owner of them is not guilty of contributory negligence in suffering them to go at large, for such is the universal custom, and was before any railroads were built; hence their occasional presence upon the track is to be reasonably anticipated, and hence the law imposes upon the persons in charge of a train the duty of keeping a vigilant outlook for them. But no such duty arises in the case of human beings, who are possessed of reason and intelligence. They are presumed to know that a railroad track is a dangerous place to walk on, and, as they are capable of taking care of themselves, they take the risk of the consequences upon themselves, if they do walk upon it."

3. The plaintiff's hay was stacked in the meadow, from which it had been mowed that year, 250 yards from defendant's line of road. The meadow between the stack and the railroad had been mowed, and the hay cut therefrom stacked. In all other respects the plaintiff's land between the railroad track and the stack was in its natural condition. Mowing the grass and stacking it the distance mentioned from the railroad track lessened the danger from fire. Upon these facts the defendant asked the court to instruct the jury "that, if you find from the evidence in this case that the plaintiff did not use any effort to protect his hay which he alleged was burned by sparks cast out by defendant's engine, either by plowing around the ricks of hay in question, or by making fire guards around the same, or using other means such as a careful, prudent person would have done, and that because of such failure to so protect said hay the same was burned, then you will find for the defendant as to such hay." The court declined to give this instruction, but did instruct the jury that if they found "from all the evidence in this case that the fire which plaintiff claims that defendant set and which injured him would not have occurred if plaintiff had used care in the protection of his property which a man of ordinary prudence under like circumstances would have used, then the plaintiff cannot recover." The defendant's request ought not to have been given, for several reasons. It assumes it to be an established fact that a careful, prudent person would have plowed around the haystack, or made fire guards, or used other special means to protect the stack from fire. There was no evidence whatever to justify that assumption. It is very well settled that it is not contributory negligence for the occupant of land adjoining a railroad to leave it in its natural state; and a farmer using his premises in the ordinary and customary manner is not guilty of contributory negligence for failing to resort to special or extraordinary precautions to prevent the destruction of his property from fire happening through the negligence of a railroad company. *Shear. & R. Neg.* §§ 680, 681, and cases cited; *Ray, Neg. Imp. Dut.* § 90, and cases cited. There was no evidence of any

usage or custom in that country to plow around haystacks or resort to any other special means to prevent fire reaching them, when situated as the plaintiff's stack was. There was, therefore, no evidence to justify the court in submitting to the jury the question of contributory negligence at all. But if the evidence had justified an instruction on the subject, the one given by the court was sufficient.

4. The defendant asked the court to instruct the jury that the plaintiff could not recover if the hay "was cut upon the land of the Chickasaw Nation, and not upon the land owned by the plaintiff." The court refused to give this instruction, and charged the jury that, so far as related to the title to the land upon which the grass burned was growing and from which the hay was cut, it was sufficient for the plaintiff to show that he was in the actual and exclusive possession of the land and hay, and entitled to the exclusive use and enjoyment of the same. The defendant excepted to this part of the court's charge. It requires no argument or citation of authorities to show that the instruction asked by the defendant was rightly refused. It asserted roundly, and without qualification, that the plaintiff could not recover if the hay, "was cut upon land of the Chickasaw Nation," and that he could not recover unless it was cut upon "land owned by the plaintiff."

It is claimed on behalf of the plaintiff in error that the fee of the lands in the Chickasaw country is vested in the Chickasaw Nation of Indians; that the citizens of the Nation, by some law, custom, or usage, have a right to the usufruct of so much of the lands of the Nation as they may improve and occupy, but that under a law of the Nation the citizen cannot make a valid lease of the land of which he has taken possession for a longer term than one year; and that the plaintiff was in possession of the land in question under a lease from Kriner, a native citizen of the Nation, which run for eight years, and was void for that reason, and that "the hay was, therefore, the property of Kriner." Assuming, but not deciding, that the laws and customs of the Chickasaw Nation are what the plaintiff in error claims them to be, and that the lease under which the plaintiff acquired the possession of the land was void, his right of recovery is not affected thereby. The plaintiff was in the actual peaceable possession of the land and the hay cut from it. As against a wrongdoer, possession is title. The presumption of the law is that the person who has the possession has the property, and the law will not permit that presumption to be rebutted by evidence that the property was in a third person, when offered as a defense by one who claims no title, and was a wrongdoer. One who goes through the country negligently or willfully setting fire to people's pastures, haystacks, and houses, will not, when called upon to pay for his wrongful act, be heard to say that the legal title to the property destroyed was in the third person, and not in the person who had the actual possession. "Occupancy," says Chancellor Kent, "doubtless gave the first title to property in lands and movables. It is the natural and original method of acquiring it, and upon the principles of universal law that the title continues so long as occupancy continues." 2 Kent,

Comm. 400. It was found impossible for all persons to be constantly in possession of their property, and society devised other evidences of title. In most controversies between rival claimants to property, these artificial or legal evidences of title are paramount and the best evidence, and must be produced; but, as against a wrongdoer claiming no right or title to the property, possession is as potent as it was before any other evidence of title to property was devised or recognized. One cannot burn down another's house over his head, and, when called upon to pay for his wrongful act, reply that the logs out of which the house was built were cut upon the public lands of the United States, and therefore not the plaintiff's property; or put the plaintiff to the proof of his title to the land upon which the house stood, in the manner that would be necessary in an action of ejectment to recover the land from one in possession.

The number of cases coming from this territory in which this defense is sought to be set up by the wrongdoer against the plaintiff in possession will justify a reference to some of the authorities. In Com. Dig. tit. "Trespass," (B2,) it is said: "So an intruder on the king's possession may maintain trespass." In *Wilbraham v. Snow*, 2 Saund. 47, c. note f: "So possession with an assertion of title, or even possession alone, gives the possessor such a property as will enable him to maintain this action [trover] against a wrongdoer; for possession is prima facie evidence of property." In *Addison on Torts*, 358, it is laid down that, "as against a wrongdoer, possession is title, and the presumption of law is that the possession and ownership of chattels go together, and that presumption cannot be rebutted by evidence that the right of property was in a third person, offered as a defense by one who admits that he had no title and was a wrongdoer when he took or converted the goods. A wrongdoer, therefore, in actual possession of goods, the property of another, can recover their value in an action against another wrongdoer who takes the goods from him." And possession of land without even a claim of title vests a sufficient right of property in the person who has such possession to enable him to hold the land against all the world except the true owner. *Tied. Real Prop.* § 692. It is prima facie evidence of a seisin in fee, which is the highest estate in land; and a prior possession is sufficient to entitle a party to recover in an action of ejectment against a mere intruder or wrongdoer. *Tyler*, Ej. 70, 72. And if the railroad company, instead of burning this property, had taken forcible possession of it, the plaintiff could have recovered the property without showing other right or title than his prior actual and peaceable possession. A leading case on this subject is *Graham v. Peat*, 1 East, 244. The case was trespass *quare clausum fregit*. Plea, the general issue. At the trial it appeared that the plaintiff was in possession of the land under a void lease, and thereupon he was nonsuited. A rule was thereupon obtained "to show why the nonsuit should not be set aside, upon the ground that the action was maintainable against a wrongdoer upon the plaintiff's possession alone, without showing any title." The report of the case proceeds as follows:

"Cockell, Serjt., Park and Wood now showed cause, and insisted that possession was no further sufficient to ground the action even against strangers than as it was *prima facie* evidence of title, and sufficient to warrant a verdict for the plaintiff, if nothing appeared to the contrary. But here it did expressly appear by the plaintiff's own case that his possession was wrongful, for it was a possession in fact against the positive provisions of an act of parliament, without any color of title even against strangers."

Counsel on the other side were stopped by the court, and Lord Kenyon, C. J., said:

"There is no doubt but that the plaintiff's possession in this case was sufficient to maintain trespass against a wrongdoer; and, if he could not have maintained an ejectment upon such a demise, it is because that is a fictitious remedy founded upon title. Any possession is a legal possession against a wrongdoer. Suppose a burglary committed in the dwelling house of such an one, must it not be laid to his dwelling house notwithstanding the defect of his title under the statute?"

In *Cary v. Holt*, Strange, 1238, 11 East, 70, note, the plaintiff declared in trespass upon his possession. The court said upon the state of the pleadings the defendant's title was out of the case, "and then it stands upon the plaintiff's possession, which is enough against a wrongdoer, and the plaintiff need not reply a title." And to the same effect are *Catteris v. Cowper*, 4 Taunt. 547; *Pol. Torts*, 315; *Jeffries v. Railroad Co.*, 5 El. & Bl. 802. Judge Cooley (*Cooley, Torts*, 444) adopts the language of Lord Campbell in the case last cited, that—

"The law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was a title in some third person, for against a wrongdoer possession is title. The law is so stated by the very learned annotator in note to *Wilbraham v. Snow*, and I think it most reasonable law, and essential for the interests of society, that peaceable possession should not be disturbed by wrongdoers. * * * It is not disputed that the *jus tertii* cannot be set up as a defense to an action of trespass for disturbing the possession. In this respect I see no difference between trespass and trover, for in truth the presumption of law is that the person who has the possession has the property. Can that presumption be rebutted by evidence that the property was in a third person, when offered as a defense by one who admits that he himself had no title and was a wrongdoer when he converted the goods? I am of the opinion that this cannot be done."

The court properly instructed the jury that the plaintiff's possession of the property was sufficient evidence of his title as against the defendant.

It will, of course, be understood that we are dealing with the question only in the light of the want of title other than possession, being pleaded as a bar to the action, and not with its effect upon the measure of damages, as to which see *Railroad Co. v. Lewis*, 2 C. C. A. 446, 7 U. S. App. 254, 51 Fed. Rep. 658.

5. It is assigned for error that the court told the jury that, if they found any sum in favor of the plaintiff, they would allow 6 per cent. interest thereon from the date of the destruction of the property. This direction was the last clause in a very long paragraph of the charge containing a summary of the whole case, and stating the rules of law applicable to the facts. This paragraph of the charge was ex-

cepted to as a whole. It stated the law accurately in two or three aspects of the proof. The rule is well settled that where the charge, or any part of it, which contains two or more distinct propositions of law, is excepted to generally, the exception will be overruled if any one of the propositions of law it contains is unobjectionable. *Price v. Pankhurst*, 53 Fed. Rep. 312.

If the plaintiff in error desired to except to that part of the charge relating to interest, he should have leveled his exception distinctly at that clause of the charge. *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. Rep. 566. If the attention of the court had been specifically called to the clause of the charge on this subject, it is highly probable its language would have been changed from mandatory to permissive, from "will allow" to "may allow," which would have removed the error complained of. *Eddy v. Lafayette*, 4 U. S. App. 247, 1 C. C. A. 441, 49 Fed. Rep. 807; *Wilson v. City of Troy*, (N. Y. Ct. App.; Oct. 4, 1892,) 32 N. E. Rep. 44. This disposes of the exception, and makes it unnecessary to inquire whether the charge in relation to interest was erroneous, and, if so, whether the maxim that the law does not concern itself about trifles would not apply; the verdict being for such a small sum, and the interest, if any was allowed by the jury, so extremely trifling in amount. *Broom*, Leg. Max. [135;] *Elliott*, App. Proc. § 636. At most the court would direct a remittitur, and not reverse the case for a trifling error in computing interest. *Id.* § 570. The judgment of the court below is affirmed.

GULF, C. & S. F. RY. CO. v. ELLIS.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 147.

1. RAILROAD COMPANIES—NEGLIGENCE—KILLING STOCK.

On trial of an action against a railway company for killing a mare and filly, the evidence showed that where the filly was struck the track was straight and level, and one standing thereon at that point could see an animal on or near the track for over half a mile in either direction, and hoof-prints showed that the filly had run on the track ahead of the engine 200 yards or more before she was struck. *Held*, that a verdict for plaintiff would not be disturbed.

2. SAME—BURDEN OF PROOF.

Under the circumstances, the burden was on defendant to show any such special circumstances connected with the operation of the train as would have rendered it unsafe and impracticable to stop it or slacken its speed within the distance of 200 yards.

3. SAME—EVIDENCE—FAILURE TO PRODUCE WITNESS.

Failure to produce the engineer as a witness to rebut the inferences raised by the circumstantial evidence would justify the jury in assuming that his evidence, instead of rebutting such inferences, would support them.

4. SAME—DUTY OF ENGINEER.

It is the duty of the engineer of a railway train to keep a lookout for stock upon the track.

5. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

In common-law actions the circuit court of appeals will not review the facts, if there is evidence direct or circumstantial fairly tending to support the verdict.

In Error to the United States Court in the Indian Territory.

This was an action commenced in the United States court in the Indian Territory, third division, by C. W. Ellis, the defendant in error, against the Gulf, Colorado & Santa Fe Railway Company, the plaintiff in error, to recover damages for killing a mare and filly and crippling a colt by the alleged negligent operation of the defendant's trains. The answer was a general denial. There was a trial, and verdict and judgment for the plaintiff, and the defendant sued out this writ of error. Affirmed.

E. D. Kenna, J. W. Terry, and C. L. Jackson, for plaintiff in error.
Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge. The court below refused to give a peremptory instruction to the jury to find a verdict for the defendant as to the filly killed July 28, 1889, and this refusal is assigned for error. The evidence shows that the defendant's engine struck and killed the filly; that the track at the place where this was done was straight and level for half a mile or more in either direction, and that one standing on the track at that point could see an animal on or near it for that distance in either direction, and that the foot-prints of the filly showed that she had run on the track, ahead of the engine, 200 yards or more, before she was overtaken and killed. It was the duty of the engineer to keep a lookout for stock upon the track, and, when discovered, to use ordinary care to avoid injuring it. We are asked by the learned counsel for the plaintiff in error to declare as a matter of law, under the evidence in this case, that the defendant's engineer was not negligent in the discharge of the duty imposed upon him by this rule; and an extended brief is filed in support of this contention, which we have carefully considered. It is said there is no evidence to show that the train could have been stopped in a distance of 200 yards; that the distance within which a train can be stopped depends on the speed that it is going, the grade and condition of the track, the number of cars, and other conditions, and that the evidence fails to disclose any information on these matters; and with some emphasis the question is asked: "Will the members of this court undertake to say that a train of unknown speed, on a track which might or might not have been slippery, pulling a train that may have had five or fifty cars, could have been stopped in six hundred feet?" This court will not undertake to declare as a matter of law that a train, under the unknown conditions named, can be stopped in 600 feet, nor will it declare as a matter of law that it cannot be stopped in that distance. The declaration, if made either way, would be a mere expression of opinion on a matter of fact, and not a declaration of law, and would settle no principle of law, and have no binding force on this or any other court in any other case. The question is not one of law, but one of fact for the jury, who doubtless brought to its determination common sense, and the knowledge common to all, that the speed of a railroad train can ordinarily be slackened sufficiently in a distance of 200 yards to avoid running down a horse going at full speed on the track ahead of it. If

the special circumstances connected with the operation of this train at this time and place were such as to make it an exception to the general rule and render it unsafe and impracticable to slacken its speed, or stop it, the burden was on the defendant to show that fact. These were matters peculiarly within the knowledge of the defendant. Its engineer must have had actual knowledge on all these subjects. His deposition was taken by the defendant, but he was not asked to testify, and did not testify, on these subjects, and was not examined at all as to the killing of this filly.

There was satisfactory proof of circumstances tending strongly to show negligence, and from which we think the jury could rightfully infer negligence. The circumstantial evidence in the case is rendered more cogent, if not conclusive, by a well-settled rule of evidence. The facts in the matter in dispute rested peculiarly within the knowledge of the defendant, and it had in its power to show, by its engineer, what they were, and declined to do so. Now, it is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support, the inferences against him, and the jury is justified in acting upon that conclusion. "It is certainly a maxim," said Lord Mansfield, "that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted." *Blatch v. Archer*, Cowp. 63, 65. It is said by Mr. Starkie, in his work on Evidence, vol. 1, p. 54:

"The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."

The same rule is applicable even in criminal cases. *Com. v. Webster*, 5 Cush. 295, 316; *People v. McWhorter*, 4 Barb. 438. That this court, upon the testimony in this case, should be seriously asked to reverse it, upon the evidence, implies, we think, a total misconception of the relative functions of the court and jury in this class of cases.

In common-law actions tried to a jury this court cannot review or retry the facts. If there is any evidence, direct or circumstantial, fairly tending to support the verdict, it must stand. Every presumption is in its favor, and all doubts must be resolved in its favor. This court will not weigh or balance the evidence. And in cases like the one at bar, which turn on the question whether the party exercised ordinary care or was guilty of negligence, after the usual and appropriate definitions of those terms by the court, it is the province of the jury to say, from a consideration of the evidence, whether in the particular case ordinary care was exercised, or whether there was negligence. In other words, what is ordinary care, or what is negligence, in the particular case, is a question of fact for the jury, and not of law for the court. Rail-

road Co. v. Stout, 17 Wall. 657, 663, 664; Jones v. Railroad Co., 128 U. S. 443-445, 9 Sup. Ct. Rep. 118; Railway Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. Rep. 679; Railroad Co. v. Foley, 53 Fed. Rep. 459; Pol. Torts, 386 et seq. But, in the trial of every case before a jury, there comes a time when it may be the duty of the court to decide, as a matter of law, whether there is sufficient evidence for the jury to found a verdict upon. If there is not, the practice in the federal courts is to instruct the jury to return a verdict for the defendant. Railway Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569. But the case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. Railway Co. v. Cox, 145 U. S. 593, 606, 12 Sup. Ct. Rep. 905. And in cases involving the question of negligence, the rule is now settled that "when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court." Railway Co. v. Ives, *supra*. The presumption is that jurors are reasonable men, and that the trial judge is a reasonable man, and when the judge and jury who tried the cause concur in the view that the evidence establishes negligence, every presumption is in favor of the soundness of that conclusion. The whole fabric of our judicial system is grounded on the idea that jurors are better judges of the facts than the judges. By the constitution of the United States, and by the constitutions of all the states of the Union, juries are made the judges of the facts in all common-law actions. These constitutional provisions are founded on centuries of experience, and every day's practice confirms their wisdom. It may be said of our constitutional provisions on the subject of juries, as it has been said of the British constitution, that juries "are, as it were, incorporated with our constitution, being the most valuable part of it." Jac. Law Dict. tit. "Jury."

It was because the people thought the judges were poor judges of the facts that they committed their decision to a jury. Undoubtedly juries sometimes err in deciding the facts, but their errors are trifling in number and extent compared with the errors of the judges in deciding the law. The numerous appellate courts of the country are engaged principally in correcting their own and the errors of other courts on questions of law. The mistakes of juries take up very little space, comparatively, in the enormous volume of law reports with which the country is being deluged. In their deliberations upon the facts of the case they are at liberty to exercise their common sense and practical experience and knowledge of human affairs, untrammelled by the excessive subtilty, overrefinement, and the hair-splitting of the school men which have crept into the administration of the law by the courts to such an extent as to sometimes bring it into reproach. It is not by such modes of reasoning that the soundness of a verdict of a jury is to be tested. It is not, there-

fore, any ground for disturbing the verdict of a jury that the court would not have rendered such a verdict. It must appear that all reasonable men would agree that it was not supported by the evidence, and should be annulled. The constitutional right of the citizen to have the facts of his case tried by a jury must not be encroached upon by the courts, under any pretext. "It is of the greatest consequence," said Lord Hardwick, "to the law of England, and to the subject, that these powers of the judge and jury be kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded it will prove the confusion and destruction of the law of England." *Rex v. Poole*, Cas. t. Hardw. 28. It is of equal consequence to the laws of this country and its people that the separate powers of the judge and jury be sedulously maintained.

The court charged the jury that it was the duty of the engineer to keep a lookout for stock upon the track. The correctness of this charge is no longer an open question in this court. *Railway Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, 49 Fed. Rep. 347; *Railway Co. v. Johnson*, 54 Fed. Rep. 474.

The judgment of the court below is affirmed.

GULF, C. & S. F. RY. CO. v. WALLACE.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 146.

In Error to the United States Court in the Indian Territory. Affirmed.

E. D. Kenna, J. W. Terry, and C. L. Jackson, for plaintiff in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge. This action was commenced by J. M. Wallace, the defendant in error, against the Gulf, Colorado & Santa Fe Railway Company, the plaintiff in error, before a United States commissioner, in the Indian Territory, to recover the value of a colt alleged to have been killed by the negligent operation of the defendant's trains. The plaintiff recovered a judgment before the commissioner, and the railway company appealed the case to the United States court for the territory, where the case was tried de novo, and a judgment rendered for the plaintiff, and the defendant sued out this writ of error. The only error assigned, not disposed of by numerous decisions of this court, is this one: That the court refused at the close of the whole evidence to instruct the jury to return a verdict for the defendant. We have read the evidence very carefully, and think the court below rightfully refused to give the instruction prayed for. *Railway Co. v. Ellis*, 54 Fed. Rep. 481.

The judgment of the court below is therefore affirmed.

GULF, C. & S. F. RY. CO. v. SEIFRED.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1893.)

No. 151.

In Error to the United States Court in the Indian Territory. Affirmed.

E. D. Kenna, J. W. Terry, and C. L. Jackson, for plaintiff in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge. This action was commenced by W. F. Seifred, the defendant in error, against the Gulf, Colorado & Santa Fe Railway Company, plaintiff in error, before a United States commissioner, in the Indian Territory, to recover the value of four head of cattle alleged to have been killed by the negligent operation of the defendant's trains. The plaintiff recovered a judgment before the commissioner, and the railway company appealed the case to the United States court for the territory, where the case was tried de novo, and a judgment rendered for the plaintiff, and the defendant sued out this writ of error. The only error assigned, not disposed of by numerous decisions of this court, is this one: That the court refused, at the close of the whole evidence, to instruct the jury to return a verdict for the defendant. We have read the evidence very carefully, and think the court below rightfully refused to give the instruction prayed for. *Railway Co. v. Ellis*, 54 Fed. Rep. 481. The judgment of the court below is therefore affirmed.

GULF, C. & S. F. RY. CO. v. MATTHEWS.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1893.)

No. 149.

In Error to the United States Court in the Indian Territory.

Action by William M. Matthews against the Gulf, Colorado & Santa Fe Railway Company for killing stock. Judgment for plaintiff. Defendant brings error. Affirmed.

E. D. Kenna, J. W. Terry, and C. L. Jackson, for plaintiff in error.
Isaac H. Orr and H. L. Christie, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

PER CURIAM. This case was submitted without oral argument, on the assumption, no doubt, that it presents the same state of facts and the same questions of law which were considered in the cases of *Railway Co. v. Wallace*, 54 Fed. Rep. 485, and *Railway Co. v. Seifred*, Id. 485, (decided at the December term of this court, at Little Rock, Ark.) in which the same counsel were engaged. We have examined the record, and have reached the conclusion that such assumption on the part of counsel is correct, and that the judgment must be affirmed, in conformity with the opinion announced in those cases.

It is so ordered.

GULF, C. & S. F. RY. CO. v. CONLEY.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1893.)

No. 148.

In Error to the United States Court in the Indian Territory.

Action by James R. Conley against the Gulf, Colorado & Santa Fe Railway Company for killing stock. Judgment for plaintiff. Defendant brings error. Affirmed.

E. D. Kenna, J. W. Terry, and C. L. Jackson, for plaintiff in error.
Isaac H. Orr and H. L. Christie, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

PER CURIAM. This case was submitted without oral argument, on the assumption, no doubt, that it presents the same state of facts and the same questions of law which were considered in the cases of *Railway Co. v. Wal-*

lace, 54 Fed. Rep. 485, and *Railway Co. v. Selfred*, Id. 485, (decided at the December term of this court, at Little Rock, Ark.) in which the same counsel were engaged. We have examined the record, and have reached the conclusion that such assumption on the part of counsel is correct, and that the judgment must be affirmed, in conformity with the opinion announced in those cases.

It is so ordered.

FRANCIS v. HOWARD COUNTY.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1893.)

No. 93.

MUNICIPAL BONDS—OVERISSUE—INNOCENT PURCHASER—ESTOPPEL.

One who buys municipal bonds at one time in such number as to exceed in amount the limit of the issue authorized by law (being an amount capable of liquidation in a certain time, at a given rate of taxation, based on the assessment rolls) is chargeable with notice, and the municipality is not estopped to plead an overissue. 50 Fed. Rep. 44, affirmed.

In Error to the Circuit Court of the United States for the Western District of Texas.

Action by David R. Francis against Howard county, Tex., to recover upon coupons of county bonds. Judgment in part for plaintiff, and in part for defendant. See 50 Fed. Rep. 44, where a full statement of the facts and the opinion of the court will be found. Plaintiff brings error. Affirmed.

John H. Overall, for plaintiff in error.

S. H. Cowan, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. Plaintiff in error brought his action in the circuit court to recover on coupons past due on bonds issued by Howard county, state of Texas. The case is exhaustively stated in the lengthy finding of facts, and, in the view we take of the case, it is not necessary to recapitulate. The opinion of the circuit court, found in the transcript, fully considers the numerous questions of law and fact presented, and, in the conclusions reached, we find no error prejudicial to the plaintiff in error. Unquestionably the issue of bonds sued on was largely in excess of the amount which the county was authorized to issue, under the law of 1881, for the purposes therein mentioned, and it is in clear violation of the law to the extent of the overissue. The all-important question in the case is whether the county is estopped from pleading such illegality and invalidity. It is contended that the recital in each bond that "this bond is issued in accordance with the provisions of the act of the legislature of the state of Texas entitled 'An act to authorize the county commissioners' court of the several counties of this state to issue bonds for the erection of a courthouse, and to levy a tax to pay for the same,' approved February 11, 1881," is a recital of the performance of a condition precedent on the part of the county commissioners'

court, to wit, that the amount of the issue was within the limits allowed by the act of 1881, and that a purchaser of the bonds was not bound to inquire, the case being within the principles declared in *Marcy v. Oswego*, 92 U. S. 637; *School Dist. v. Stone*, 106 U. S. 183, 1 Sup. Ct. Rep. 84, and cases there cited; and, particularly, in *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. Rep. 216. In the last-mentioned case it was held: "When there is an express recital upon the face of a municipal bond that the limit of issue prescribed by the state constitution has not been passed, and the bonds themselves did not show that it had, the holder is not bound to look further." The answer to this contention of the plaintiff in error is that the recital in the bonds sued on is not a recital of facts so much as of a conclusion of law; that the bonds contain no express recital of the existence of any fact; and that a fair construction of the act of 1881 leaves the ascertainment of no fact to be found by the county commissioners' court as a condition precedent to the issue of bonds thereunder, but practically leaves the county commissioners' court and all purchasers and holders of bonds to act at their peril. All of the decisions of the supreme court of the United States from *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315, to *Sutliff v. Board*, 147 U. S. 230, 13 Sup. Ct. Rep. 318, (decided during the present term,) agree that the purchasers of bonds issued by municipalities under authority of laws which limit the amount of bonds to be issued to a certain percentage of the assessment rolls, or to a given rate of taxation, based on such rolls, are charged with notice of the assessment rolls, and of the amount of bonds which can be validly issued, based on such assessment rolls.

According to the finding of facts by the circuit court, bonds numbered from 1 to 30, being over twice the amount of bonds that the defendant county could lawfully issue under the act of 1881, were issued in bulk by the county commissioners' court of Howard county, were transferred by the treasurer of the county to Milliken & Co., who transferred them to Nelson & Noel, by whom they were transferred to the plaintiff; so that, in fact, the plaintiff and his vendors had actual notice, notwithstanding any recitals that may have been contained in the bonds themselves, that the issue of bonds was largely in excess of the amount which the defendant county could lawfully issue under the law invoked.

Considering all the undisputed facts in the present case, we are clear that the defendant county ought not to be estopped, by the recital contained in the bonds to the effect that they were issued in accordance with the provisions of the law of 1881, from pleading, as a defense to the action, the illegality and invalidity of the bonds sued on. The judgment of the circuit court is affirmed, with costs.

UNITED STATES v. SINGLETON.

(District Court, S. D. Alabama. March 7, 1892.)

1. CRIMINAL LAW—INDICTMENT FOR PERJURY—MATERIAL AVERMENTS.

An indictment for perjury must aver the facts showing the falseness of the oath and its materiality to the proceeding in which it was taken.

2. SAME—MATERIALITY FOR COURT.

In perjury, the question of materiality of the false oath is for the court, and not for the jury.

2. SAME—MATERIALITY ESSENTIAL.

An indictment for perjury, alleging the false oath to have been made in final homestead proof in stating the beginning of a party's residence to have been in a certain year, without averring also that this year was the beginning of the entry, does not show the statement to be material, and is demurrable.

Criminal Law. On demurrer to indictment for perjury in final homestead proof. Demurrer sustained.

M. D. Wickersham, U. S. Dist. Atty.

T. C. Stevens and I. M. Davison, for defendant.

TOULMIN, District Judge. The indictment charges the defendant with the commission of perjury in testifying as a witness on the proceeding for "final proof" in the homestead entry of one William A. West, on the 1st of October, 1890. In giving testimony on said proceeding it was material to show that said West had resided on or cultivated the land covered by his homestead entry for the term of five years immediately succeeding the filing of the affidavit required by law to be made by him at the time he made the entry. The indictment avers that defendant did in giving his said testimony, depose and say that William A. West settled and established a residence on said homestead land (describing it) about the year 1882, and that he cultivated about one half to one acre for five seasons or more; with the proper averments that such statements were made on oath duly administered, etc., and that they were knowingly and willfully false, etc.

To found an indictment for perjury one of the requisite circumstances is that the matter sworn to must be material to the question depending; and the materiality of the matter sworn to must be expressly averred, or it must be clearly disclosed by the facts as stated on the face of the indictment. It must clearly appear that it was material, or it must be alleged to be so; and the question of materiality is for the court. The specific statements by the defendant that the homesteader had settled and established a residence on the land about 1882, and had cultivated a small portion of it for five seasons or more, may or may not have been material. It does not appear by facts, as stated on the face of the indictment, that such matter was material, and there is no express averment that it was so. The proceeding, as I have said, was the making of "final proof" in a homestead entry, and it was material whether the homestead applicant had resided on or cultivated the land entered for the term of five years immediately succeeding the filing of the affidavit required to be made by him at the time of the entry. The indictment does not aver that the defendant made any such material statements on oath. It does not aver that he testified to any such material facts. It does not anywhere appear in the indictment that the entry was made in the year 1882. If it did, it could then be seen that the alleged false statement made by the defendant had some materiality to the question depending in the final proof proceedings. When there is a specific averment that the cultivation or residence

was at a particular time or for a particular period, it is necessary for it to appear by some other appropriate averment in the indictment that such particular time had some connection with or reference to the time required by law for such residence and cultivation. Without such appropriate averment, the materiality of the particular time of such residence and cultivation averred to have been sworn to by defendant does not appear. The point raised by the demurrer to the indictment is not whether there are material or immaterial averments in the indictment; but whether the indictment shows that the matter alleged to have been sworn to by the defendant, and on which the perjury is assigned, was material in the proceeding in which the alleged false oath was taken. My opinion is that the point is well made, and that the demurrer is good, and should be sustained. It is so ordered.

UNITED STATES v. MOCK CHEW.

(Circuit Court of Appeals, Ninth Circuit. January 30, 1893.)

No. 47.

CHINESE—CERTIFICATE—VALIDITY.

A certificate of identification given by a Chinese consul in Japan, and visaed by the vice consul general of the United States at Yokohama, is not sufficient under section 6 of the exclusion act of July 5, 1884, in the absence of evidence, other than the certificate itself, that the consul issuing it has authority from the Chinese government to do so.

Appeal from the Circuit Court of the United States for the Northern District of California.

Habeas corpus proceeding by Mock Chew, a Chinese person who was refused permission to land in the United States. The circuit court discharged the petitioner, and permitted him to land. The United States appeals. Reversed.

W. G. Witter, Asst. U. S. Atty.
Thomas D. Riordan, for appellee.

Before McKENNA, Circuit Judge, and MORROW, District Judge.

McKENNA, Circuit Judge. The appellee alleges that he is a subject of the emperor of China and that he came to the United States on the steamer Gaelic, but that the collector of the port of San Francisco denied his application to land, basing his refusal on the Chinese restriction act of May 6, 1882, and the acts amendatory thereof and supplemental thereto. Appellee, however, claims the right to land by reason of a certificate issued to him by the Chinese consul at Yokohama, Japan. The certificate, with the indorsement of G. A. Scidmore, United States vice consul general, is as follows:

"H. I. Chinese Majesty's Consulate.

"Yokohama, Japan, May 14, 1891.

"To Collectors of the Ports of the United States, and to All Others to Whom These Presents may Come, Greeting: I, the undersigned, consul of the imperial government of China at Yokohama, Japan, hereby certify that the following described person is entitled and permitted to go to and come from the United

States of America, of his own free will and accord, in accordance with the provisions of article 2 of the treaty between the United States and China, dated November 17th, 1880. In conformity with section 6 of the restriction act, as amended July 5th, 1884, and the instructions given to collectors of customs by the secretary of the treasury, dated January 14th, 1885, this certificate is issued to the following named person, and will be recognized, upon production and delivery to the customs officers at the port of arrival, as prima facie evidence of his right of entry into the United States: Destination: Chong Tai Co., No. 803 Dupont street, San Francisco. Description: Individual name, Moc Chew. Family name, Moc. Tribal name, Moc. Residence, No. 147 Yokohama. Title or official rank, —. Age, 22. Height, 5 feet 4 $\frac{3}{4}$ inches. Physical peculiarities, a long mark on the right side of neck. Occupation, (former and present,) merchant. How long pursued, 6 years. When, 1885. Where, Yokohama. Nature and character of, sundry goods. Value of, \$800,000.13. Signature of above named. [Here follows Chinese signature.] Given by the imperial government of China, and under my hand and seal of this consulate, at Yokohama, this 7th day of the 4th moon, in the 17th year of the emperor Kwang Shu.

"[Chinese signature.]

"H. I. Chinese Majesty's Consul, Lee Ju Chien.

"[Chinese consulate seal.]"

"[Vignette.]

"Chinese Emigration Certificate.

"I, vice consul general of the United States at Kanagawa, (Yokohama,) Japan, hereby certify that I have personally examined into the truth of the statements set forth in the certificate hereto attached, of Lee Ju Chien, H. I. Chinese majesty's consul at the port of Yokohama, (Kanagawa,) with respect to Moc Chew, a Chinese merchant, certifying as to his right of entry into the United States, and that, after and upon such examination, I find that the statements contained in said certificate are true, and have duly visaed and indorsed said certificate. I further certify that the said Moc Chew came personally before me, and that upon personal examination I find that he is the identical person mentioned in said certificate, and for further identification I attach hereto a photograph of the said Moc Chew. I further certify that the seal and signature of the foregoing certificate are those of Lee Ju Chien, H. I. Chinese majesty's consul at this port. Description of emigrant: Name, Moc Chew. Age, 22 years. Height, five feet four and $\frac{3}{4}$ inches. General physical features, scar on right side of neck. Former occupation, merchant. Present occupation, merchant. Place of residence, No. 147 Yokohama, Japan. In witness whereof, I hereto set my hand and seal of office at the port of Kanagawa, (Yokohama,) Japan, this 15th day of May, in the year one thousand eight hundred and ninety one.

"G. A. Scidmore,

"Vice Consul General of the United States, Kanagawa, Japan.

"[Photograph of Mock Chew stamped on certificate, with consulate seal.]

"12. No. 34. Visaed, May 15, 1891.

"G. A. Scidmore,

"U. S. Vice Consul General, Kanagawa, Japan.

"[Consulate Seal.]"

The circuit court discharged the petitioner, and permitted him to land, from which the United States appeals. The case is submitted entirely on the certificate.

Section 6 of the Chinese restriction act is as follows:

"Sec. 6. That, in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of, and be identified as so entitled by, the Chinese government, or of such other foreign government of which, at the time, such Chinese person shall be subject, in each case to be evidenced by a certificate which shall be in the English language, and shall show such permission," etc. " * * * The certificate provided for

in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be visaed by the indorsement of the diplomatic representative of the United States in the foreign country from which such certificate issues, or of the consular representatives of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate; and if he shall find, upon examination, that said or any of the statements therein contained are untrue, it shall be his duty to refuse to indorse the same. Such certificate, visaed as aforesaid, shall be *prima facie* evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted, and the facts therein stated disproved, by the United States authorities."

It is undoubtedly competent for the Chinese government to authorize its consuls to give the certificate prescribed by section 6, but there is no proof in the case that it has done so. The appellee contends that the certificate itself is evidence of authority to issue it. We do not think so. It is also contended that no point was made in the court below on the want of authority of the consul to issue the certificate, and, if such point had been made, proof of such authority could have been submitted. If such proof exist, the circuit court will no doubt hear it on the return of the case. The judgment of the circuit court is reversed, and the case remanded for further proceedings.

In re MATHESON et al.

(Circuit Court, S. D. New York. March 14, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—DYES—PRIMULINE BUFF.

Primuline buff, a compound of a preparation from quercitron or black oak bark, 80 per cent., and alizarine, a preparation from coal tar, 20 per cent., is dutiable under the tariff act of October 1, 1890, Schedule A, par. 26, (26 St. p. 567,) imposing a duty of seven eighths of a cent per pound on dyewood extracts, and not under paragraph 18, imposing a duty of 35 per cent. ad valorem on coal-tar dyes.

Appeal by the Collector of the Port of New York from a Decision of the United States Board of General Appraisers sustaining the protest of the importers, and authorizing a reliquidation accordingly. Affirmed.

Thomas Greenwood, Asst. U. S. Atty., for the collector.
Albert Comstock, for respondents.

COXE, District Judge. The opinion of the board is as follows:

"SHARPE, G. P. The merchandise consisted of an article known as primuline buff, and is subject to duty under the act of October, 1890. The assistant appraiser reported that the article was submitted to the United States chemist, who made return that it exhibited the qualifications of a coal-tar color, and it was thereupon classified for duty, under paragraph 18, as a coal-

tar color or dye, at 35 per cent. ad valorem. The appellant's claim that the merchandise is a dyewood extract, liable for duty under paragraph 26.

"We find from the evidence adduced on the hearing that primuline buff is a preparation from quercitron, which is the bark of the black oak, sometimes called 'dyers' oak,' and that it is used in tanning, and more generally in dyeing. In the latter use it imparts to calicoes and cloths shades of yellow colors. There is an admixture of alizarine in the preparation, which modifies the color, and this part comes from coal tar. The evidence showed, however, that quercitron furnishes 80 per cent. and alizarine 20 per cent. of the compound. The chief agent in the tinctorial result comes from the quercitron, which is predominant, and the effect of the alizarine is subordinate. We also find that primuline buff, at and prior to October 1, 1890, was known as a dyewood extract in the markets of the country and in the wholesale trade generally. On these findings we sustain the protest, and authorize a reliquidation accordingly."

It is thought that this decision is right and should be affirmed.

NATIONAL HARROW CO. v. HANBY.

(Circuit Court, N. D. New York. March 2, 1893.)

No. 5,973.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—SPRING-TOOTH HARROWS.

Letters patent No. 388,306, granted August 21, 1888, to Reed and Clark, for an improvement in clips for spring-tooth harrows, claimed "the combination of a harrow beam, a tooth or share, a clip channeled on the under side, and the binding bolts, substantially as set forth;" the object of the invention being to protect, by means of a front flange on the clip or washer, the bolt heads or burrs from wear. *Held* that, in view of the prior state of the art, the claim must receive a narrow construction; and it is not infringed by a harrow having but one bolt, passing through a hole in the tooth, with a recessed washer so constructed that the bolt head is protected from wear, but having no clip channeled on the under side.

2. SAME—SUIT FOR INFRINGEMENT—PATENT AS PRIMA FACIE PROOF.

In a suit for infringement, the fact that defendant's machine is patented is prima facie proof that it does not infringe. *Brown v. Selby*, 2 Biss. 457, followed.

In Equity. Suit by the National Harrow Company against James Hanby for the infringement of a patent. Bill dismissed.

Charles H. Duell, for complainant.

George B. Selden, for defendant.

COXE, District Judge. The complainant, as assignee, sues for the infringement of letters patent, No. 388,306, granted to Reed and Clark, August 21, 1888, for an improvement in clips for spring-tooth harrows. The invention is an exceedingly simple one and can be sufficiently understood by reading the claim which is as follows: "The combination of a harrow beam, a tooth or share, a clip channeled on the under side, and the binding bolts, substantially as set forth." The object of the invention is to protect, by means of a front flange on the clip or washer, the bolt heads or the burrs from wear when the harrow is in use. The defenses are want of patentable novelty and non-infringement.

Any one at all familiar with patent litigation for the last decade will recognize that a pioneer invention in "spring-tooth har-

rows" is, seemingly, out of the question. The field was crowded when these patentees entered it. The record shows that every element of the patented combination and the combination itself, considered broadly, was old at the date of the application. It further appears that the feature to which special attention is called as being "the gist of the invention," namely, the protection of the bolt heads, was also well known. In letters patent, No. 334,180, granted to Franklin J. Marshal, in 1886, for improvements in spring-tooth harrows, appears this statement: "In order to obtain a more secure hold for the said tie bolts on the frame, and guard against the wear and enlargement of the bolt holes in the frame, and at the same time protect the heads of the tie bolts from wear and abrasion incident to the dragging of the same over the soil, I place on the under side of the bottom bar a plate or washer," with concave countersinks, etc. The only distinction pointed out between the Marshal clip and the patented clip, regarding this feature, is that the former does not protect so much of the bolt head as the latter. In letters patent, No. 358,839, granted to J. Morris Childs, in 1887, for improvements in similar harrows, is the following statement: "Another important feature of this construction consists in protecting the heads of bolts, 6, 6, from wear." This is criticised only because the protecting flange is a part of the harrow frame.

It is too plain for debate that the claim, if sustained, must receive a narrow construction, and the court is clearly of the opinion that when so construed the defendant does not infringe.

The two harrows sold by the defendant were made under letters patent, No. 473,796, granted to William Strait, April 26, 1892. The fact that the defendant's harrow is patented is, *prima facie*, proof that it does not infringe. In *Brown v. Selby*, 2 Biss. 457, the court, at page 470, says:

"As has already been stated, the defendants are all claiming under patents, many of which embrace essential parts of their machines. They are, therefore, *prima facie* protected in their rights. It is true, if the plaintiff is a prior inventor and patentee, their claims, so far as they trench upon his, must yield. But all of these parties claim to be improvers of the corn planter. There are numerous patents upon different parts of the machine, and it would seem to be the duty of the court to confine each inventor to the specific parts which he invented, and to which he is fairly entitled."

See, also, *Burden v. Corning*, 2 Fish. Pat. Cas. 477, 497.

The defendant's harrow does not have the two bolts on either side of the tooth, as required by the claim. It has one bolt which passes through a hole in the tooth. It does not have a clip channeled on the under side, but it does have a recessed washer so constructed that the bolt head is protected from wear. Similar washers were well known long prior to the complainant's patent. It follows that the bill must be dismissed.

WILSON v. ANSONIA BRASS & COPPER CO.

(Circuit Court of Appeals, Second Circuit. February 7, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—LAMP BURNERS.

Letters patent No. 316,422, granted April 21, 1885, to George H. Wilson for a lamp burner, in which the alleged novelty consisted in the arrangement and number of the teeth in the wick carrier, which were located at the top and bottom edges of the carrier, holding the wick so that it could be raised equally on all sides, are void for want of invention, in view of the prior state of the art. 48 Fed. Rep. 681, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Suit by George H. Wilson against the Ansonia Brass & Copper Company for infringement of a patent. There was a decree in favor of complainant, sustaining his patent, and declaring defendant's device an infringement, (48 Fed. Rep. 681,) from which defendant appeals. Reversed.

Edwin H. Brown, for appellant.

R. H. Shannon, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The complainant claims under a patent to himself, No. 316,422, dated April 21, 1885, for a lamp burner. Its two claims are:

"(1) In a lamp burner, a wick-adjusting tube or carrier, provided with teeth projecting inwardly from the top and bottom edges thereof, substantially as described. (2) In a lamp burner, a wick-adjusting tube or carrier, I, having one or more slots, P, and provided with inwardly projecting teeth at the top and bottom, in combination with an air tube provided with one or more air inlets, G, whereby the wick is drawn upward with the carrier in the usual way, and downward positively past the air inlet or inlets, substantially as set forth."

Air inlets were old, and it was old to cut a slot in the wick raiser so as to enable it to play over the air inlets. The alleged novelty of complainant's device is wholly in the arrangement of the teeth,—the number of them and their location at the top and bottom edges of the raiser, "holding the wick so that it can be raised equally on all sides." The specification states that "wick carriers having inwardly projecting teeth at two points between the extremities" were old. The evidence as to the prior state of the art shows teeth—at the upper end, (Moeller's patent;) at the lower edge, (Morse's patent;)—extending a considerable distance downward from the upper end, (Bailey & Thayer's patent;) near the upper end, and near the lower end, with an intermediate row, (Carton's patent;) near the upper end, and near the lower end, (Brokke's patent.) Sometimes these teeth projected inwardly; sometimes outwardly. It also shows wicks sewn into holes near the bottom of the wick raiser, (Reistle's patent,) which is the method used by defendant for his lower fastening. It may be that no one prior to complainant used two rows of teeth for this purpose, located, one exactly at the top, the other exactly at the bottom;

but in the condition of the art it was no invention to thus aggregate the single rows which had been used before. *Dunbar v. Myers*, 94 U. S. 187; *Holland v. Shipley*, 127 U. S. 398, 8 Sup. Ct. Rep. 1089; *Schlicht & Field Co. v. Sherwood Letter-File Co.*, 36 Fed. Rep. 591. The decree of the circuit court is reversed, and cause remanded, with instructions to dismiss the bill.

OVERMAN v. WARWICK CYCLE MANUF'G CO.

(Circuit Court, D. Massachusetts. February 7, 1893.)

No. 2,663.

PATENTS FOR INVENTIONS—INFRINGEMENT—BICYCLE SADDLES.

Letters patent No. 331,001, granted November 24, 1885, to Albert H. Overman, for a bicycle saddle, were for a flexible suspension saddle, supported by a spring at its rear end, to which, as well as to the forward support, the saddle is detachably connected, so that "it may be removed and attached at pleasure," in order that "the saddle may be protected from rain and weather, and the bicycle dismantled against riding, with the least inconvenience." *Held* that, in view of the prior state of the art, the capacity of the saddle to be removed with ease and convenience is an essential element of the combination; and hence the patent is not infringed by a somewhat similar device, in which the saddle is removable only by the use of a degree of force that does violence to, rather than exercises a normal function of, the machine.

In Equity. Suit by Albert H. Overman against the Warwick Cycle Manufacturing Company to restrain the alleged infringement of a patent. Bill dismissed.

E. S. White, for complainant.

John L. S. Roberts, for respondent.

CARPENTER, District Judge. This is a bill in equity to restrain an alleged infringement of letters patent No. 331,001, granted November 24, 1885, to the complainant, Albert H. Overman, for saddle for velocipedes. The claims alleged to be infringed are as follows:

"(1) A flexible suspension saddle, a spring forming the rear support of the saddle, which is detachably hooked to it, and detachable connection between the saddle and its forward support, whereby the saddle may be removed and detached at pleasure, substantially as set forth. (2) A flexible suspension saddle, a U-shaped stay secured to its rear end, a spring forming the rear support of the saddle, and adapted to have the said stay detachably connected with it, and detachable connection between the forward end of the saddle and its support, whereby the saddle may be attached to and detached from its supports at pleasure, substantially as set forth. (3) A flexible suspension saddle, detachable connection between the same and its rear support, and a bifurcated hook attached to its forward end for detachable connection with its forward support, whereby the saddle may be attached to and detached from its supports at pleasure, substantially as set forth. (4) A flexible suspension saddle, a spring located under the same, and adapted to be thrown forward, and having the rear end of the saddle detachably connected with it, and detachable connection between the forward end of the saddle and its support, whereby the saddle may be attached to and detached from its supports at pleasure, substantially as set forth."

Without undertaking to foresee all the limitations which are implied in the statement that the patented saddle may be attached

and detached "at pleasure," it is at least clear, as it seems to me, that this phrase implies a saddle so constructed that the attachment and removal may, by a person familiar with the machinery, be easily and quickly removed, and that the process may be often repeated, without injury, other than ordinary wear and tear, either to the removable saddle, or to the remaining parts of the mechanism. So much seems to be implied by the statement that, by the removal of the saddle, it "may be protected from rain and weather, and the bicycle dismantled against riding, with the least inconvenience." Such protection and dismantling would be useful only when the bicycle is left in the road temporarily by the rider; and, as the necessity for so leaving the bicycle constantly occurs, it seems clear that there must be a capability for frequent attachment and removal.

The respondent claims that the patented device is shown in the patent No. 293,656, granted February 19, 1884, to James Alfred Lamplugh, and in the patent No. 294,645, granted March 4, 1884, to Freeman Lillibridge. It is true that the saddles shown in those patents are capable of removal and replacement, but the mechanism shown is evidently neither intended nor adapted for the frequent and habitual removal and replacement which is both contemplated and provided for in the Overman saddle. In truth, the Lamplugh saddle and the Lillibridge saddle are adjustable saddles, rather than removable saddles.

Having in mind the characteristic feature of the Overman patented saddle, as I have thus stated it, I turn to the device which is alleged to be an infringement. There is no drawing in the record which shows this device, and, in describing it, I therefore refer to the example of the machines made by the respondent, which is produced as an exhibit in this case. The saddle in that machine seems to me clearly within the class represented by the Lillibridge saddle, as distinguished, for the purpose of this case, from the class represented by the Overman saddle. It is, indeed, possible to detach and to reattach the saddle in the machine made and sold by the respondent. But the operation cannot be performed "at pleasure," for two reasons. In detaching the saddle, it is necessary to move it forward so as to disengage the fastening at the forward end of the saddle. Now, when the respondent's saddle is adjusted so that the leather is under a tension sufficient to support the weight of the rider, the whole mechanism is absolutely rigid, and incapable of such a forward motion as is necessary to detach the saddle, with the single exception that there is a small piece of vulcanized India rubber, by whose compression a slight forward movement is made possible. This movement can be accomplished only by great pressure, or by a sudden and heavy blow. The removal of the saddle, therefore, requires the expenditure of a degree of force which, as it seems to me, may be best described by saying that it does violence to, rather than exercises a normal function of, the mechanism. In the amount of force required, and also in the danger involved to the machine itself, the respondent's saddle falls far short of the description of the patent, which calls for a saddle which may be "removed and attached at pleasure." For the reason that the respondent is not proved to infringe, the bill must be dismissed, with costs.

WILLIAMS v. GOODYEAR METALLIC RUBBER SHOE CO.

(Circuit Court of Appeals, Second Circuit. February 7, 1893.)

PATENTS FOR INVENTIONS—NOVELTY—ARCTIC OVERSHOES.

Letters patent No. 131,201, granted September 10, 1872, to Isaac F. Williams, claimed, "as a new article of manufacture, a cloth and rubber gaiter overshoe, having a double waterproof flap composed of extensions of the vamp and quarter, folded on each side of the vamp or instep, and provided with a buckle and flap tongue, which are arranged to draw equally on each side of the quarter across the instep." *Held*, that this device differed from former manufactures solely in making the waterproof flap or gore integral with the vamp or quarter, instead of a separate piece stitched to them; and, as this change does not involve invention, the patent is invalid. 49 Fed. Rep. 245, affirmed.

Appeal from the Circuit Court of the United States for the District of Connecticut.

In Equity. Suit by Isaac F. Williams against the Goodyear Metallic Rubber Shoe Company to restrain the infringement of a patent. The circuit court dismissed the bill. 49 Fed. Rep. 245. Complainant appeals. Affirmed.

C. E. Mitchell and Mr. Thurston, for appellant.

John K. Beach and Mr. Ingersoll, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. At the close of the argument of this cause, we announced our conclusion that the patent of 1875 was invalid for want of novelty, but reserved our decision as to the validity of the other patent, (No. 131,201, dated September 10, 1872, granted to Isaac F. Williams,) and as to the other questions presented by the record which would require consideration if the patent should be sustained. We conclude, as to the patent of 1872, that there is no patentable novelty in the subject of the claim. Consequently, the other questions reserved will not need consideration. The claim of the patent is as follows:

"As a new article of manufacture, a cloth and rubber gaiter overshoe, having a double waterproof flap composed of extensions of the vamp and quarter, folded on each side of the instep, and provided with a buckle and flap tongue which are arranged to draw equally on each side of the quarter across the instep, substantially as described."

The patented shoe is an improvement on the well-known "Arctic" overshoe, one of the first examples of which appears in the patent to Thomas C. Wales of 1858. A gaiter overshoe comes well up around and above the ankle. As distinguished from the ordinary, low-cut rubber, the Arctic was a cloth and rubber gaiter overshoe constructed very much like the ordinary brogan shoe; the upper, like that of the brogan, being composed of only two portions, called the "vamp" and the "quarter;" the vamp being the forward portion, and the quarter the rear portion, of the shoe. The forward edges of the quarter overlapped the rear edges of the vamp, and at each side of the shoe the quarter had a flap extension, one of which was provided with a buckle, and the other with a tongue, to enable the shoe to be buckled over the instep, and securely

held upon the foot. When buckled, the flaps drew equally on each side of the quarter across the instep. This gaiter was not waterproof above the shoe or foot part, but from the top of the rubber foxing, which begins at a distance of about an inch from the sole, there were interstices through which water could penetrate inside; and while the overlapping of the vamp was sufficient to keep out snow, ordinarily, it did not afford a water-tight construction above the foxing. To make a water-tight connection between the quarter and the vamp, Mr. Williams, the patentee, united together, above the foxing, the vamp and the flap extension of the quarter by a flap or fold, commonly known as a "Bellows Flap." The flap is made of the same material as the vamp and quarter,—waterproof cloth,—and consists of a gore-shaped extension of the vamp, cemented at its exterior edges to the quarter flap; the apex being at the line of the foxing. When the quarter flaps are buckled, the flap folds; one part doubling over the other, and forming a hinge line from the apex upward. When they are loose, it unfolds, and thus readily admits the withdrawal or the insertion of the undershoe. These changes in the organization of the gaiter are the improvements upon the old Arctic which are the subject of the patent.

In view of the cognate use of flaps or folds in undershoes and gaiters as a means of uniting the vamp and quarter to make the gaiter water-tight, there could be no invention in using them for a like purpose in an overshoe, unless something more than the skill of the calling was necessary to adapt them to the new occasion. Mr. Williams made no changes in the Arctic itself. He located the flap at the place in the shoe most obviously adapted for the purpose; and, in making and inserting it, he did not have to encounter any difficulties arising from the nature of the material to be employed, because the rubber cloth could be cut, joined, folded, and manipulated as readily as leather or common cloth. A single reference to the prior state of the art, with which, by legal presumption, Mr. Williams must be deemed to have been familiar, will suffice to show what his departure was.

The Evory & Heston patent describes a gaiter containing a flap for the purpose of making the gaiter water-tight, which is in every respect the double flap of the present patent, except that, instead of being formed, like the latter, of one piece, integral with the vamp, and united at the exterior edges to the quarter, it is made of two pieces of leather stitched together, and stitched at the exterior edges to both the vamp and the quarter. The flap is inserted in each side of the gaiter, and in the same location as the flap of the present patent. The two pieces thus united together, and to the vamp and quarter, form, as the specification states, "a double extension gore upon each side of the shoe, which readily expands to admit the foot, and which may be folded forward over the instep, and be secured by a buckle or suitable lacing, * * * being also water-tight to the extreme top of the shoe." By incorporating this flap, made of rubber cloth, into the old Arctic shoe, locating it at the most obviously appropriate place, and just where it had been located by Evory & Heston, the overshoe would

correspond literally with that specified in the claim of the present patent. It would be a cloth and rubber gaiter overshoe, it would have a double waterproof flap composed of extensions of the vamp and quarter folded on each side of the instep, and it would be provided with a buckle and flap tongue arranged to draw equally on each side of the instep. But, although the flap would be composed of extensions of the vamp and quarter, it would not be made integral with the vamp; and upon this feature of difference is based the argument for the complainant, that Mr. Williams devised a new formation of the vamp of the Arctic shoe, and a new method of folding the same, and of combining it with the quarter. But a mere change in the form of the vamp so as to produce a gore-shaped extension above the foxing line could not require anything beyond the range of the ordinary skill of the calling. The shoemaker would only have to mark off the outlines of the old vamp upon his material, and add the outlines of the Evory & Heston gore, beginning at the foxing line. The exhibit Newark shoe is a demonstration that the insertion of the Evory & Heston flap, made of cloth and rubber, into the old Arctic, at the same point of junction between the vamp and the quarter where it is located in the Evory & Heston shoe, so reorganizes the Arctic as to produce a practically water-tight over-gaiter. The changes made by Mr. Williams did not in the least change the function or essential characteristics of any one of the old parts thus newly assembled together. No one of them performs a new office, or does its appointed work in any better way. The shoe of the patent is a less clumsy and more artistic article than the Newark shoe, and consequently it is not a matter of surprise that it is a commercially successful shoe, which has been popular with those who have wished to wear a completely water-tight shoe.

The observations made by the supreme court when the novelty of the Evory & Heston patent was before that tribunal for consideration, are appropriate to the present patent:

"The changes made in the construction of a water-tight shoe were changes of degree only, and did not involve any new principle. * * * In the construction of it, the vamp, the quarters, and the expansible gore flap were cut, somewhat differently, it is true, from like parts of the shoes constructed under the earlier patents referred to, but they subserve the same purposes. * * * We do not think there is any patentable invention in it, but, on the contrary, that it is merely a carrying forward of the original idea of the earlier patents on the same subject,—simply a change in the form and arrangement of the constituent parts of the shoe, or an improvement in degree only." *Burt v. Evory*, 10 Sup. Ct. Rep. 394, 133 U. S. 349.

We have not overlooked the testimony bearing upon the commercial success of the patented shoe, or upon the time and effort devoted by Mr. Williams in devising and perfecting his improvement. We are not convinced by it that his shoe supplied a long-felt want, which others before him had appreciated, and attempted in vain to supply, nor that his difficulties in perfecting the shoe were intrinsic ones, inherent in the character of his improvement; and we cannot doubt that if he had taken the Evory & Heston shoe, and placed it by the side of the old Arctic, at the outset of his experiments, he would not have found it difficult either to

transfer physically the flap of the one into the same location in the other, or transfer it by such modifications as he made in the vamp. The decree of the circuit court is affirmed, with costs.

ST. PAUL PLOW WORKS v. DEERE & CO.

(Circuit Court, N. D. Illinois, S. D. February 17, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—COMPOSITE HARROWS.

Letters patent No. 178,461, granted June 6, 1876, to James E. Perkinson, for an improvement in harrows, is for a harrow composed of three harrows, the center one being triangular and the others being diamond-shaped, the one the reverse of the other, and set inclined, so as to correspond to the outer beams in the center harrow; all the harrows being connected by links with an equalizing bar to which are secured the ends of a chain, having the doubletree attached to its center. The claim is for "the combination of the reversed outer harrows and the corresponding center harrow, connected by chains to the evener, having the draught applied by a chain substantially as described." *Held*, that this is a patentable combination, but, in view of the prior state of the art, the patent is not infringed by a device consisting of two similar diamond-shaped harrows, not one the reverse of the other, with a triangular harrow on the outer left-hand side, all attached by short chains or links to an equalizing bar or evener.

In Equity. Suit by the St. Paul Plow Works against Deere & Co. for infringement of a patent. Bill dismissed.

F. B. Wright, Bion A. Dodge, and P. H. Gunckle, for complainant.
John R. Bennett, for defendant.

BAKER, District Judge. The bill of complaint charges the defendant, Deere & Co., a corporation, with infringing the claim of letters patent of the United States to John E. Perkinson, June 6, 1876, No. 178,461, for "improvement in harrows," which is owned by the complainant. It prays for an injunction and damages. The answer presents, in substance, as grounds of defense, want of novelty in the alleged invention, anticipation in prior patents, and noninfringement. In the specification the invention is described as follows:

"My harrow is composed of three distinct and separate harrows, the center one of which is composed of a center beam, A, with a crossbar, B, near each end, passing through a mortise therein. These bars also pass through mortises in side beams, C, C, which are set at an angle towards both sides, as shown, and teeth, a, are passed through the beams at suitable distances apart. The side harrows are composed each of a series of parallel beams, D, connected by bars, E, passing through mortises therein; the beams being set inclined, so as to correspond with the inclination of the side beams, C, of the center harrow. Teeth, a, are also passed through the beams of the side harrows. All the harrows are connected by links, b, with an equalizing bar, G, to which the ends of a chain, d, are secured, and the doubletree is attached in the center of said chain. By means of the equalizing bar and chains, as described, the harrow will work equally as well on side hill as on level ground."

The claim is as follows:

"What I claim as new, and desire to secure by letters patent, is the combination of the reversed outer harrows, D, E, D, E, and the corresponding cen-

ter harrow, A, B, C, connected by chains, b, to the eveners, G, having the draught applied by a chain, a, substantially as described, and for the purpose set forth."

When, as in this case, the claim immediately follows the description of the invention, it may be construed in connection with the explanations given in the description; and if, as here, the claim contains words referring back to the specification, it cannot properly be construed in any other way. *Seymour v. Osborne*, 11 Wall. 516.

For the purpose of showing the prior state of the art, and that the alleged invention of Perkinson had been anticipated, 57 patents and a large number of models of simple and combination harrows were produced in evidence and exhibited on the hearing. To analyze these various patents and models and point out their elements of coincidence with or divergence from the complainant's combination would be alike tedious and unprofitable. It is sufficient to say that the center harrow in the complainant's combination is the old triangular or A-shaped drag which had been known and in familiar use long prior to his invention. The side harrows in its combination, composed of parallel beams extending from front to rear, connected by crossbars passing through mortises therein, the beams being set inclined so as to correspond with the inclination of the outer beam in the A-shaped harrow, had also been long known and used, and were familiar to the trade. The equalizing bar or eveners, the chains or links for securing harrows to the same, and the chain attached to the eveners, to which the doubletree is secured, were all old and familiar devices. The defendant had previously manufactured and introduced into extensive use combination harrows composed of two or more rhomboidal or diamond-shaped harrows identically similar to the outer harrow on the right side of the complainant's combination. In this combination harrow of the defendant, whether composed of two or more rhomboidal or diamond-shaped harrows, each section is secured to an equalizing bar or eveners by chains or links, and the doubletree to which the draught is attached is secured to the equalizing bar or eveners by a chain. In these particulars the combination harrow covered by the complainant's patent is similar to the combination harrows previously manufactured and sold by the defendant. Every element composing the complainant's combination was known in the art of manufacturing harrows, and had been in public use prior to its alleged invention.

In view of the state of the art, the complainant's combination, in my judgment, stands close upon the border line separating a patentable invention from an improvement which would be suggested by the prior state of the art to a competent and skillful mechanic familiar with the manufacture and use of harrows. *Adams v. Stamping Co.*, 141 U. S. 539, 12 Sup. Ct. Rep. 66; *Hailes v. Van Wormer*, 20 Wall. 353; *Pickering v. McCullough*, 104 U. S. 310. The complainant's combination, however, has been held to embody a patentable invention, and, with some hesitancy, I concur in that opinion. See *Howard v. Plow Works*, 35 Fed. Rep. 743. In this case the court says:

"The patent to the latter [Perkinson] covers a combination of three harrows, the two outer ones being reversed, and being composed of parallel beams,

the center one being A-shaped, and all of the harrows being connected by links with an equalizing bar or evener, the beams of the reversed outer harrows having the same inclination as the corresponding side beam of the center harrow."

The patented improvement is a combination of old elements constituting an apparatus for effecting the result described in the specification. In such a case, to constitute an infringement, the infringing apparatus should embody all the elements, or the mechanical equivalents, of the patented invention claimed to be infringed. Such a combination ought not to be broadly construed so as to prevent others from gleanings in the same field. Intentional infringement is alleged by the complainant, and the burden is upon him to prove the allegation, as the charge imputes a wrongful act to the defendant. *Fuller v. Yentzer*, 94 U. S. 288. The equalizing bar or evener, and the method of attaching the doubletree and the three harrows in the complainant's combination to the same, involve nothing novel, either in their elements or in their combination. They had all been in use to accomplish the same purpose or result in prior combinations. The complainant's combination of three harrows, composed of a center A-shaped harrow and two outer ones, reversed, of a rhomboidal or diamond shape, one on each side of the center harrow, with their beams so inclined as to be parallel with the outer beams of the center harrow, constitutes the patentable novelty, if any, in the complainant's invention. The elements of this combination are the two outer rhomboidal or diamond-shaped harrows, the one the reverse of the other, with an A-shaped harrow placed between them, and all attached to the equalizing bar or evener by short chains or links. The defendant's combination does not contain two outer rhomboidal or diamond-shaped harrows, the one the reverse of the other; nor does it have an A-shaped harrow placed between two outer reversed rhomboidal or diamond-shaped harrows. Its combination consists of two similar rhomboidal or diamond-shaped harrows, and not one the reverse of the other, with an A-shaped harrow on their outer left-hand side, and all attached by short chains or links to an equalizing bar or evener. The outer reversed harrow on the left side of the complainant's combination, which is a material element in it, is entirely wanting in the defendant's combination. So, also, there is no A-shaped harrow placed between two outer ones in the defendant's drag. Nor is there any harrow in the defendant's combination which can be made to take the place of the outer reversed harrow on the left side of the plaintiff's combination, without taking it in pieces and reconstructing it on a different plan.

The defendant, prior to the complainant's invention, had manufactured and introduced into extensive use a combination harrow consisting of three similar rhomboidal or diamond-shaped harrows, all attached to an equalizing bar or evener by short chains or links, and having the doubletree secured to the equalizing bar or evener by a chain. The defendant's combination consists simply in detaching the outer harrow on the left side of its old combination, and in substituting therefor the old triangular or A-shaped harrow. Such a change and readjustment hardly rises to the dignity of a patent-

able invention; but, whether it does or does not, in my opinion it is not an infringement of the complainant's combination. In my opinion, the bill of complaint is without equity, and ought to be dismissed at complainant's cost; and it is so ordered.

EDISON ELECTRIC LIGHT CO. et al. v. WESTINGHOUSE ELECTRIC
& MANUFACTURING CO. et al.

(Circuit Court, W. D. Pennsylvania. February 23, 1893.)

No. 6.

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION—PROCEDURE.

By a preliminary injunction the defendants were restrained, *pendente lite*, from infringing the second claim of the patent in suit, and specifically from manufacturing incandescent electric lamps like "Exhibits 1, 2, and 3," which the courts of another circuit had held to infringe the claim. *Held*, that the court would not, at the instance of the defendants, against the objection of the plaintiff, undertake in a summary way to pass upon the question whether a new structurally differing lamp, devised by the defendants, and by them put on the market since the injunction, is an infringement, but that, unless the plaintiff moved for an attachment for a violation of the injunction, the decision of the question must await the final hearing.

In Equity. Suit by the Edison Electric Light Company and others against the Westinghouse Electric & Manufacturing Company and others. On motion to discharge defendants' rule to show cause. Motion granted.

Grosvenor P. Lowry, R. N. Dyer, and Knox & Reed, for the motion.
George H. Christy and Kerr & Curtis, opposed.

ACHESON, Circuit Judge. The preliminary injunction issued in this case on December 27, 1892, restrains the defendants, *pendente lite*, from infringing the second claim of the letters patent in suit, No. 223,898, granted to Thomas A. Edison January 27, 1880, and particularly from making, using, or selling incandescent electric lamps of the kind described in the plaintiff's moving papers, designated "Exhibits Nos. 1, 2, and 3," and shown to be the same as lamps which had been adjudged to infringe the second claim of said patent, and the manufacture and sale of which were enjoined by the United States circuit court for the southern district of New York and the United States circuit court of appeals for the second circuit in the suits of Edison Electric Light Co. v. United States Electric Lighting Co., 47 Fed. Rep. 454, and 52 Fed. Rep. 300, 3 C. C. A. 83, and Edison Electric Light Co. v. Sawyer-Man Electric Co., 53 Fed. Rep. 592. In view of the decisions of the courts of the second circuit above cited, our order for a preliminary injunction was made, the defendants, indeed, not resisting the granting of the same. But on February 1, 1893, the defendants presented to the court an affidavit setting forth that shortly after the allowance of the injunction they completed arrangements (contemplated and in progress before) for the manufacture and sale of "a stopper lamp," which, they had been advised by counsel, was entirely outside the scope of the claims

of the patent in suit, and that, acting under advice of counsel, they had put such lamps upon the market about the middle of the preceding January, and that at the same time they furnished to the plaintiffs' counsel specimens of the lamp, with information of what they had done; and that they had been notified by the plaintiffs' counsel that they regarded the new lamps as an infringement and a violation of the injunction. Thereupon the defendants obtained a rule upon the plaintiffs to show cause why the injunction should not be so construed, or, if need be, restated, as to leave the defendants free to make, use, and sell these stopper lamps. The plaintiff has moved the court to revoke this rule, and we have heard the counsel of both parties upon the motion. And now, upon reflection, we are of opinion that the plaintiffs' motion should be sustained, for reasons which we will briefly express.

While we are quite prepared to accept the defendants' course in taking this rule as evidence of their good faith to the court, and as indicating a purpose to avoid even the appearance of any willful disobedience to our writ of injunction, yet, under all the circumstances, we think it would be going too far, at their instance and in this summary way, to enter upon the consideration of the question whether the lamp now submitted to us infringes the patent in suit. This lamp was not before the courts of the second circuit, and the question of infringement involved in this rule is entirely new. Undoubtedly there is a marked difference of structure between this stopper lamp and lamps such as Exhibits Nos. 1, 2, and 3, which we have specifically enjoined, but enough appears to satisfy us that the question of infringement cannot be determined safely upon a mere inspection of the lamp. No investigation would be complete without the aid of expert testimony and evidence touching the art of electric lighting in its earlier stages. But *ex parte* affidavits upon these subjects (and this rule contemplates nothing more) would be most unsatisfactory. Moreover, should the rule go to hearing on the merits, the action of the court thereon would be inconclusive.

But, furthermore, if the question whether the defendants' stopper lamp infringes the second claim of the patent in suit can properly be considered at all upon a mere rule to show cause, the party invoking the rule, we think, should be the plaintiffs, to whom it is, of course, open to apply for an attachment against the defendants for the alleged violation of our injunction. In the absence of such an application by the plaintiffs, the consideration of this question must await the final hearing. Then we may be called on regularly and properly to decide the question, for clearly the relief obtainable under the present bill is not limited, as respects either an injunction or an account, to infringing lamps made before the institution of the suit, but equally embraces those made afterwards, although structurally different from the former ones. *Story, Eq. Pl. § 352; Knox v. Mining Co., 6 Sawy. 430; Rubber Co. v. Goodyear, 9 Wall. 788.*

The rule to show cause, granted February 1, 1893, will therefore be discharged, but without prejudice to the defendants' right to set up in their answer the matters upon which said rule was founded; and it is so ordered.

STUTZ v. ROBSON et al.

(Circuit Court, W. D. Pennsylvania. February 13, 1893.)

No. 4.

1. PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIMS—INFRINGEMENT—COAL-WASHING MACHINES.

If claim 3 of reissue patent No. 9,011, granted to Sebastian Stutz, for improvements in coal-washing machines, namely, "the chambers, A, A, having sieves, s, s, inclined ways, C, C, leading into the central chamber, L, and the valve passages, e, e, as set forth," can be sustained at all, it must be narrowly construed, and therefore a coal-receiving chamber located in front of the washer boxes and six feet distant therefrom is not the "central chamber" of the claim.

2. SAME—ANTICIPATION.

The defense of anticipation to claims 2 and 3 of patent No. 194,059, for improvements in coal washers, granted to same patentee, sustained.

3. SAME.

There is no invention in changing the location of a sulphur outlet or the location of a drying screen in a coal-washing machine, where there is no change of function or increased efficiency.

In Equity. Suit by Sebastian Stutz against Robson & Son and others for infringement of a patent. Bill dismissed.

William L. Pierce, for plaintiff.

W. Bakewell & Sons, for defendant.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. This suit is upon two letters patent for improvements in coal-washing machines granted to the plaintiff, Sebastian Stutz, viz. reissue No. 9,011, dated December 30, 1879, and No. 194,059, dated August 14, 1877. The defendants are charged with the infringement of the third claim of reissue No. 9,011, which is as follows: "3. The chambers, A, A, having sieves, s, s, inclined ways, C, C, leading into the central chamber, L, and the valve passages, e, e, as set forth." The coal-washing apparatus shown comprises three contiguous compartments or chambers, of which the two outer ones, A, A, are separators or washer boxes, each provided with a sieve, s, and a slate outlet, e, controlled by a valve; while directly between the two washer boxes, and in actual contact therewith, is located the third compartment, L, into which the washed coal and water are delivered from each washer box by an inclined plane or way, C. The central chamber, L, is divided into two parts, L and L', and the water flows through an opening in the dividing partition into the part, L', and thence into the washer boxes, thus traveling in a circuit, and is used over and over again.

Now, the proofs show that, before the plaintiff made his inventions, coal-washing machines of the same general type as his were in use at the coke works of Carnegie Bros. at Larimer, Pa., at the works of Jones & Laughlins, in Pittsburgh, and at the works of the Mansfield Coal & Lime Company, at North Mansfield, Pa.; and these prior machines, respectively, had in combination all the elements mentioned in claim No. 3 of the reissue, namely, the

washer boxes with sieves, slate-discharge passages operated by valves, inclined ways for the coal and water, and a settling tank or receiving chamber; the only difference being that, whereas in the plaintiff's machine the chamber, L, is between and immediately adjacent to the two washer boxes, in the prior machines the settling tank or receiving chamber was in front of the washer boxes,—in the Larimer machine immediately in front and close thereto, so that the coal and water passing over an incline were delivered directly into the chamber; while in the other two cases the receiving chamber was somewhat further removed, the washed coal being discharged therein over a screen, so as to drain the coal as much as possible. It is clear that the only feature of novelty in claim No. 3 of the reissue is the location of the receiving chamber between the washer boxes. If, then, the claim under consideration can be sustained at all, it must be interpreted very narrowly. In view of the designation "central chamber, L," it is difficult to see how the claim can be construed otherwise than as limited to a receiving chamber located between the separators or washer boxes; but, assuredly, the central chamber of the claim cannot be a tank or chamber located in front of the washer boxes and away therefrom. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274; *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. Rep. 72. Indeed, an interpretation which would include a receiving chamber not directly connected with the washer boxes, but separated and distant therefrom, is excluded by the prior state of the art. *Roller-Mill Co. v. Walker*, 138 U. S. 124, 133, 11 Sup. Ct. Rep. 292. Now, the receiving chamber of the defendants' machine is not located between the washer boxes, but is situated in front of them, and not less than six feet distant. It is not, therefore, a "central chamber," within the true meaning of the claim. Moreover, it is noteworthy (*Rowell v. Lindsay*, 113 U. S. 103, 5 Sup. Ct. Rep. 507) that the defendants' apparatus does not possess the distinguishing function of the plaintiff's combination whereby the water is saved and used over and over again. Waiving the question of patentability, our conclusion is that there is no infringement of this claim by the defendants.

The defendants are charged with the infringement of claims 2 and 3 of the other patent, No. 194,059, namely:

"(2) The boxes, A, B, provided with the curved partition, M, and the outlet, o, substantially as described, for the purpose specified. (3) The combination of the stationary sieve, S, and water chamber, A, with the dam, n, passage, F, and dry screen, f, and with the passages, h, g², and, g, g', substantially as described."

The box, A, of the second claim is the "separator box," and it is provided with a sieve, S, upon which is placed the layer of crushed coal which is to be washed. In the box, B, a box-shaped piston works, and thereby a current of water is forced up against the coal. The curved partition, M, is at the bottom of the separator box, A, and upon it fall the sulphur and other fine matter dropping through the sieve as the coal is moved and lifted by the action of the water. The function of the curved partition is stated to be "greater convenience of cleaning out that part of the box

from fine sulphur and slate, the mud sliding down more easily to the opening, o, where its outlet is effected automatically;" that is, upon moving a valve or lifting a gate which closes the hole, o.

Anticipation of this claim is clearly shown. The coal-washing machine of Jones & Laughlins and at Mansfield, respectively, had a plunger box and a washer box equipped with a sieve, and having a curved bottom, shaped like a half circle, in the lowest part of which was a sulphur outlet, operated by a valve for the periodical discharge of the sulphur and other fine particles. True, in the plaintiff's machine the curvature is only in the front part, and the opening for the discharge of sulphur is at the opposite side of the machine, the sulphur passing out through the space under the plunger. These differences, however, do not amount to invention. The function of the sulphur outlet is the same whether located at the one place or the other. The plaintiff, indeed, testifies that his machine possesses a special advantage, in that his curved partition, M, leads into a chamber beneath the plunger, which acts as a receptacle for the sulphur, which thus is prevented from mixing with the clean water during the agitation of the latter; but there is no hint in the specification of any such advantage or function, and the plaintiff cannot read into his claim a sulphur deposit chamber. *Western Electric Manuf'g Co. v. Ansonia Brass, etc., Co.*, 114 U. S. 452, 5 Sup. Ct. Rep. 941; *Howe Mach. Co. v. National Needle Co.*, 134 U. S. 394, 395, 10 Sup. Ct. Rep. 570. Besides, according to the weight of evidence, the asserted advantage has no real existence. Moreover, the coal-washing machine at Larimer had an inclined bottom, down which the sulphur slid to the sulphur outlet at the extreme bottom part of the box. This construction is also shown in the prior patent granted to George Lauder on May 30, 1871. It is to be added that, in point of fact, the defendants do not use a curved bottom, but an inclined one. The defendants' structure, too, otherwise differs from the plaintiff's specific form. But this line of discussion we will not further pursue, for it is enough to say that, in our judgment, this claim is altogether destitute of patentable novelty.

The third claim of patent No. 194,059 was before this court in the case of *Stutz v. Armstrong*, 20 Fed. Rep. 843, and was sustained, with certain other claims; but the contest there was mainly over the other claims, as the latter embodied the really meritorious and novel features of the plaintiff's apparatus. Touching this particular claim the proofs were scanty and incomplete; but here they are full, and such as to compel us to hold that the defense of anticipation is made out. It is now conclusively shown that the prior machines of Jones & Laughlins and at Mansfield contained all the elements of this third claim, performing severally the same identical functions, and combined in substantially the same way, for the same purpose, and with the same result. The single difference is in the location of the "dry screen, f," in the chute connecting the washer boxes and the "elevator boot" into which the washed coal is delivered. The function of the screen, as is stated in the specification, is "to separate the water from the delivered material before the latter has reached the elevator

buckets." In the plaintiff's patent this drying screen is placed immediately in front of the washers, whereas in the prior machines referred to it was placed further in advance,—nearer to the elevator. But, whether in the one place or the other, the screen performs the same function with equal efficiency. Certainly the change made by the plaintiff in the position of the screen, even if it secured a better result, was a matter simply of good judgment, not involving invention; but, in fact, the change was of no advantage.

Let a decree be drawn dismissing the bill, with costs.

BUFFINGTON, District Judge, concurs.

PALMER et al. v. McDERMAID.

(Circuit Court of Appeals, Seventh Circuit. February 11, 1893.)

No. 59.

PATENTS FOR INVENTIONS—NOVELTY—CHURNS.

Letters patent No. 378,144, issued February 21, 1888, and Nos. 418,355 and 518,356, issued December 31, 1889, to Samuel D. Palmer, for devices for securing the lid of end over end revolving barrel churns, consisting of the combination, with a churn having bails, of a removable head, and a cam to engage the free portion of the bails, and means for operating the cam, are void for want of novelty, having been anticipated by letters patent issued July 5, 1881, to William Dobson.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

In Equity. Suit by Henry H. Palmer, George E. King, and Samuel D. Palmer against John McDermaid to restrain the alleged infringement of certain patents. Defendant obtained a decree. Complainants appeal.

The following opinion was delivered in the circuit court, May 2, 1892, by Judge BLODGETT:

"In this case defendant is charged with the infringement of patent No. 378,144, granted February 21, 1888, to Samuel D. Palmer, for a 'churn,' and patents Nos. 418,355 and 518,356, granted December 31, 1889, to Samuel D. Palmer, for a 'churn.' All these patents relate to devices for securing the lid of end over end revolving barrel churns. Patent No. 378,144 shows a ring head, preferably of metal, inserted in the croze or open end of the churn, and extending inwardly, say a couple of inches, more or less,—enough to form a seat for the lid. On this ring head are four uprising ears, to which two bails are pivoted in such a way that these bails may be used to handle the churn, and are also adapted to be used as levers to press upon the lid, and hold it closely upon its seating on the ring head, so as to close the churn; these bails acting as levers, and when turned inwardly, towards the center of the lid, are fastened so as to hold the lid firmly in place. Infringement is charged of the first claim of this patent, which is: '(1) The combination, with a churn having bails pivoted thereto, of a removable head, and a cam secured to the said head to engage the free portions of the bails, substantially as set forth.' Patent No. 418,355 is, in its general characteristics, as the preceding one, except that it shows the ears attached to the body of the churn, outside of the ring head, and a device for locking the bails in place after they have been turned over the lid to act as levers to hold it closed; and infringement is charged of the second claim of this patent, which is: '(2) The combination of a churn body having a pair of bails pivoted thereto, a ring head, a removable head, a cam secured to the removable head to engage the free por-

tion of the balls, and means for operating the cam, substantially as set forth.' Patent No. 418,356 shows a churn in which the staves of the open end are cut off square, or at right angles with lengthwise axis of the churn; a removable lid, mainly of wood, encircled with the metallic ring surrounding its periphery and a portion of its top; a portion of the outer periphery of the under side of the lid cut away, and filled with cork packing; ears fastened to the body of the churn, with the lower parts of such ears so twisted as to conform to the body of the churn, and the upper part so twisted as to bring the holes of the bail in line with the bail, or in a chord across the periphery of the lid; balls adapted to act as levers to hold the lid in the closed position; a bolt passing up through the center of the lid, on which a cam turns to lock the balls, when it is desired to do so, for the purpose of holding the lid firmly in place. Infringement is charged of the third, fourth, fifth, sixth, seventh, eighth, and ninth claims of this patent, which are: (3) The combination of a removable head, a churn body, two pairs of ears secured to the churn body, and provided with bail holes, arranged at an oblique angle to the base portion of the ears, and a pair of balls pivoted to the upper portion of the ears, and engaging the removable head, substantially as set forth. (4) The combination of a removable head, a churn body, two pairs of ears secured to the churn body, the upper portion of the ears formed at an angle to the base portion, and a pair of balls pivoted to said upper portion, and engaging the removable head, thereby holding it in position, substantially as set forth. (5) The combination of a removable head, a churn body, two pairs of ears secured to the churn body, the upper portion of the ears formed at an angle to the base portion, a pair of balls pivoted to the said upper portion, and engaging the removable head, and a fastening for the balls, substantially as set forth. (6) The combination of a removable head, a fastening on the removable head, a churn body, two pairs of ears, each ear being secured to the churn body by a fastening passing radially through the churn body and ear, the upper portion of the ears formed at an angle to the base portion, and a pair of balls pivoted to said upper portion, and engaging the fastening, thereby holding the removable head in position, substantially as set forth. (7) The combination of a churn body, a pair of balls pivoted thereto, a removable head, and a cam secured to the removable head to engage the free portion of the balls, substantially as set forth. (8) The combination of a churn body, two pairs of ears secured thereto, a pair of balls pivoted to the ears, a removable head, a cam located on a removable head to engage the free portion of the balls, and means for operating the cam, substantially as set forth. (9) The combination of a churn body, a pair of balls pivoted thereto, a removable head, a cam located on the removable head to engage the free portion of the balls, said cam being provided with a lever projection or projections to form means for operating the cam, substantially as set forth.'

"The defenses of noninfringement and want of patentable novelty were both relied upon, but I care only to consider the latter.

"The patent of July 5, 1881, to William Dobson, which is in evidence, shows all the features of the complainants' patent 378,144. We there see the ring head with the four ears, the two balls swinging in these ears, and so arranged as to act as levers to hold the lid in place when the churn is closed, and a rotating cam in the center of the lid to engage with these balls to press or hold the lid firmly in place. Patent No. 418,355 does not differ from the Dobson device in any essential particular, except that the ears are to be fastened to the body of the churn, instead of the ring head, and minute directions are given for making a cam fastener to hold the balls in place when they act as levers to fasten down the lid. And I say, unhesitatingly, that these features do not rise to the dignity of invention, but involve the simplest order of mechanical skill. If, for any reason, it was deemed desirable to put the ears on the body of the churn, instead of the ring head, any mechanic could have done so.

"The same may be said of patent No. 418,356, which is but a reproduction of the Dobson patent and of complainants' patent 418,355, so far as ears, balls, and cams are concerned; and there was surely no inventive ability required to cut the open end of the churn off square, and fit the lid upon it,

using the Dobson balls to hold it in place, and the cork packing to make a tight joint. The cam of this patent is but a reproduction of the Dobson cam, so far as I can see from the drawings, except that the cam face may be a little more inclined,—a little more ‘cammy,’ if I may coin a word to describe the difference. But the question of too much cam, or whether any cam is necessary, depends largely upon the shape given the balls. If the arch of the ball is high, it is obvious that when it is placed in an inclined position, as it must be to lock the lid closely, the ball itself will furnish cam enough, so that a straight button might only be required to press home the lid. If the ball arch is low, then some cam shape should be given the button to secure the requisite amount of pressure to the lid.

“With all due respect to the patent office, I must say that it seems to me all these patents in suit, as well as others in this record, were very improvidently issued. They may cover improvements in this class of churns, but all improvements do not involve or imply invention. These patents are void for want of novelty, and the suit is dismissed for want of equity.”

Banning & Banning & Payson, for appellants.

L. L. Morrison, for appellee.

Before GRESHAM and WOODS, Circuit Judges, and BUNN, District Judge.

PER CURIAM. The decree appealed from is affirmed upon the grounds stated in the opinion of the court below.

HOLLOWAY v. DOW et al.

(Circuit Court, D. Indiana. March 13, 1893.)

No. 8,497.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—OFFSETTING LOG CARRIAGES.

In letters patent No. 279,537, granted June 19, 1883, to Carter & Seeley, for an offsetting log carriage for sawmills, whose object was to prevent the cut surface of the log from coming in contact with the saw during the backward motion of the carriage, claims 1 and 2 were for a carrying frame, slightly narrower than the trucks on which it was mounted, and adapted to slide transversely on their axles, with a draft beam, to which was attached the mechanism for moving the carriage longitudinally towards the saw in the operation of cutting, such beam being adapted to have a slight longitudinal movement in relation to the carriage, and being so connected by links with the carrying frame that this motion would produce the transverse motion of the carrying frame on the axles. *Held*, that these claims are not infringed by a carriage in which the transverse motion is produced by the action of spiral cam plates carried by a swinging arm actuated by the rotation of the axles of the trucks.

2. SAME—ANTICIPATION.

Claim 3 of this patent was as follows: “In a sawmill, the combination with a saw, a fixed track by the side of the saw, and a series of trucks, or their equivalent, adapted to move along said track, and occupying a fixed position transversely thereon, of a frame adapted to support a log mounted on said trucks, and adapted to have a transverse movement thereon.” *Held*, that this was not anticipated by the Fox patent No. 271, reissue of No. 10,888 of 1854, or No. 60,648 of 1866, to Stearns, in both of which the offset was of the whole carriage by means of the leverage of grooved wheels, mounted obliquely, against the rails, neither being capable of such lateral motion except when the carriage was in motion longitudinally, especially as both machines were uncertain in their operation, and never came into general use.

8. SAME—CONSTRUCTION OF CLAIM—INFRINGEMENT.

This claim is complete in itself, and covers a combination adapted to operate in offsetting and inseting whenever power is properly applied to give it motion; and hence it is infringed by a similar combination of frame and trucks, to which the power is applied, not by the draft beam of the first two claims, but by a swinging arm, operated by the rotation of the axles.

In Equity. Suit by Lewis W. Holloway against Thomas Dow and William P. Brown for infringement of a patent. Decree for complainant.

V. H. Lockwood, for complainant.
Coburn & Thacher, for defendants.

BAKER, District Judge. The bill in this case is filed by the complainant to obtain relief for an alleged infringement of letters patent No. 279,537, granted to James F. Carter and Thomas Seeley, June 19, 1883, to which the complainant deraigns title by deed of assignment bearing date May 1, 1889. The invention relates to an offsetting log carriage in sawmills. The defenses are want of novelty, incomplete combination, and noninfringement. The nature and object of the invention are set forth in the specifications as follows:

"Our invention relates to an improvement in the log carriage of a sawmill, and its object is to prevent the cut surface of the log from coming in contact with the side of the saw during the backward movement of the carriage. This object we attain by causing the carriage, with the log upon it, to have a slight transverse movement, as hereinafter fully explained. * * * A rectangular frame, a, adapted to receive and carry on its upper surface any ordinary style of head blocks, has on its under surface suitable bearings, which rest on the axles, b, b, of the trucks, c, c. The flanges of the truck fit nicely between the rails of the carriage way in the usual manner. The space between the trucks forming each pair is longer than the width of the carriage frame, a, and said frame is free to slide in the direction of its width upon the axles connecting said trucks. A beam, d, extends lengthwise beneath frame, a, having slots, e, through which the axles, b, pass, and notches, f, f, on the upper surface, through which the cross timbers of frame, a, pass. To the beam, d, the feed mechanism is connected for moving the carriage in the direction of its length towards and from the saw. Any suitable mechanism may be used for this purpose. We have here shown the ordinary rack and pinion, h, i. Beam, d, is not rigidly secured to the carriage frame, as is the case with the usual rack beam, but it rests on the axles, b, between the collars, j, j, a pair of which are rigidly secured to each of the said axles, the faces of the collars resting against suitable friction plates on the sides of beam, d, the effect being to prevent all lateral motion of the beam on the axle. Frame, a, is connected at intervals with beam, d, by links, l, l, of which there may be two or more, each of which is pivoted at one end to the frame and at the other end to the beam."

The specifications then proceed to describe, by reference to the accompanying drawings, the operation of their invention. The claims, so far as material to this controversy, are the following:

"(1) In a sawmill, a log carriage, consisting of a series of trucks; a frame mounted on said trucks, and adapted to move transversely thereon, and to support a log; a draft beam, adapted to move longitudinally in relation to said frame at each forward and backward movement thereof; and means for connecting said draft beam with the trucks and with the frame, whereby the frame is moved transversely by the longitudinal movement of the draft beam, substantially as shown and described. (2) The combination, with a

log carriage in a sawmill, of a draft beam mounted therewith, and adapted to have a limited longitudinal movement in relation thereto at each forward and backward movement thereof, substantially as and for the purpose specified. (3) In a sawmill, the combination, with a saw, a fixed track by the side thereof, and a series of trucks, or their equivalent, adapted to move along said track, and occupying a fixed position transversely thereon, of a frame adapted to support a log mounted on said trucks, or their equivalent, and adapted to have a transverse movement thereon, substantially as and for the purpose set forth."

These claims cover two distinct features of the log carriage described. The third covers a frame adapted to support a log mounted on a series of trucks, or their equivalent, having axles slightly longer than the width of the frame, adapted to move along a track by the side of the saw, and occupying a fixed position transversely on the track, the frame being adapted to have a transverse movement on the trucks without the movement of the carriage. The second covers the mechanism to effect the transverse movement of the frame of the carriage, and the first embraces these two features in combination.

The defendants admit the validity of the first and second claims, but insist that they do not infringe them, because the transverse movement of the frame on their log carriage is not effected by applying the feed which moves the carriage directly to an independent longitudinal, reciprocating, offsetting beam, which these claims call for. In the complainant's device the longitudinal movement of the draft beam is converted into transverse power for the offsetting and inseting the frame by means of two or more links pivoted at one end to the frame and at the other end to the draft beam, which is adapted to move longitudinally in relation to the frame at each forward and backward movement thereof, whereby the frame is moved transversely by the longitudinal movement of the draft beam. In the defendants' mechanism the transverse movement of the frame is effected by a swinging arm, mounted loosely on the axles between two friction clutch collars fastened on the latter, so that ordinarily this friction clutch will turn the arm with the axle. At the upper end of this arm there is a pair of cam plates of spiral form, and a fixed pin depending from the frame passes in between these two cams. The turning of the cam arm by the revolution of the axle through the friction clutches moves the cams along the fixed pins on the frame, and this movement slides the frame transversely on the axles until the turning of the cam arm is stopped. Stops are fixed on the carriage frame on each side of the axles, and the upper end of the cam arm strikes one or the other of these stops, and thereby its further rotation with the axle is arrested, while the rotation of the axle continues, the friction clutches between the arm and the axle permitting this movement. The range of this swinging movement of the cam arm is about a quarter turn, so that the arm is free to move with the axle in both directions about a quarter of a circle. In the defendants' carriage the lateral movement of the frame is effected by the revolution of the axles and truck wheels while moving along the track. There is no possible way of shifting the frame unless the axles and truck wheels revolve. The defendants' offsetting device can operate only with the movement of the carriage along the tracks,

due to the revolution of the wheels in one direction or the other. It has no feed or draft bar, and the draft or feed mechanism is connected directly to the carriage frame, and not to that which shifts the frame transversely. It seems to me that the offsetting mechanism in the two carriages does not operate upon the same principle, and is substantially dissimilar. While each accomplishes substantially the same result, the mechanism to effect it is so unlike that the one cannot be said to be the equivalent of the other. The defendants' device does not produce the same result as the plaintiff's by the same principle or mode of operation. The defendants do not deny their use of the mechanism described in the third claim of complainant's patent. They seek, however, to escape liability upon several grounds going to the validity and construction of the claim.

They earnestly contend that the third claim is void in view of the prior state of the art, and that it was anticipated by the prior patents of Fox and Stearns. They also insist that it is void, because it fails to describe a complete operative mechanism. And they further contend, if the third claim is valid, it must have read into it the identical means of offsetting the frame shown and described in the patent, and hence that this claim, thus construed, covers the same combination described in claim 1, and is not infringed, for the same reason that claim 1 is not infringed. The patent, with each of its claims, is *prima facie* valid. It is a solemn grant, issued by competent authority under the sanction of law. It is a muniment of title. He who would overcome it must do so by clear and convincing evidence. The court, in *Coffin v. Ogden*, 18 Wall. 120, on page 124, says:

"The invention or discovery relied upon as a defense must have been complete, and capable of producing the same result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him."

"The grant of the letters patent is *prima facie* evidence that the patentee is the first inventor of the device described in the letters patent, and of its novelty. *Smith v. Vulcanite Co.*, 93 U. S. 486; *Lehnbeuter v. Holthaus*, 105 U. S. 94. Not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that every reasonable doubt should be resolved against him." *Cantrell v. Walllck*, 117 U. S. 689, 6 Sup. Ct. Rep. 970.

It is thoroughly settled that practically useless and inoperative devices do not anticipate or invalidate a subsequent patent for a successful device. A prior device, which will not satisfactorily perform the work of the patented device, is not a substantial anticipation of the patent.

While a number of patents were in evidence and called to the attention of the court to show the prior state of the art, only two were claimed to anticipate the complainant's invention. These are the Fox patent, No. 271, reissue of No. 10,888 of 1854, and the Stearns patent, No. 60,648 of 1866.

The Fox device was the first offsetting log carriage. It consists of a frame mounted on stub-axled wheels, which on one side of the carriage run on an inverted V-shaped rail and on the other side on a flat rail. Its construction and principle of operation are described in the patent as follows:

"The journals of the wheels, B, are set in the box, C, (shown in Fig. 5 and Fig. 6,) and as they move forward they move up the inclined plane, f, and set the carriage up for the cut, while on the return for giggering back the journals run into the opposite extremity of the boxes, and, pressing against the inclined plane, f, move the carriage sufficiently from the saw to admit of the carriage running rapidly back without interfering with the saw."

In this device the axles are stubs mounted in boxes no longer than the axles, so that in a state of rest the frame is incapable of transverse movement. The offset of this carriage is necessarily dependent upon the movement of the wheels, which causes a leverage of the wheels on the track rails. Fox did not conceive the idea embodied in the complainant's third claim, namely, of a frame so adjusted on trucks mounted on long axles as to be adapted to have a free transverse movement thereon, independently of the movement or leverage of the wheels. The Fox device necessarily required great power to effect the offset, and in the friction of the parts probably as much power was lost and wasted as was utilized. The evidence shows that it never went into practical use. While the demand for some suitable offsetting device was constant and pressing, the Fox device was wholly unfit and inadequate to meet it.

The Stearns patent was the next offsetting log carriage. It had the frame mounted on stub axles, and the inside rail was inverted V-shaped and the outside one was flat, as in the Fox patent. Its construction and operation are described in the patent as follows:

"The carriage wheels, a, a, on the outside flat track, b, are hung differently from the wheels, a, a, on the inside of track, b. The wheels, a, a, are hung on axles, c, c, placed a little out of right angles with the slide frame of the carriage, so that they are set with an inclination slightly oblique with the wheels of the right track, as shown in Fig. 3. The wheels, a, a, are run on the inside track, and are hung at right angles with the frame on axles, c, c, but the axles are shorter than the inside of the boxes in which they run, as shown in Fig. 4, allowing the wheels to shift a little from side to side. It will be observed, also, that the journals of the axle, c, c, on the wheels, a, a, on the outside flat track, fill the boxes at their end, and have no side play. By this arrangement of the wheels of the carriage it will be seen that the front and rear wheels, a, a, on the V-track can shift a little out of line with each other, while the movement is still in parallel lines, allowing the oblique wheels, a, a, on the flat track to incline the carriage inwards towards the saw when the motion is reversed for giggering, by which the log is offset from the saw, and is relieved of friction."

It will be seen that in this device the offset is caused by allowing the wheels to shift a trifle from side to side. The front and rear wheels on the saw side of the carriage can shift a trifle out of line with each other, while their movement is still in parallel lines. Each wheel on the same side can shift differently, and every wheel in the carriage is independent of every other. In a state of rest, it is incapable of lateral movement. In the Stearns device, as well as in the Fox, the offset cannot be effected independently of the revolution of the wheels, which causes a leverage on the rails. The objections to this device are as serious as those to the Fox device. The evidence in the record shows that its defects were so great that it was used very little, if at all. It wholly failed to meet the growing demand for an effective and reliable offsetting mechanism. All the remaining patents, with a single exception, which were issued after the Stearns patent in 1866, and that to complainant's assignors in

1883, exhibit frames mounted rigidly on wheels set at a slight angle to their line of movement, causing the carriage to press towards the saw when the log is being fed, and to press from the saw when giging back. The exception was where the carriage was so constructed that the outer wheels were made to gig back on a lower track, and thus throw the surface of the log from the saw. None of these patents anticipate the combination or device described in complainant's patent, and claimed in the claim under consideration.

All the devices prior to complainant's, with the exception above noted, effected the offset by the leverage of the grooved wheels against the rails. All carriages offsetting by the leverage of the wheels caused severe pressure against the rail, which was destructive of both rail and wheel. These devices were uncertain in movement and operation. They were incapable of making a positive, quick, and uniform offset. The Fox device was also practically useless, because the weight on the stub axles would cause them to wear a seat below and at their ends in a short time. For these and other reasons none of these prior inventions were useful or practically operative, and none of them were introduced into general use. The combination covered by the third claim of complainant's patent has proved its novelty and utility by its general use in log carriages constructed during recent years. It is true that the invention involved in this claim is simple, but it is sufficient to say that the manner of combining the elements in the claim is undoubtedly novel and useful, and turned failure into success. "Under such circumstances, the courts have not been reluctant to sustain a patent of a man who has taken the final step which has turned failure into success. In the law of patents it is the last step that wins." *Washburn & Moen Manuf'g Co. v. Beat 'Em All Barbed Wire Co.*, 12 Sup. Ct. Rep. 443; *Loom Co. v. Higgins*, 105 U. S. 580.

It is insisted that the combination covered by the third claim is incomplete. It is a general rule of patent law that a subcombination, or any combination adapted to operate and produce a useful result when power is properly applied, can be secured by a separate claim or a separate patent. The power or mode of applying it is never stated unless it is peculiar. *Walker on Patent Law* (section 117) says:

"In cases when the description sets forth an entire machine, the applicant may lawfully make a claim coextensive with the description, if the machine as a whole possess novelty. But such a claim ought seldom to be the only one in a patent, because, for reasons stated in the chapter on infringement, it can, in most cases, be readily evaded. The proper practice is to fix upon the new parts or new subcombinations which the described machine contains, and to make a separate claim for each of these combinations. Indeed, the applicant may, if he will, apply for and receive a separate patent for each of those parts and combinations. In either way the rights of the inventor may be secured, because it is a rule of infringement that a patent is infringed whenever any one of its claims is violated. To secure a particular part of a machine, a claim must specify that part; and to secure a particular combination of the parts of a machine, a claim must specify all of those parts, and the description must explain their joint mode of operation, and must state their joint function. And a combination may be claimed separately, though it cannot do useful work separately from the residue of the machine or apparatus of which it forms a part."

This claim covers a distinct group of elements, adapted to operate if power is properly applied, either through the mechanism described in complainant's patent, or through any other mechanism adapted to convert longitudinal motion into transverse power. The following cases more or less directly support this view of the claim: *Machine Co. v. Murphy*, 97 U. S. 120; *Hyndman v. Roots*, Id. 224; *Bates v. Coe*, 98 U. S. 31; *Imhaeuser v. Buerk*, 101 U. S. 647; *Wicke v. Ostrum*, 103 U. S. 468; *Topliff v. Topliff*, 12 Sup. Ct. Rep. 825; *Loom Co. v. Higgins*, 105 U. S. 580; *Fuller v. Yentzer*, 94 U. S. 299; *Robertson v. Blake*, Id. 728. The combination covered by this claim is complete in itself, and is adapted to operate in offsetting and inseting whenever power is properly applied to give it motion. It is new and useful, and a distinct advance over all former devices. As such it is entitled to the favorable consideration of the court. *National Cash Reg. Co. v. American Cash Reg. Co.*, 53 Fed. Rep. 367; *Brush Electric Co. v. Electric Imp. Co.*, 52 Fed. Rep. 965. The defendants' mechanism substantially embodies the combination of elements embraced in the complainant's third claim. It is true that they employ improved mechanism for communicating a transverse movement to the frame of the carriage; still an improver cannot use the improved machine. Decree for complainant.

LALANCE & GROSJEAN MANUF'G CO. v. HABERMAN MANUF'G CO.

(Circuit Court, S. D. New York. February 10, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—METAL-SPINNING MACHINERY.

Letters patent No. 286,115, granted October 2, 1883, to Jules Chaumont for machinery for sheet-metal spinning, was for a device in which a rotating mold chuck was mounted within the vessel to be spun eccentrically on a rod holding the vessel against the head stock, which had a rim for holding such vessel, and a spinning roller mounted on a slide outside, and movable by hand screws to press the metal of the rotating blank inwardly to and along the rotating mold chuck in forming vessels with contracted mouths. *Held that*, as all the elements are old, and only the combination novel, the patent is not infringed by a device in which the rotating mold chuck is mounted separately outside the vessel, having a spinning roller within movable by hand screws to press the metal of the rotating blank outwardly against the rotating mold chuck in forming vessels with bulged sides.

In Equity. Suit by the Lalance & Grosjean Manufacturing Company against the Haberman Manufacturing Company for the infringement of a patent. Bill dismissed.

Arthur v. Briesen, for orator.

Robert N. Kenyon, for defendant.

WHEELER, District Judge. This suit is brought upon letters patent No. 286,115, dated October 2, 1883, and granted to Jules Chaumont, assignor to the orator, with four claims for machinery for sheet-metal spinning. The specification, referring to a prior application, states:

"I have shown and described a sheet-metal vessel, formed without seam by spinning, having a greater diameter at its base than at its mouth; and my

present invention relates to machinery or apparatus for producing vessels having the forms above referred to, as well as sheet-metal vessels of the ordinary character and forms."

And—

"I am aware that it is not new to spin sheet-metal vessels by revolving spinning, having a greater diameter at its base than at its mouth; and my mold chuck; but the combination of a rotary mold chuck so supported with my improved form of head stock I believe to be new, as well as the other specific combination of parts, as hereinafter claimed."

The first two claims only are involved here, which are for—

"(1) In a machine for spinning sheet-metal vessels, the combination, substantially as hereinbefore set forth, with a head stock or chuck mounted directly upon the spindle of the machine, and having a flat surface for supporting the base of the vessel, and a rim or guard laterally projecting from its periphery, of means for holding the vessel within or against said head stock, and a rotating mold chuck, mounted eccentrically with respect to the axis of the head stock. (2) In a machine for spinning sheet-metal vessels, the combination, substantially as hereinbefore set forth, with a head stock or chuck mounted directly upon the spindle of the machine, and having a flat surface for supporting the base of the vessel, and a rim or guard laterally projecting from its periphery, of means for holding the vessel within or against said head stock, a rotating mold chuck mounted eccentrically with respect to the axis of the head stock, and a roller mounted in proximity to said mold chuck and blank, whereby the contour of the blank is forced to conform to that of said mold chuck."

All parts of these combinations except the rim around the surface of the head stock are conceded to have been old, and testimony uncontradicted tends to show that to have been old. The use of this rim for holding the vessel would be so obvious that the testimony that it was so used is not incredible, but rather convincing. That it was, as a fact, seems to be well enough established. Still this particular combination appears to have been new, and, as such, patentable. Yet, in view of the concessions of the specifications, the defendant may not infringe by the use of these same parts unless they are used in precisely the same combination. *Railway Co. v. Sayles*, 97 U. S. 554. The specification shows the rotating mold chuck mounted within the vessel, eccentrically, on a rod holding the vessel against the head stock, and a spinning roller mounted on a slide outside, and movable by hand screws to press the metal of the rotating blank inwardly to and along the rotating mold chuck in forming vessels with contracted mouths. The defendant uses a concentric rod for holding the vessel against the head stock, a rotating mold chuck mounted separately outside the vessels, and a spinning roller within, movable by hand screws to press the metal of the rotating blank outwardly to and along the rotating mold chuck in forming vessels with bulged sides. The head stock is open to all, not being improved by the inventor. Instead of the eccentrically supported mold chuck within the vessel, of these claims, a separately supported mold chuck without is used. The spinning roller is within the vessel instead of without, and works in a different direction. The patented combination, which can only work inwardly, could not do the work of the defendant's machine, which can be done only by spinning outwardly. The head stock of the defendant's machine does the same thing as the head stock of these claims, and in sub-

stantially the same way; but the mold chuck and spinning roller of this machine are differently mounted, and spin differently shaped vessels from what those of the patent are, in a different way. The combination of these parts in this machine therefore appears to be different from that of either of these claims, and the machine fails to appear to infringe. Let a decree be entered dismissing the bill for want of infringement.

RIKER v. CROCKER-WHEELER MOTOR CO.

(Circuit Court, S. D. New York. February 7, 1893.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—ARMATURES.

In letters patent No. 393,266, granted to Andrew L. Riker November 1, 1888, claim 1 was for "an armature for motors or dynamos, comprising a series of flat rings having outwardly projecting teeth, composed each of two like parts, adjacent rings breaking joints, and bolts or rivets passing through the overlapping ends of adjacent half rings, so that by withdrawing said bolts or rivets the armature can be divided diametrically into two halves." *Held*, that the teeth with spaces for the coils of wire between are important, and hence this claim is not anticipated by the British patent No 1,736, of April 6, 1883, to Marcel Duprez, which has no such teeth.

2. SAME.

Nor is it anticipated by the British patent No. 3,570, of February 19, 1884, granted to John H. Greenhill, which shows projecting teeth providing spaces for coils of wire between, but not an armature which can be wound in parts, as that of Riker's patent can be.

3. SAME.

Neither of these British patents shows the series of flat, stamped-out rings, each composed of two like halves, joined at their ends, having teeth with spaces between for coils, and rivet holes opposite alternate teeth, so placed as to be reversible alternately and break joint, which is the construction covered by the second claim of Riker's patent; and hence that claim is not anticipated.

4. SAME—INFRINGEMENT.

Putting the rivet holes through alternate teeth as they broaden outward, instead of through the bodies of the rings opposite the teeth, constitutes an infringement of Riker's patent when such rivet holes are spaced, and are out of the way of the coils, the same as when they are in the body of the rings.

In Equity. Suit by Andrew L. Riker against the Crocker-Wheeler Motor Company for infringement of a patent. Decree for complainant.

Philip Mauro, for orator.

Thomas Ewing, Jr., for defendant.

WHEELER, District Judge. This bill is brought upon letters patent No. 393,266, applied for by the orator November 1, 1887, and granted to him November 1, 1888, with nine claims, for an electric motor and dynamo. The answer denies infringement upon any rights and privileges claimed under the patent, "except such as are described in the first claim thereof;" denies that the orator is the first and original inventor of the devices of that claim; sets up letters patent of Great Britain No. 1,736, dated April 6, 1883, and granted to Marcel Duprez for dynamo-electric machines, and No.

3,570, dated February 19, 1884, and granted to John H. Greenhill for improvements in dynamo-electric machines, as prior descriptions of the devices of that claim; and alleges prior knowledge of the individual defendants and Charles G. Curtis of New York of the devices of the first and third claims, and communication of it to the orator. The first and second claims only are relied upon. They are for—

"(1) An armature for motors or dynamos, comprising a series of flat rings having outwardly projecting teeth composed each of two like parts, adjacent rings breaking joints, and bolts or rivets passing through the overlapping ends of adjacent half rings, so that by withdrawing said bolts or rivets the armature can be divided diametrically into two halves, substantially as described; (2) An armature for electric motors or dynamos, comprising a series of flat, stamped-out rings, having teeth and intermediate spaces for the coils, and rivet holes opposite alternate teeth, each ring being composed of two like halves, joined at their ends, the rings being reversed alternately with reference to their top and bottom, so that adjacent rings break joints, substantially as described."

The defendant insists also by evidence and in argument that these claims do not involve any patentable invention. The evidence tends to show, and does well enough show, that a skilled workman in this trade could readily make the armatures of these claims, if directed to make them, or that occurred to him; yet some contriving would be necessary for giving the direction or carrying out the thought. This, from the intricacy and requirements of the subject, would seem to involve the exercise of inventive faculties. The evidence also shows that the individual defendants and Curtis were much engaged and skilled in these matters, and had communications with and gave information to the orator about them, but does not show with the clearness necessary to overcome the presumptions from the patent that either of them made these particular constructions known to him, or knew them before he did. The patent of Duprez shows the armature of the first claim, without teeth for the coils of wire between; but the teeth are important, and the armature of Duprez is not the same, nor substantially the same, as that of this patent. The patent of Greenhill shows projecting teeth, providing spaces for coils of wire between, but not a body of an armature built up like that of Duprez, or which can be wound in parts as that of the first claim of this patent can be; and neither of these patents shows the series of flat, stamped-out rings of the second claim, each composed of two like halves, joined at their ends, having teeth with spaces between for coils, and rivet holes opposite alternate teeth, so placed as to be reversible alternately and break joints, and have rivet holes through the joints, and all the rivet holes register accurately. This construction is far different from that of either, and could not be produced from either or both without something besides the customary skill of artisans to set their skill at work. None of the defenses to these claims seems to be sufficiently made out to defeat either.

Infringement of the first claim is not denied. The rivet holes of the defendant's armature are through alternate teeth, as they broaden outward, instead of through the bodies of the rings opposite the teeth. This change is argued to be sufficient to take the armature out of that claim. But the rivet holes there are spaced, and are out

of the way of the coils, the same as when they are in the body of the rings; and answer the same purpose in the same way, although not in the same place. This change may be an improvement, but the principle and plan of construction of the armatures are the same; and if it is an improvement the armature of this claim was taken to improve upon. This taking for that purpose is none the less an infringement. Let a decree be entered for the orator.

STANDARD OIL CO. v. SOUTHERN PAC. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1893.)

No. 16.

1 PATENTS FOR INVENTIONS—COMBINATION—OIL CARS.

Letters patent No. 216,506, issued June 17, 1879, to M. Campbell Brown, for an improvement in cars, consisting in a division of the car into two or more parts, some of which shall be constructed as tanks for carrying oil, while others are fitted for ordinary merchandise, the object being to carry such merchandise on the return trip, and thus obviate the necessity of hauling empty oil cars for long distances, are void for want of patentable combination. 48 Fed. Rep. 109, affirmed.

2. SAME—SUIT FOR INFRINGEMENT—PARTIES.

In a suit against a railroad company for infringing a patent upon oil cars, defendant disclaimed ownership of the alleged infringing cars, and of any interest in the patent, and averred that it simply transported the cars under the obligations of a common carrier. *Held*, that the true owner was entitled to become a party, and defend the suit, upon filing a petition for leave to intervene, setting up its rights.

Appeal from the Circuit Court of the United States for the Northern District of California.

In Equity. Suit by the Standard Oil Company against the Southern Pacific Company and Whittier, Fuller & Co. for infringement of a patent for an improvement in oil cars. The circuit court entered a decree dismissing the bill. 48 Fed. Rep. 109. Complainant appeals. Affirmed.

Langhorne & Miller and Pillsbury, Blanding & Hayne, for appellant.

John L. Boone, for appellee Whittier, Fuller & Co.

Before McKENNA and GILBERT, Circuit Judges, and MORROW, District Judge.

MORROW, District Judge. This is a bill in equity, filed in the circuit court for the northern district of California, charging infringement of letters patent No. 216,506, for an improvement in oil cars, granted to M. Campbell Brown, June 17, 1879, and assigned to complainant. The original bill was filed November 4, 1889, against the Southern Pacific Company alone. The purpose of the bill was to restrain the railroad company from using or transferring in any way any railroad cars embracing the improvement described in complainant's patent. On filing the bill, a bond in the sum of \$5,000 was given by the complainant, as required by the court, and thereupon a preliminary injunction was issued. November 26, 1889,

the complainant proceeded to take testimony in support of the bill. On the 2d day of December, 1889, the Southern Pacific Company filed an answer admitting the averments of the bill, and alleging, among other things, as follows:

"Avers that it does not now, and never did, own any of the cars alleged by complainant to be an infringement upon complainant's patent, and that it does not now, and never did, own any interest therein; avers that it has not in its possession, or under its control, any such cars. And for a further, separate, and distinct answer and defense, defendant avers that it is a common carrier, for hire; that, as such, it is accustomed to receive and transport over its railroad cars belonging to other corporations and individuals; that, under the laws of the United States, it is required to receive all cars, without discrimination, and transport the same; that it has not the means for discovering or ascertaining whether cars offered to it for transportation are infringements on patent rights or not; that, immediately upon receipt of notice from complainant, this defendant notified the owners of said cars complained of that it had received such notice, and that it would transport no more of such cars unless secured against all losses and damages by said owners; that said security has not been given; and that defendant has neither received nor transported any of such cars since the date of complainant's notice."

December 5, 1889, Whittier, Fuller & Co. filed a petition entitled "Petition for Interpleader," in which it is alleged, among other things:

"That said firm of Whittier, Fuller & Co. is now, and has been for about thirty years last past, engaged in conducting and carrying on a large wholesale and retail business in paints and oils in the city and county of San Francisco, state aforesaid; that the magnitude of its business renders it necessary for said firm to ship into this state, from the eastern states, large quantities of petroleum and other oils; that in order to make such shipments, and to supply its said trade with oils, your petitioners have had constructed, at a large expense, several cars which are especially adapted for containing, storing, and transporting petroleum and other oils in bulk; that its custom has been to have said cars filled with oils in the eastern states, and the cars so filled were delivered as freight to one of the transcontinental lines of railway to be transported and delivered in San Francisco; that during the month of October, 1889, your petitioner was notified by the Standard Oil Company, an eastern corporation, that it claimed that your petitioner's said cars were an infringement upon a certain United States letters patent which was issued to one M. Campbell Brown on the 17th day of June, 1879, and which said Standard Oil Company claimed had been assigned to, and was the property of, said corporation; that your petitioner immediately took legal advice in the matter, and was advised, after careful investigation, by competent authority, that no infringement upon said letters patent existed; that on the 2d day of December, 1889, your petitioner was notified that two of its said oil cars had been delivered by the Atchison, Topeka & Santa Fe Railroad Company, at Mojave, in the state of California, to the Southern Pacific Company, for carriage to San Francisco, Cal., but that said Southern Pacific Company refused to haul or deliver said cars; that, in the course of correspondence with the said officials of said Southern Pacific Company, your petitioner learned that an action in equity had been commenced in this court by said Standard Oil Company against the Southern Pacific Company for infringing upon the said letters patent issued to said M. Campbell Brown, and claimed to be owned by said Standard Oil Company. But this was the first information your petitioner had of the existence of such suit. * * *

"Your petitioner further represents to your honors that said defendant, the Southern Pacific Company, has not now, and never has had, any interest whatever in said cars, further than to haul them from place to place in the capacity of a common carrier; that said cars belong to, and are the property of, your petitioner; that your petitioner is fearful that the said suit now pending, above referred to, is a collusive suit between said complainant and respondent, and that it is the intention of said parties to collusively obtain a decree of this

honorable court adjudging and declaring your petitioner's said cars to be an infringement upon said letters patent issued to said Brown, and claimed as being the property of said Standard Oil Company, without permitting your petitioner to defend its rights in the premises; that your petitioner is ready, able, and willing to defend its right to make, use, and maintain said cars; that your petitioner is desirous of making answer to the complaint filed herein, and to produce proof on the issues made in said case; that, unless your petitioner be granted the privilege of interpleading in said suit, it is liable to suffer irreparable damage and loss, and will be deprived of the use of its property, without being permitted to make any defense in said action whatever. Wherefore, your petitioner prays that said cause be opened, and that your petitioner be permitted to interplead in said action by filing an answer to the matters set forth and charged against said cars in the bill of complaint herein, and that it be permitted to produce proof in support of the matters it may set forth in its said answer."

To this petition the defendant filed an answer December 7, 1889, admitting that it had no interest in the patent in question, or in the cars of either the Standard Oil Company or Whittier, Fuller & Co., and consenting that the petitioners might defend the suit in their own names, with their own counsel, and at their own expense, and that the prayer of the petitioners to interplead might be granted. December 9, 1889, the complainant interposed a demurrer to the petition; and on that day the court ordered that complainant should within 10 days file an amended bill of complaint, making Whittier, Fuller & Co. parties respondent, and that complainant should thereupon file a bond in the sum of \$20,000 to indemnify the respondents, or either of them, for all damages they, or either of them, might sustain by reason of the preliminary injunction. Pursuant to this order the complainant, on the 19th day of December, 1889, filed an amended bill, which it appears did not comply with the order of the court, and on motion it was struck from the files; and on December 31, 1889, the court made the further order that the complainant, on or before Friday, the 3d day of January, 1890, should file a second amended bill of complaint, making respondents Whittier, Fuller & Co. respondents in fact, and charging said Whittier, Fuller & Co., jointly with the Southern Pacific Company, with having infringed upon the letters patent sued on, and demanding an injunction against all of said respondents. It was further ordered that a new injunction should be issued, running against both of said respondents, and that upon the filing of the new injunction the injunction theretofore issued against the Southern Pacific Company should be dissolved. It was further ordered that a bond in the sum of \$20,000, to be approved by the judge of the court, should be filed by said complainant on or before said Friday, the 3d day of January, 1890, indemnifying both of said respondents against the effect of said injunction, in case the same should have been wrongfully issued. Pursuant to this last order the complainant, on January 3, 1890, filed a second amended complaint, and a bond on injunction in the sum of \$20,000. It is claimed by counsel, in their brief, that the court erred in making the orders of December 9, 1889, and December 31, 1889, whereby it was ordered that complainant file an amended bill of complaint, making Whittier, Fuller & Co. parties respondent, and compelling complainant to take out an injunction against Whittier, Fuller & Co., and to execute a bond

in the sum of \$20,000 to indemnify the respondents from all damages they might sustain by reason of the injunction. To the second amended bill, Whittier, Fuller & Co. interposed a demurrer, which was overruled. *Standard Oil Co. v. Southern Pac. Co.*, 42 Fed. Rep. 295. Thereafter, the case being at issue upon the answers of the defendants and the replications of the complainant, testimony was taken, and upon the final hearing a decree was entered, dismissing the bill, on the grounds that the patent sued on was a mere aggregation of devices, and not a patentable combination. *Standard Oil Co. v. Southern Pac. R. Co.*, 48 Fed. Rep. 109. From this decree the complainant appealed.

We would perhaps be justified, under rule 11 of this court, in disregarding the claim of error, as it is not contained in the assignment of error in the transcript of record, but it will probably assist to a better understanding of the case to notice the contention of the complainant in this behalf.

It is said by counsel for appellant, in support of this claim of error, that the original bill was brought against the Southern Pacific Company alone, to restrain it from using, as a common carrier, upon the railroads operated by it, any and all cars which infringed upon complainant's patent. It was not aimed against Whittier, Fuller & Co., or against any particular owner or patentee of cars. Its object and scope were simply to enjoin the railroad company from using cars which would amount to an infringement of complainant's patent. It may be admitted that the complainant had a right of action against the Southern Pacific Company, upon the facts stated in the bill, but does it follow that Whittier, Fuller & Co. were not also proper parties to the action? The Southern Pacific Company, in its answer, disclaimed all ownership or interest in the cars alleged to be an infringement of complainant's patent, and even denied that the cars were in its possession, or under its control; but it averred that its relation to the cars was that of a common carrier for hire, required by the laws of the United States to receive all cars, without discrimination, and transport the same; that it did not have the means for discovering or ascertaining whether cars offered it for transportation were infringements or not, but it had notified the owners of the cars of complainant's request to desist from the use of the invention. By this answer the railroad company disclaimed any interest in the controversy as to whether the cars received by it for transportation infringed upon complainant's patent or not, but it pointed to the owners of the cars as the real parties in interest. Whittier, Fuller & Co., in their petition, alleged that they were engaged in conducting and carrying on a large wholesale and retail business in paints and oils in the city and county of San Francisco; that the magnitude of their business rendered it necessary for them to ship to California, from the eastern states, large quantities of petroleum and other oils; that in order to make such shipments, and to supply their trade with oils, they had constructed, at a large expense, several cars especially adapted for containing, storing, and transporting petroleum and other oils in bulk; that these cars belonged to them, and were their property, and were the cars claimed to be infringements upon complainant's patent; and accordingly they

asked permission to defend the action. Clearly, they had a beneficial interest in the suit. The cars had been constructed, and were being used, by them, for transporting oil to California over at least a portion of the railway owned and controlled by the Southern Pacific Company. A decree in favor of the complainant, and against the railroad company, would necessarily affect that use, and perhaps destroy the value of the cars altogether. They were therefore entitled to be made defendants in the suit, whatever might be the title of their petition.

In the case of *Supply Co. v. McCready*, 17 Blatchf. 291, the bill alleged that cotton ties made in infringement of patents owned by the plaintiff were being shipped from New York to ports in the southern part of the United States, by steamers belonging to a corporation of which the defendants were the managing officers, for persons whose names they refused to disclose to the plaintiff; the ties being shipped to be sold at such ports for use. It was held that carrying of such ties by the steamer was an infringement of the patents, and that such officers would be restrained by an injunction from so doing, but the court found as a fact that the officers of the steamship company were acting as the agents and servants of the owners of the infringing cotton ties, in promoting and effecting such sale and use. The defendants had not confined themselves to the business of a carrier, but had actually engaged in promoting the sale and use of the infringing article. The case is, however, of interest upon another point. The court, in answering a suggestion that the injunction would be a hardship upon the steamship company, observed:

"The defendant's company will be deprived of no more carrying trade in respect to infringing ties than they would be deprived of if the shippers of such ties were enjoined, and it must be presumed that they would be enjoined if their names were known. The defendant company could have caused such names to have been disclosed on inquiry, but it did not. The allegation that the information was asked and refused is not denied."

The action was therefore sustained against the defendants, as officers of the common carrier—First, because they acted as the agent and servant of the shipper of the infringing cotton ties; and, second, because they refused to disclose the name of such shipper. Had the name of the shipper been known, he would undoubtedly have been made a party defendant. In the present case the shipper is not only known, but he asks to be made a defendant upon a showing that he owns and uses the cars alleged to be infringements of complainant's patent. We find no difficulty, under these circumstances, in determining that Whittier, Fuller & Co. were properly admitted as defendants in the action, and that the court had authority, under its equitable jurisdiction, to require a new bond of the complainant, to meet the new conditions of the case.

In the transcript of record a number of errors are assigned, stating in different forms the claims that the court erred in decreeing that the claim of the patent sued on was a mere aggregation of devices, and not a patentable combination. The patent is for an "improvement in oil cars." The specification and claim are as follows:

"My invention relates to cars, and especially to that class of cars designed for transporting merchandise and oil or other liquids; and it consists in the parts and combination of parts hereinafter described and claimed, whereby oils or other liquids may be safely transported in the same car with miscellaneous merchandise. * * * The object, as briefly above stated, of my device, is to produce an improved form of car for the transportation of oils and liquids in bulk, and which shall also be adapted for the transportation of ordinary merchandise on roads where a load of oil or liquid cannot be obtained on return trip, thus obviating the necessity of hauling empty tank cars over long distances, as is now commonly done; and to this end the construction of the ordinary freight car is modified as follows: The car space is divided into two or more compartments; but, for the purpose of the present specification, we will suppose it to be divided into three. The central compartment, as shown in the drawings, would embrace about two thirds of the entire length of the car, and is designed and adapted for ordinary storage, and for this purpose may be constructed in any proper manner. The two end compartments occupy each about one sixth of the entire length of the car, are located in the ends thereof, over the trucks, and are designed and constructed to contain metallic tanks, * * * which tanks are adapted for safely containing and transporting oil or other liquid. * * * I am aware that the several features embodied in my improvement are not independently new, and I restrict the invention to the specific combination of parts set forth in the claim."

The claim is as follows:

"What I claim is a car subdivided into two or more compartments, each end compartment containing an oil tank, said tank constructed with an inclined or self-drawing bottom, and resting upon a floor formed in counterpart thereto; said tank also having a tapering or inclined top, with a filling opening placed at or near its highest point, and in line with a filling opening in the car top,—and there being a removable partition separating said tank from the adjacent compartment,—all combined substantially as set forth."

In discussing the question of difference between a mere aggregation and a patentable combination, Judge Hawley, in the circuit court, applies the principles declared by the supreme court to the present case in the following language:

"Is this invention a mere aggregation, or is it a patentable combination? What is the distinction between mere aggregation and a patentable combination? A combination of well-known separate elements, each of which, when combined, operates separately, and in its old way, and in which no new result is produced which cannot be assigned to the independent action of one or the other of the separate elements, is an aggregation of parts, merely, and is not patentable. But if to adapt the several elements to each other, in order to effect their co-operation in one organization, demands the use of means without the range of ordinary mechanical skill, then the invention of such means to affect the mutual arrangement of the parts would be patentable. The parts need not act simultaneously, if they act unitedly to produce a common result. It is sufficient if all the devices co-operate with respect to the work to be done, and in furtherance thereof, although each device may perform its own particular function only." 48 Fed. Rep. 109.

In support of this doctrine of aggregation, as distinguished from a patentable combination, the case of *Hailes v. Van Wormer*, 20 Wall. 353, is cited, as follows:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known, and in common use, before the combination was made. But the results must be the product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect, without

the production of something novel, is not invention. No one, by bringing together several old devices, without producing a new and novel result, the joint product of the elements of the combination, and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in the combination."

Also, the following from *Reckendorfer v. Faber*, 92 U. S. 357:

"The combination, to be patentable, must produce a different force or effect or result in the combined forces or processes from that given by their separate parts. There must be a new result produced by their union. If not so, it is only an aggregation of separate elements."

And the following from *Pickering v. McCullough*, 104 U. S. 318:

"In a patentable combination of old elements, all the constituents must so enter it as that each qualifies every other. * * * It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions."

The opinion proceeds:

"Numerous other authorities might be cited substantially to the same effect. The law is well settled, the principles clearly defined. The dividing line between mere aggregation and patentable combinations is well established. Every case must fall upon one side or the other. No case stands directly on the pivotal line. But the facts are often of such a character as to make it difficult to determine upon which side of the border line the case should be classed. This difficulty arises in the application of the facts to the principles of the law so frequently announced by the supreme court of the United States. * * * The several features embodied in complainant's improvement are admitted not to be independently new. The contention is that new and useful results are reached that were not hitherto attainable under the prior state of the art. The result claimed to be new is the cheaper transportation of oil in bulk over long hauls. That is, by the combined use of the patented car, complainant is enabled to save the expense of \$95 hitherto paid for the expense of the return of an empty car. It is not claimed that the carrying of oil one way co-operates directly with the performance of carrying dry merchandise the other way, but the point relied upon is that the two co-operate directly in the performance of carrying merchandise both ways, thereby producing a common result, viz. a reduction of the cost of transportation of oils by successive acts performed in different parts of the service of the car; this result being, as before stated, in saving the dead loss of hauling empty cars one way. If this contention is sound, then the patent must be maintained. Is it tenable? I am of opinion that it is not. The construction of this patent as contended for by complainant would, in my judgment, be extending the principle of patentability of inventions beyond the rules laid down by the supreme court of the United States in its recent decisions upon this subject. The patentee admits that the several features in his improvement 'are not independently new.' Upon the hearing prior patents were introduced which embodied the general feature of carrying oils or liquid and dry freight at the same time, or 'for liquid freight in one direction, and dry freight in the other.' Do the elements of the car and of the oil tank, combined, so co-operate as to produce a new result by their joint union? Successive action of old parts, where they all relate to each other, and all work to a common end to perform a common result, if the result is new, are patentable, but in all cases it must be a result which is due to the successive action of these parts."

After referring to the case of *Reckendorfer v. Faber*, and the illustrations there given of articles in combination which produce new results, and amount to patentable combinations, the opinion concludes, upon this feature of the case, as follows:

"In this case there is no joint operation or effect in the construction of a railway car and the oil tank combined which is in any manner due from the simultaneous or successive action of the two as combined. It is a mere aggregation of old elements, producing no new result by the combination."

We have carefully examined the authorities cited upon this question, and, applying the principles as determined by the courts, we find that Judge Hawley has correctly interpreted the law applicable to the facts in this case. Decree affirmed.

FISK et al. v. MAHLER et al.

(Circuit Court, S. D. New York. March 21, 1892.)

PATENTS FOR INVENTIONS—INFRINGEMENT—ACCOUNTING—COSTS.

Where defendants' infringement of the patent sued on is plain, but they have denied the infringement until after the suit is brought, embodying a denial of infringement and of the validity of complainants' patent in their answer, they cannot defeat complainants' right to an accounting by offering then to pay royalty on a certain number of the patented articles, which they admit that they sold, and the costs of suit.

In Equity. Suit by Henry G. Fisk, Thomas R. Clark, and Thomas J. Flagg against Samuel Mahler and Louis Mahler for the infringement of a patent. Decree for complainants.

B. F. Watson, for complainants.

H. W. Grindall, for defendants.

WALLACE, Circuit Judge. There is nothing in this case to defeat the right of the complainants to the usual decree for an injunction and an accounting. It is entirely plain that the defendants have infringed the two patents in suit. The neck scarf sold by them in January, 1889, known as "Exhibit D," so plainly embodied the inventions claimed in the patents that expert evidence to establish identity is not necessary. The proofs show that they had quite a number of similar scarfs on hand before this suit was brought. If the defendants had not denied infringement before the suit was commenced, and had made an offer to pay complainants the established royalty for the use of the inventions, they might properly urge that they should not be subjected to the costs of the suit, and to the expense of an accounting. But they did not do this. They denied infringement until after the suit was brought. Then, after it was brought, in their answer, they denied the validity of the patents, and still denied infringement, although they inserted in their answer an offer to pay the royalty on a certain number of neck scarfs which they admitted having sold, together with the costs of the suit. There is no merit in the contention of the defendants that complainants have been guilty of laches. So far as appears, the complainants had no proof prior to January, 1889, that the defendants had sold more than a single one of the patented neck scarfs; and, if they had brought suit upon such a trivial infringement, their suit would probably have been dismissed, with costs. There is enough in the proofs to suggest quite persuasively that the

defendants have infringed beyond the extent of the sales of the 18 dozen of neck scarfs purchased by them of Hellenberg & Lowenstein. If the complainants choose to take a decree upon the basis of the royalty upon the 18 dozen neck scarfs sold by the defendants, they are entitled to do so. But, if they prefer to go to an accounting, it is their right to do so. If it should turn out that the defendants have not sold any more than that number, the question will arise whether the costs of the accounting should not be imposed upon the complainants. The usual decree is ordered.

THE ALBERT DUMOIS.

**RUSTAD v. FOUR HUNDRED AND FIFTY-SEVEN BAGS OF COFFEE
et al.**

(District Court, E. D. New York. January 27, 1893.)

CHARTER PARTY—LIEN ON CARGO—BILL OF LADING STATING FREIGHT—LIABILITY OF CARGO FOR UNPAID CHARTER MONEY.

The provisions of a charter party gave the shipowner a lien "on all cargoes and all subfreights for any amounts due under this charter." The charterer subchartered the vessel by a charter party of similar terms, and claimant shipped certain cargo, for which bills of lading, fixing the freight due, were given by the purser of the subcharterer. Claimant having paid to the subcharterer the freight due on the cargo as per bills of lading, after notice that the shipowner claimed a lien thereon, *held*, that the shipowner could enforce a lien upon the cargo for the freight stated in the bills of lading, but for no more.

In Admiralty. Libel for balance of charter money. Decree for libellant.

Libellant was the master of the steamship *Albert Dumois*, and libeled 457 bags of coffee, 110 bales of deerskins, 151 bales of rubber, and 400 bales of hides, for the amount due under the charter party of the vessel, dated August 5, 1890, by which she was chartered to H. Dumois & Co. H. Dumois & Co. subchartered the steamer to the Central American & Honduras Steamship Company, under a charter party similar in its terms to the original charter party. The charter party contained a clause giving the owners a lien "upon all cargoes and upon all subfreights for any amounts due under this charter." The vessel was loaded by the steamship company at Honduras, and brought to this port the cargo above named. After the commencement of this action the cargo was claimed by Hoadley & Co., and a stipulation given by them. After the filing of the libel they paid to the Honduras Steamship Company the amount of the freight on the libeled cargo. The libellant claimed that he was entitled to his lien upon the cargo to the extent of the unpaid charter money, namely, \$1,433.53. The claimant insisted that the vessel had a lien on the cargo only to the extent of the freight named in the bills of lading which were given by the steamship company to shippers.

Goodrich, Deady & Goodrich, for libellant.
Wheeler, Cortis & Godkin, for claimants.

BENEDICT, District Judge. The charter party shows that it was the intention of the parties to confer upon the charterers authority to fix the freight to be paid by cargo that might be shipped under bills of lading. The cargo in question was shipped under bills of lading signed by the purser, by which the freight to be paid on each shipment was fixed. These bills of lading were authorized

contracts which, as between the shipper and the ship, fix the freight to be paid by each shipment, notwithstanding that provision is made in the charter party for a shipowner's lien for the charter money. By virtue of this provision the shipowner may enforce a lien upon the cargo for the freight stated in the respective bills of lading, but for no more. Let the libelants have a decree with an order of reference to ascertain the amount of such freight.

OLSEN v. HUNTER-BENN & CO.¹

(District Court, S. D. Alabama. October 29, 1892.)

1. SHIPPING—CHARTER PARTY—"ALL CONVENIENT SPEED."

The provision in a charter party that the vessel chartered shall proceed to port of loading "with all convenient speed" is equivalent to a contract that she shall proceed without unnecessary delay, and implies an agreement that it shall be without unreasonable delay, and these are conditions precedent.

2. SAME—"AT PORT OR SAILED."

The provision in a charter party that the vessel to be chartered is "at Santos, or sailed," is a contract that she will soon sail, or has sailed, therefrom.

3. SAME—REASONABLE DILIGENCE.

One of the conditions implied in a charter party is that the vessel will commence the voyage with reasonable diligence, and this is violated by waiting over four months to carry out a previous contract before beginning the new one.

4. AGENT—POWER TO WAIVE CONDITIONS.

An agent to load cargoes has not, in general, power to waive forfeiture of charter party, so as to bind his nonresident principal.

5. SHIPPING—CHARTER PARTY—WAIVER OF FORFEITURE.

The advancement by an agent of a small sum, without commissions, to a delayed vessel, is not a waiver of forfeiture of charter party by delayed arrival, when accompanied by a declaration that he did not know what his principal, the charterer, would do about the delay.

In Admiralty. Libel in personam to recover damages for breach of charter party. Libel dismissed.

G. L. & H. T. Smith, for libellant.

Pillans, Torrey & Hanaw, for defendants.

TOULMIN, District Judge. On the 27th day of July, 1891, the libellant, and owner of the Norwegian bark Franklin, through an agent in Pensacola, Fla., chartered his vessel to the defendants to carry a cargo of timber from Ship island, Miss., to some port in the United Kingdom. The charter party, among other stipulations, contained the following:

"Ship or vessel now at Santos, or sailed. * * * Said ship, being * * * and in every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Ship island, Miss., and there load for the said charterers a full and complete cargo, to consist of," etc.

¹Reported by Peter J. Hamilton, Esq., of the Mobile, Ala., bar.

When the charter was effected the vessel was at Santos. She had arrived there on the 31st of May, 1891, with a cargo of coal to be delivered to consignees at that port. The discharge of this cargo commenced on the 3d of September, and was not finished until the 1st of November. The vessel then took in ballast, and on the 16th of December sailed for Ship island. After leaving Santos the vessel proceeded on her voyage, without unnecessary delay, and arrived at Ship island on the 3d of February, 1892. She was then tendered the defendants, under the charter, but they refused to accept her, on the ground of her long delay in reaching Ship island. Thereupon the owner brought this suit in personam against the charterers to recover damages. It appears from the evidence that when the vessel arrived at Santos she was not able to obtain a berth, at once, for the discharge of her cargo of coal. It also appears that the vessel lost two masters by death, and had much sickness among the crew, during the time she lay at Santos.

Under the rule established by the supreme court in *Lowber v. Bangs*, 2 Wall. 728, I think the stipulation that the vessel should, with all convenient speed, proceed to Ship island, was a condition precedent. *Abb. Shipp.* p. 332; *The B. F. Bruce*, 50 Fed. Rep. 123. The contract was that the vessel should proceed "with all convenient speed" to Ship island to enter upon the charter. I consider the stipulation that the vessel "should, with all convenient speed, proceed," as equivalent to a stipulation that she should proceed without unnecessary delay. And the shipowner, by his contract, impliedly agreed that his vessel should proceed without unreasonable delay. This was a condition precedent, as well as an agreement. Now, it does not appear from the evidence whether the delay from the 27th of July, the date of the charter party, until the 1st of November, when the discharge of the cargo was finished, was or was not necessary. The cause of the delay does not clearly appear; and while I cannot say whether or not the delay was unnecessary, I have no hesitation in saying that it was unreasonable, so far as the defendants are concerned. There is no intimation given in the charter party of a necessity for staying at Santos to discharge cargo. The language used clearly implies that there was nothing in the existing engagements of the vessel to prevent her entering on the new contract with promptness. It does not appear that the charterers knew at the time the charter party was effected that the vessel was burdened with a cargo. The stipulation, "at Santos, or sailed," conveys the idea that, if the vessel had not already sailed, she was "at Santos," and would soon sail. One of the conditions implied in the contract was that the ship would commence and carry out the voyage contracted for with reasonable diligence. She did not reach Ship island until more than 6 months after the charter party was signed, and she did not sail from Santos until the expiration of more than 4½ months from that time, and, as was said by Mr. Chief Justice Waite in a case very similar to this, (*Antola v. Gill*, 7 Fed. Rep. 487,) "this because it took her most of that time to get rid of the obligations of another contract she was under, to deliver a cargo she had on board to consignees at Santos. "In

other words, she was delayed in the performance of her new contract because she was bound by an old one." "By staying at * * * [Santos, in this case] to discharge her cargo, she saved the profits of her old contract, but we think she is not now in a condition to throw the losses of the new one upon her charterers." My opinion is that the vessel did not proceed to Ship island with all convenient speed, within the meaning of the contract, and without unreasonable delay, as implied therein. Therefore the libelant cannot recover, unless the charterers waived the broken conditions of the contract. If, after knowledge of the breach, they received substantial benefit under the contract, they will not be entitled to repudiate it.

The facts, as shown by the proof, are that the defendants have their head office in Mobile. That they have an office and agent at Scranton, the port to which Ship island belongs. This agent was employed and authorized to attend to all general and ordinary matters connected with defendants' business at Scranton. That he had no authority to act in extraordinary matters except by special instructions in the particular instance, and that he had no express authority to waive the breach claimed in this case. The contention is that his general powers as agent, and his recognized conduct in connection with the defendants' business, gave him such authority, and that the acts done by him in connection with this vessel amounted to a waiver of the alleged breach of her contract. While a waiver may be implied from acts, yet, if claimed to have been done by an agent in a common employment in general business, I think that express authority in the agent must be shown. *Bennecke v. Insurance Co.*, 105 U. S. 355; *Abb. Shipp.* p. 350.

But suppose the agent was authorized to waive the breach, as is contended by the libelant. Were his acts or conduct such as to justify the master in relying upon them, and setting them up as an estoppel? And did the defendants thereby receive any substantial benefit under the charter party? If not, the contention must fail. The acts referred to are that, when the master of the vessel reported his arrival to the agent, he informed the agent that he wanted some money to pay entrance fees, and for his individual use, and that he wished to get the ballast lighter to take his ballast. The agent had no money in hand, and told the master that he would give him a draft on defendants, at Mobile, for \$100, if he could use it, and this was done. He also said that he would send the lighter, or request the stevedore to send a lighter, to the vessel, to take her ballast, and this was also done. The agent at the same time told the master that he did not know what would be done with him; that, owing to the long delay in the arrival of the vessel, the charterers had disposed of the cargo which they had for her; and that he would have to see them, to learn what was to be done about it. This was on Saturday. On the following Monday the agent went to Mobile, and reported the facts to the defendants. The lighter that was ordered to go alongside for ballast was recalled. It had reached the vessel, but had taken out no ballast. The master of the ship was requested to go to Mobile to see the defendants relative to the matter, which

he did; and it was then that the defendants refused to load the vessel under the charter party, informing the master that they had disposed of the cargo which they had prepared for his vessel, owing to her delayed arrival, and that at that time they had no other cargo like that mentioned in the charter party. I do not think that the acts of the agent were such as to justify the master in relying on them as a waiver, when coupled with the declaration made by the agent to him, that owing to his long delay the cargo intended for his vessel had been otherwise disposed of; that he did not know what the charterers were going to do about it, and he must learn from them. The proof fails to show that the defendants received any benefit under the charter party. They, through their agent, advanced \$100 to the master, but it does not appear that they have received any commissions or interest on it, or, indeed, that the principal has been repaid.

I think the charterers took their objections to the delay within a reasonable time, and that they can avail themselves of the broken conditions of the contract. 1 Pritch. Adm. Dig. p. 489, par. 185. It follows that the libel must be dismissed, and it is so ordered.

THE STACEY CLARKE.

THOMPSON v. THE STACEY CLARKE.

(District Court, S. D. Alabama. May 13, 1892.)

1 SHIPPING—AUTHORITY OF MASTER—PUNISHMENT OF SEAMEN.

A master may punish a seaman who refuses to do his duty, and may, if the seaman is incorrigible, discharge him, confine him, or deprive him of privileges; but forfeiture of wages cannot be superadded to corporal punishment, and it is not within the ordinary powers of a master to imprison a sailor on shore.

2. SAME—MUTINY—DEFINITION.

Mutiny consists in attempting to deprive the master by violence of his authority as such, whether by resisting him in its exercise, or by actual usurpation of the command.

3. SAME—WAGES AS DAMAGES.

When a seaman sues for discharge and for damages for alleged ill treatment, a decree of discharge ends his contract with the vessel, and prevents the allowance of further wages.

In Admiralty. Libel in rem for wages, and damages for alleged cruelty. Decree for libelant.

Smith & Gaynor, for libelant.

W. D. McKinstry, for claimant.

TOULMIN, District Judge. If a seaman refuses to do his duty, he is liable to punishment by the master, and, if he is incorrigible, the master may discharge him, or correct or confine him, or dock him of his privileges; but he cannot superadd a forfeiture of wages after inflicting corporal punishment, (Desty, Shipp. & Adm. 129; Thorne v. White, 1 Pet. Adm. 168;) and it is not one of the ordinary powers of a master to imprison a seaman on shore. But a seaman is bound

to obedience and respect of officers, and the master has the right to enforce discipline, and is justified in the use of any necessary means to this end. He may use a deadly weapon when necessary to suppress a mutiny, but only when mutiny exists or is threatened. A revolt or mutiny consists in attempts to usurp the command from the master, or to deprive him of it for any purpose by violence, or in resisting him in the free and lawful exercise of his authority, the overthrowing of the legal authority of the master, with an intent to remove him against his will, and the like. The evidence fails to satisfy me that there was any revolt or mutiny committed, attempted, or threatened by the libellant on the occasion referred to; but it does satisfy me that he was guilty of disorderly and insubordinate behavior of a very reprehensible character. There was, however, no obstinate or continued misconduct or refusal to do duty, although his misconduct was of a highly aggravated character, and deserved the punishment which he received, and which in my judgment was severe, being shot at two or three times with a pistol, and then placed in close and solitary confinement on bread and water for a period of 15 days. I do not say that under the circumstances this was excessive or immoderate punishment, such as would entitle the libellant to damages; but I do think it is sufficient, without superadding to it a forfeiture of all wages. The government and discipline of the seaman being largely in the discretion of the master, and he having seen proper to correct him in the manner that he has, I do not feel called upon either to punish the master for his acts, by awarding damages against him, or to further punish the libellant, by superadding to the punishment already inflicted a forfeiture of all wages. I therefore award libellant one month's wages, less the amount of \$5 already received by him. As his term of service contracted for has not expired, more wages would be awarded him, but that he files his libel before the expiration of one month's service praying for a discharge, and thereby severing his connection and ending his contract with the vessel. The imprisonment on shore in the guardhouse by the master and police officer was in my opinion unlawful, but, as no appreciable damage was done libellant, I consider the amount awarded as wages sufficient to cover this tort, if it be a tort. A decree will therefore be entered for \$20.

THE WARRIOR.

S. H. HARMON LUMBER CO. et al. v. THE WARRIOR.

(Circuit Court of Appeals, Ninth Circuit. January 30, 1893.)

No. 57.

LOWAGE—STRANDING OF TOW.

Where on trial of a libel against a steam tug for damages caused by the stranding of a schooner upon a bar while in tow of the tug, the evidence as to the schooner's draft, and the depth of water at the time of stranding is conflicting, a finding by the district court that the schooner was in fault will not be disturbed on appeal.

Appeal from the District Court of the United States for the Northern District of California.

In Admiralty. Libel by the S. H. Harmon Lumber Company and others, owners of the schooner *Sailor Boy*, against the steam tug *Warrior*, (the Wilmington Transportation Company, claimant,) for damages to the schooner, caused by stranding. Decree for libelee. Libelants appeal. Affirmed.

E. W. McGraw, for appellants.

Page & Eells, for appellee.

Before GILBERT, Circuit Judge, and KNOWLES and HAWLEY, District Judges.

GILBERT, Circuit Judge. On January 5, 1888, the steam tug *Warrior* undertook to tow the schooner *Sailor Boy* from the roadstead off San Pedro to a berth inside the bar. While crossing the bar the schooner was stranded, and suffered damage. The libel charges that the injury was caused by the negligence of the master of the tug in attempting to tow her over the bar at a time when the tide was ebbing, and the water was insufficient in depth; that the master of the schooner informed the master of the tug that the schooner's draft was 14 feet 6 inches. The defense is that the master of the schooner did not correctly state his draft; that his draft was 15 feet, instead of 14 feet 6 inches; that there was sufficient water for a vessel of the draft as represented, but not sufficient for a vessel of the actual draft of the schooner. The decision on appeal, as in the court below, depends upon the preponderance of the evidence as to the draft of the vessel and the depth of the water upon the bar. The testimony is conflicting upon both these issues.

The draft of the schooner was measured and marked upon her rudder posts up to 13 feet, but no further. The captain of the schooner at the time she grounded was making his first voyage upon that vessel. Both he and the mate of the schooner testify that her draft at that time was 14 feet 6 inches, but it appears that their knowledge was derived from hearsay only. The mate admits that his information was obtained from Capt. Mitchell, a former captain of the schooner. Mitchell testified that he had "carried over forty cargoes in her," and that when she is loaded down to within 3 inches of the top of her rudder post, her draft was 14 feet 6 inches. It was evidently in consequence of this information derived from Mitchell that the captain of the schooner, who had no knowledge of his own upon the subject, stated to the captain of the tug that his draft was 14 feet 6 inches. He also said to the captain of the tug, after the accident, according to the evidence of the latter, that the vessel was loaded to within 3 inches of the top of her rudder post. The captain of the tug soon afterwards made measurements up to 3 inches below the top of the rudder posts, and found the distance to be 14 feet 11½ inches, instead of 14 feet 6 inches. He also measured up to the dark line on the schooner's side, and, assuming that to be

her water mark when loaded, he made her draft to be 15 feet 1 inch. The accuracy of these measurements is not disputed. It is claimed, however, that by actual test upon a subsequent voyage it was shown that with 395,000 feet of lumber (30,000 more than she carried on this voyage) the schooner's draft was only 15 feet 1 inch, and that upon discharging 30,000 feet of her cargo the draft was reduced to 14 feet 6 inches. The value of this test is to some extent impeached by the fact that at the time of the voyage on which the injury occurred the season was wet, both while the schooner was loading at Gray's Harbor and while on her voyage of 13 days from there to San Pedro, and that the lumber which she was engaged in transporting from Gray's Harbor was at that time in active demand, and was shipped green, and as soon as sawed. These conditions were to a large extent changed when the test voyage was made. It was proven that on some of her voyages 400,000 feet of lumber would load her down no more than would 360,000 feet at other times, the difference resulting from the condition of the lumber, whether wet or dry. A careful consideration of all the testimony convinces us that the preponderance of the evidence is in favor of the conclusion reached by the learned district judge, that the draft of the schooner was misrepresented to the tug, and that the schooner's actual draft was about 15 feet.

The preponderance of the evidence also indicates that at the time the schooner struck there was sufficient water on the bar to allow a vessel drawing 14 feet 6 inches to have passed over with safety. The captain of the tug testifies that on crossing the bar a few minutes before he returned, with the schooner, he sounded and found the lowest water to be 16 feet 4 inches. High water was at 2 o'clock. According to the master of the tug, who looked at his watch, the schooner struck at 2:05. Another witness took the time after he heard the distress whistle of the tug, and found it to be 2:15. Others estimate the time to have been 2:15, 2:20, 2:30, and one places it as late as 2:45. It does not seem to us material whether it was 2:15 or 2:45. The evidence shows that in the first 45 minutes after the turn of the tide at that time and place the water ran out slowly, and the fall was slight, probably not to exceed two inches. The depth of water on the bar, as found by the tug master, is corroborated by the soundings of the coast survey engineers. Mr. Von Geldern, of the United States engineer corps, places the depth on the bar at high water on that day at 15 feet $7\frac{1}{2}$ inches. His estimate was given from soundings made by him in his official capacity in May, 1887, when the depth was found to be 11.2 feet at low water, and in June, 1888, when the lowest water was 11.8 feet. He thought it reasonable to infer that the increase of depth between these dates must have been gradual, and that in January, 1888, the depth at low water was 11.5 feet. This, with the added depth at high water, which is conceded to be 4.1 feet, would give a depth at high water at 2 o'clock on the day of the accident of 15.6 feet. It is contended that there is no evidence to support the assumption of Mr. Von Geldern that the increase from May, 1887, to June, 1888, was continuous or grad-

ual. It seems to us, however, a not unreasonable assumption, and it has some support in the sounding taken by Capt. Melberg. The only evidence to contradict it is the evidence of Capt. Welt, the port pilot, who testified that at high water on that day the depth would be a little over 15 feet. If we assume that Capt. Welt's measurement is correct, and adopt the very lowest estimate given of the water on that day, there is still nothing in the evidence to convince the court that at 45 minutes past 2 o'clock a vessel drawing 14 feet 6 inches could not have crossed the bar in safety.

In this case the most of the evidence was taken before the district judge, and it would seem to be a proper case for the application of the rule that on appeal in admiralty from the district court, where questions of fact are involved depending upon conflicting testimony, the decision of the district judge, who has had the opportunity of seeing the witnesses, hearing them testify, and judging of their credibility, will not be reversed unless clearly against the weight of evidence. *The Sampson*, 4 Blatchf. 28; *The Sunswick*, 5 Blatchf. 280; *The Thomas Melville*, 37 Fed. Rep. 271; *The Albany*, 48 Fed. Rep. 565. The decree of the district court is affirmed, with costs to the appellees.

PILOT BOAT NO. 5.

KASIT et al. v. PILOT BOAT NO. 5.¹

(District Court, E. D. New York. February 21, 1893.)

SEAMEN'S WAGES—SERVICE ON PILOT BOAT—CONSTRUCTION OF CONTRACT.

The contract by which certain seamen on a New York pilot boat were hired specified only the nature of the employment, and that the wages were so much a month. At the termination of a cruise, but before the end of a month, they left the vessel. Owing to the nature of a pilot boat's occupation, it is impossible for her to be in port at regular monthly intervals. *Held*, that the effect of the contract was that the seamen should serve for at least a month, and until the termination of the cruise, if, at the expiration of the month, the vessel should happen to be at sea. Libelants not having served a month, *held* that their departure from the vessel was a desertion.

In Admiralty. Libel for seamen's wages. Dismissed.

Alexander & Ash, for libelants.

Carter & Ledyard, for claimants.

BENEDICT, District Judge. This is an action for seamen's wages brought by the crew of a New York pilot boat. The libelants were hired to serve as hands on board the New York pilot boat No. 5, at the wages of \$25 and \$20 a month, respectively. They served until the 20th day of November. On the termination of a cruise on that day they left the boat, a month from the time of their hiring not having elapsed. They now sue for wages for the time they served, at the rate of wages agreed on. The defense is that, by

¹ Reported by E. G. Benedict, Esq., of the New York bar.

leaving the boat when they did, the crew deserted, thereby forfeiting their wages. The contract made with the libelants specified two things only,—the nature of the services, viz. that of a hand on board pilot boat No. 5; and that the wages were to be so much a month. The question to be determined is whether such a contract gave the crew the right to leave the pilot boat when they did, that being at the termination of a cruise, but before the expiration of a month from the time they were hired. Ordinarily, in the hiring of seamen, their engagement at monthly wages is not regarded as an engagement by the month, but the term of service is fixed either by a stated limitation of time or by a described voyage. In this contract no voyage was described, nor was the term of service fixed by any limitation of time. Of course, some limitation must be inferred, as an unlimited service could not have been intended. The cruise of the New York pilot boats is as follows: The boats take on board a company of pilots in the Upper bay of New York, proceed with them to the pilot ground, and put the pilots on board incoming vessels, as such vessels arrive. When all the pilots have left, the pilot boat returns to the Upper bay, where the pilots rejoin the boat, and she again proceeds to sea. The cruise is sometimes of two or three days' duration, and sometimes two weeks or more. The boat is never long in port. If the boat arrives up early enough before dark, the pilots may join her, and she proceeds to sea on the same day. Sometimes the boat remains only a couple of hours in port. Every pilot boat is liable to go on station duty outside for four days in each three months, at designated times, under a penalty of \$100 a day in case of the boat's failure to be in the station at the time.

In the case of a pilot boat, it is therefore impossible for the vessel to be at the port of departure at monthly periods; and, when she is not in port, she is upon the high seas, where it is impossible for the seamen to leave, and impossible to permit the seamen to leave. The understanding of the parties, therefore, must have been that the time of service was to end when the boat was in port, and also the understanding that she was not to be expected to be in port at monthly periods. Plainly, these men were not considered as hired by the day; the agreement was for so much a month. Effect can, I think, be given to this method of hiring the crew by considering the intention to have been that the men should serve at least for a month; and, if at the expiration of the month the boat should be at sea, where a termination of the service would be impossible, the service should continue until the boat arrived in port, at the end of a cruise, the wages of the crew continuing until the time of such arrival. From this understanding of the contract in question, the conclusion follows that the libelants were not entitled to leave the boat when they did, because a month had not elapsed from the time of their shipment. The departure, under such circumstances, was therefore desertion, and they forfeited the wages then unpaid.

The libel must be dismissed, but without costs.

THE J. E. POTTS.

HOWARD TOWING ASS'N v. THE J. E. POTTS.

(District Court, N. D. Illinois. February 23, 1893.)

1. SALVAGE—LIEN—WAIVER—BURDEN OF PROOF.

Where a lien for salvage has once attached, and notes are given for the salvage, the burden of proof is upon the party asserting that the notes were intended to detach the lien.

2. SAME—AMOUNT OF COMPENSATION—AGREEMENT.

In the absence of proof to the contrary, the acceptance of such notes shows that the amount of the notes is the proper salvage.

In Admiralty. Libel by the Howard Towing Association against the barge J. E. Potts for salvage. Decree for libelant.

C. E. Kremer, for libelant.

W. H. Condon, for respondent.

GROSSCUP, District Judge. The libel in this case is for services rendered in pulling the barge Potts off the beach at North Fox island, in Lake Michigan. The claim is for \$750, and a number of witnesses have testified that that, under the circumstances, would be a reasonable amount. The defense is that subsequent to the services the owner of the Potts entered into negotiations with the representatives of the libelants, which resulted in the execution of notes amounting to \$600 in full payment of the services. The claim is also made that the delivery and acceptance of these notes operated as a waiver of libelant's lien upon the barge saved. The testimony respecting the execution of these notes, and their purpose, is limited to two witnesses. I can see no reason in their testimony why one should be given greater credence than the other. Where a lien for salvage has once attached, and notes have been given for the services, the burden of proof is upon the party alleging that these notes were intended to detach the lien to show that fact. Under this rule, I am of the opinion that the delivery and acceptance of these notes is not shown to have been intended to detach the lien.

I think, however, that the acceptance of these notes, in the absence of proof to the contrary, shows that the amount agreed upon is the proper salvage, and, accordingly, that the libelant's claim is limited to \$600. The decree, therefore, will be in favor of the libelant for \$600, with a lien upon the barge for its payment.

THE BRIXHAM.

VELASCO TERMINAL RY. CO. v. THE BRIXHAM.

(District Court, E. D. Virginia. March 1, 1893.)

1. SALVAGE—AWARD—RIGHT OF CHARTERER TO SHARE.

A steamer was chartered to carry a cargo to a certain port. The charter party provided that the steamer should "have liberty to tow and to be towed, and to assist vessels in all situations;" and the bill of lading provided that she should "have liberty to tow and assist vessels in dis-

treass, and to deviate for the purpose of saving life or property." The master and crew were in full control and charge of the steamer during the whole voyage, subject to no orders from the charterer, and there was no supercargo aboard. During the voyage she rendered salvage services to another vessel, and was thereby delayed for several days, *Held*, that the charterer was not entitled to any damages for the delay occasioned by the services rendered. The *Persian Monarch*, 23 Fed. Rep. 820, followed.

3. **SAME.**

Mere inert cargo is not entitled to share in a salvage award, solely because of the risk to which it was subjected. The *Blaireau*, 2 Cranch, 240, distinguished.

In Admiralty. Libel by the Velasco Terminal Railway Company against the steamship Brixham. On a petition of the owners of cargo claiming part of a salvage award made by this court in favor of the Brixham against the S. S. Chatfield for salvage services rendered by the Brixham to the Chatfield, and claiming damages for delay in delivering cargo in consequence of rendering the salvage service. Dismissed.

A. R. Hanckel, for petitioners.

Whitehurst & Hughes and Convers & Kirlin, for the Brixham.

HUGHES, District Judge. During the 27th, 28th, and 29th of December, 1891, the steamer Brixham rendered to the steamer Chatfield valuable and meritorious salvage service, for which this court made a decree awarding to the Brixham for the service and for bounty the sum of \$12,500. 52 Fed. Rep. 479. At the time of rendering the salvage service, the Brixham was under charter to the Velasco Terminal Railway Company to carry a cargo of railroad iron and material from Philadelphia to Velasco, Tex., at an agreed freight per ton. The charter was not a demise. The master and crew remained in full control and charge of the Brixham from the beginning to the end of the voyage, subject to no orders from the charterer. The charter party contained a clause providing that the steamer should "have liberty to tow and be towed, and to assist vessels in all situations." The bill of lading provided that the steamer should "have liberty to tow and assist vessels in distress, and to deviate for the purpose of saving life or property." The owners of the freight had no supercargo on board, and there was no semblance or pretense of their having or exercising any authority or control over the steamer during the voyage, direct or indirect, actual or virtual.

The Brixham sailed from Philadelphia on the 25th of October, 1891. On the 27th, when she was nearly abreast of the Virginia capes, she saw the Chatfield flying signals of distress, and deviated from her voyage in order to render assistance. The service she rendered in bringing the Chatfield into Hampton Roads was pronounced by this court a meritorious salvage service. It occupied the Brixham until the 29th of October. During the progress of this service the Brixham sustained damages from the Chatfield, which she found it necessary to have repaired before proceeding on her voyage from Hampton Roads to Velasco. The time consumed in obtaining these

repairs was five days; so that the entire detention incurred in consequence of rendering the salvage service was nine days. The Brixham proceeded from Hampton Roads on the 5th of November, and ultimately reached Velasco with all of her cargo, for the delivery of which she obtained full receipts from its consignees.

The petition under consideration claims damages for delay in delivering the railroad material at Velasco, caused by the deviation of the Brixham from her course in saving the Chatfield, and prays that these damages may be paid out of the salvage money awarded to the Brixham by this court, and still under the court's control. It also prefers a claim to share in the salvage award, on account of the risk to which the railroad material was subjected by the Brixham in rendering the salvage service.

In regard to the claim for damages by delay resulting from this salvage service, I agree with the declaration of the court in the case of *The Persian Monarch*, 23 Fed. Rep. 820: "It seems to add a new horror to shipwreck to hold that, when the master of a vessel in distress accepts the services of another vessel for his rescue, he binds his owners to the owners of the cargo of such other vessel to pay them all damages resulting from the rendition of salvage service. Such cannot be the law." It would be a still greater discouragement of salvors if it were held that, in rendering salvage services to vessels in distress, they would be held liable to owners of cargoes on their own ship for damages for the mere delay resulting from such services, such as are claimed in this petition. "Such cannot be the law," and I must disallow the claim.

As to the claim of petitioners in this case to share directly in the salvage award, it is equally inadmissible. Salvage is awarded for actual, daring service, attended by risk to life and property. The mere fact of inert property being at risk does not entitle its owner, who may be safe on land, to share in a salvage award. Actual physical service attended by risk, and, in the case of a steamer or ship, risk or loss of property, are the chief ingredients of salvage service. Insentient, inert cargo cannot of itself participate in a salvage award. There were circumstances in the case of *The Blaireau*, 2 Cranch, 240, where the supercargo, who was also one of the charterers of the saving ship, was on board, in control of ship and cargo, and rendered material personal service in saving the other ship, to justify an award to the charterers. The supercargo was one of six men who left his own ship and went on board the one saved, to take her into port. It was under these circumstances that the supreme court allowed the owners of the cargo—that is to say, the charterers—of the saving ship to share in the salvage award. This case of *The Blaireau* is, I believe, the only one in which the supreme court of the United States has allowed the cargo, as such, to share in salvage awards. As a precedent, therefore, the case is not of value to show that inert, insentient cargo, by reason solely of risk, may be awarded salvage. I do not think it worth while to pass upon the defense, set up in the answer, of *lis alibi pendens*. The prayers of the petition must be denied. I will so decree.

THE LAURENCE.

NEW YORK, P. & N. R. CO. v. THE LAURENCE.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1893.)

No. 37.

COLLISION—STEAMER WITH BARGE AT ANCHOR—FOG—EXCESSIVE SPEED.

A coal barge was anchored for several days in the west side of the channel of the Elizabeth river, Virginia, at a place designated by the harbor master, and customarily used as an anchorage for many years. The channel was 450 yards wide for 18-foot water and 600 yards for 12-foot water, and there was at least 200 yards of sea room east of the barge. During a dense fog the barge was struck by a steamer making a regular run at about her usual speed of 15 miles per hour. The officers of the steamer were aware of the position of the barge, and were on the lookout for her, and those on the barge, on hearing the steamer's approach, gave frequent signals by bell and horn. The steamer was out of her usual course, and out of the part of the channel generally used by passing vessels. *Held*, that the steamer was in fault for maintaining excessive speed in a fog, thus violating Act Aug. 19, 1890, c. 802, art. 16, § 1.

Appeal from the District Court of the United States for the Eastern District of Virginia.

In Admiralty. Cross libels for collision by the New York, Philadelphia & Norfolk Railroad Company against the barge Laurence, and the Thames Towboat Company of New London against the steamer New York. Decree for the Thames Towboat Company. The New York, Philadelphia & Norfolk Railroad Company appeals. Affirmed.

Robert M. Hughes, for appellant.

Samuel Park, for appellee.

Before BOND and GOFF, Circuit Judges, and SIMONTON, District Judge.

GOFF, Circuit Judge. About 8:45 o'clock in the morning of the 9th day of March, 1891, during a dense fog, a collision took place in the Elizabeth river below the Lambert's Point coal piers, the steamer New York running into and sinking the barge Laurence. The steamer was owned by the New York, Philadelphia & Norfolk Railroad Company, and the barge by the Thames Towboat Company of New London. The steamer was bound from Cape Charles to Norfolk, and the barge was at anchor, laden with coal. The steamer was damaged, and the barge and her cargo lost. Cross libels were filed in the district court of the United States for the eastern district of Virginia at Norfolk. They were tried before the judge of that district, who dismissed the libel against the barge Laurence, and passed a decree in favor of the Thames Towboat Company, libellant in the cross bill. From the decree dismissing its libel the New York, Philadelphia & Norfolk Railroad Company appealed.

The claim of the appellant is that the barge was anchored in an improper place and manner, and that proper signals of her presence were not given. The questions involved (mostly questions of fact) are to be determined as we find the weight of the evidence to be

relative to the location of the steamer and barge in the channel, and the rate of speed the steamer was making when she was informed of the presence of the barge, as well as the width of the channel at the point where the collision occurred, and the character and frequency of the signals given by the barge. We have carefully considered the testimony, and, while it on some points is contradictory, we find that its weight decidedly sustains the conclusions reached by the judge who heard the cases, and before whom the witnesses were examined. As to the contention that the barge was anchored in the channel, in an improper place, and without proper authority, we find that about 30 vessels were so anchored on the west side of the channel at the time the collision occurred. These vessels had been so placed, by and under the direction of one who had been acting as deputy harbor master at Norfolk for years. The west side of the channel at that point had been so used for years, and this custom, then well established and understood, was well known to those navigating that channel, and going in and out of the port of Norfolk. The Laurence had been for several days in the position she was on the morning of the collision, and the steamer New York was aware of the fact that the barge was so anchored. It appears that the steamer was on the lookout for the barge, and the latter, hearing the steamer approaching, was giving signals advisory of her presence. The fact that the custom of anchoring on the west side of the channel existed and was well known by the steamer and the barge, and the further fact that the steamer was fully advised as to the location of the barge, make quite a different case from the one argued by counsel for appellant, who dwelt with much force upon the dangers to navigation occasioned by the unauthorized and improper anchoring of vessels in channels necessarily used by steamers in going in and out of our ports. Had the location been unusual and without authority—the anchoring of the barge an isolated circumstance at an unaccustomed place—of which the steamer was not informed, then it would have been entitled to serious consideration in connection with the question of the liability of the barge.

Why did this collision happen? Where was the fault? Could the steamer have passed the barge safely with the use of due care and necessary caution? We think so. The Laurence was lashed to another barge, the Puritan, which was considerably larger, and was also laden with coal. They were on the western side of the channel of the river, which at that place was 450 yards wide for 18-foot water and 600 yards wide for 12-foot water. The Laurence drew about 12 and the Puritan 13 feet, and they were at anchor in about 36 feet of water. The barge was struck in her starboard quarter by the steamer, which cut into her 5 or 6 feet, wedging the vessels so firmly together that it required the power of the engines of the steamer and a tug to pull them apart. The evidence shows that the men on the barges were using a bell and a horn, frequently ringing and blowing them as signals, in the dense fog then prevailing in the channel where the vessels were anchored. The officers of the steamer were aware that the barges were at

anchor, and were advised as to the locality they so occupied. There was at least 200 yards of sea room east of the barges, used by vessels in going in and out of the port of Norfolk. It was the duty of the steamer, in motion, to steer clear of the barges, at anchor. The steamer was evidently moving at a greater rate of speed than was proper under all the circumstances. A crowded harbor and a dense fog should at least suggest more care and less speed. The steamer ran in connection with the railroad, and had her schedule time. She drew 9 feet at rest and 11 feet at full speed, and was a screw boat 210 feet in length. She made the run from Cape Charles to Craney island, in the fog, at her usual rate of speed, about 15 miles an hour. As to her speed at the time she struck the barge the evidence is conflicting, but we have no difficulty in finding from it that she was moving in disregard of the law in such case made and provided, and the regulations issued in pursuance thereof. She was bound to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog. This is the rule laid down by the supreme court of the United States in the case of *The Colorado*, 91 U. S. 692, 702. See *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. Rep. 122.

It is also evident from the evidence that the New York was, at the time of the collision, out of her usual course,—out of that part of the channel generally used by passing vessels. This was doubtless owing to the dense fog, and it was this mistake that brought her into collision with the *Laurence*. For the reasons we have given we find the steamer liable for the damages to the barge, and the decree of the district court is affirmed, with costs.

HUDSON RIVER RAILROAD & TERMINAL CO. v. DAY.

(Circuit Court, D. New Jersey. March 22, 1893.)

1. **REMOVAL OF CAUSES—WHO IS A DEFENDANT—CONDEMNATION PROCEEDINGS.**
A landowner who is dissatisfied with the award of damages in condemnation proceedings, and who appeals to a state court, as provided by law, is a defendant, for the purpose of removing the appeal to a federal court, although the law of the state (New Jersey) gives him the right on such appeal to open and close; the issue being confined solely to the amount of damages.
2. **SAME—WAIVER—REVIEW BY STATE SUPREME COURT.**
A landowner who has appealed to a state court from the decision in condemnation proceedings against him waives his right of removal to a federal court by having the record of prior proceedings sent up on certiorari for review by the state supreme court. *Amy v. Manning*, 10 N. E. Rep. 737, 144 Mass. 153, approved.

Proceeding by the Hudson River Railroad & Terminal Company against James Day to condemn certain land. Day appealed to the circuit court of Bergen county, N. J., and removed the appeal to this court. On motion to remand. Granted.

John W. Taylor, for the motion.
Cortlandt Parker, opposed.

GREEN, District Judge. The Hudson River Railroad & Terminal Company, a corporation of the state of New Jersey, under the provisions of the general railroad law of that state, instituted proceedings to condemn for its uses and purposes certain lands situate in Bergen county, in that state, belonging to James Day, a nonresident. In due course an award covering the value of the lands taken, and the damages resulting therefrom, was made by commissioners thereunto duly appointed. Mr. Day, the owner, being dissatisfied with the award, appealed to the circuit court of the county of Bergen, as the statute authorized him to do. Upon filing his appeal in that court, he also filed a petition to remove that appeal to this court, for the reason that he was not a citizen of this state. At the same time he moved for, and obtained, a writ of certiorari from the supreme court of New Jersey, directed to the circuit court of Bergen county, commanding that court to send up to the supreme court, for examination and review, and for adjudication as to their legality, all the proceedings in the condemnation matter which had thus far been had. This writ was duly served, its mandate obeyed, and the allegations of the respective parties heard and taken into consideration by the supreme court. No judgment has yet been rendered by that tribunal, but the controversy is still pending. This matter now comes before the court on a motion to remand it to the circuit court of Bergen county, in the state of New Jersey, from which court it had been removed under the statute regulating removal causes to federal courts.

Two reasons are assigned for remanding: First. That Mr. Day, the landowner who petitioned for the removal, was and is, in fact, the plaintiff in the appeal proceedings before the circuit court on

appeal from the award of commissioners condemning his land for the uses and purposes of the Hudson River Railroad Terminal, and therefore, although a nonresident, had, under the statute, no right to remove the cause; such right being reserved to those who are defendants, only. Second. At the time of filing the petition and bond required by the statute regulating removals to the federal courts, he had applied for and obtained from the supreme court of the state of New Jersey a writ of certiorari, directed to the circuit court of the county of Bergen, commanding that court to certify and send up to the supreme court the record and proceedings in the controversy then pending, for review by the latter tribunal, and that by such proceeding he had waived his right to remove the case to the federal court.

So far as the first reason goes, I do not think it is well founded. It is true that the landowner is an appellant in this case, and might be designated as "plaintiff on appeal," but he is not plaintiff, technically, in this action. The railroad company was the actor. It instituted the proceedings to condemn the lands in question. It originated the initiatory steps which led to the award which is now on appeal from the judgment of a lower tribunal. It invoked the execution of the law, as against the landowner, and it was and is, in fact, the plaintiff. It is undoubtedly true that in New Jersey the supreme court has held that, for sake of uniformity in practice upon the trial of an appeal like this, the landowner has the opening and closing; but that was upon the ground that the issue before the court on appeal in condemnation causes concerns solely the damages which the railroad company are to pay for acquiring land taken, and necessarily the landowner would be called upon to prove those damages affirmatively. Hence, the burden of proof being upon him, the technical right to open and close the case would be his. But that does not in any degree alter the legal character cast upon him by the action taken by the railroad company in the beginning. He was then made defendant, and he remained a defendant all through the litigation. He may be plaintiff in appeal, but he is defendant in the cause. The reasoning of the counsel for the railroad company was very acute upon this branch of the case, but I cannot think it was accurate. So far as the appellant's distinctive character in this litigation is concerned, I must hold that Mr. Day is a defendant, and as such, being a citizen of another state, while the railroad company is a corporation of this state, he is entitled, under the statute in such case made and provided, to invoke its provision, and remove the controversy from the state to the federal tribunal.

The second reason assigned is much more cogent. It is admitted that, at the very time Mr. Day filed his petition for removal in the circuit court of Bergen county, he obtained from the supreme court, or from a justice of the supreme court, a writ of certiorari directed to the Bergen county court, requiring that court to send up all the record and proceedings which had theretofore been had in the cause, that they might be reviewed by the supreme court sitting in banc; that the proceedings and record have been sent, in obedience to the writ, to the supreme court, and a review has been had, both parties

being represented by counsel. The argument on the certiorari took place before the supreme court months after the filing of the petition for removal of the controversy to this court. I think that Mr. Day, in choosing the state tribunal for the protection of his rights, has waived his right to remove his cause to the federal tribunal. He cannot proceed tentatively in either court. He must make his selection. If he chooses to rest the protection of his rights with the state tribunal, he cannot afterwards seek to delay or embarrass the final determination of his case by appealing to the federal tribunal. A single illustration will show that this double proceeding cannot be permitted. If the supreme court of the state of New Jersey, upon considering the validity of the proceedings heretofore had in the condemnation, should set them all aside, as illegal or unwarranted, what pretense would there be that there was any cause to be removed or to be heard in the federal tribunal? The action of the supreme court of the state of New Jersey would be final in the premises, and there would be remaining no controversy to remove into this court.

I think the case of *Amy v. Manning*, 144 Mass. 153, 10 N. E. Rep. 737, is very much in point. In that case the defendant filed a motion to dismiss a pending cause, and also a petition for removal, and with the latter a motion in which he asked, in case the motion to dismiss should not be granted, the court would order the removal as prayed for in the petition. The court overruled the motion to dismiss, and then held that by his conduct, in moving to dismiss the case, he had lost his right to have it removed. This case is certainly very analogous to the one now before the court. When Mr. Day presented his petition for removal, he asked also for the allowance of a writ of certiorari. The distinct object which he had in view was to obtain from the supreme court of New Jersey an adjudication, in effect, setting aside all proceedings in the cause which had theretofore taken place. This is tantamount to a motion to dismiss the cause. Having taken that course simultaneously with the filing of his petition for removal, I think he has, by such election, waived his right to remove the controversy to this court, and hence the motion to remand is granted.

TEXAS & P. RY. CO. v. KUTEMAN.

(Circuit Court of Appeals, Fifth Circuit. November Term, 1892.)

No. 86.

1. FEDERAL COURTS—INJUNCTION—THREATENED SUITS IN STATE COURT.

A federal court is not prohibited by Rev. St. § 720, from issuing an injunction to restrain the prosecution in a state court of a multiplicity of threatened suits which have not been actually begun.

2. SAME—JURISDICTIONAL AMOUNT.

In a suit by a railroad company for injunction to restrain a shipper from prosecuting in a state court a multiplicity of suits for overcharge in freight, the maintenance of the scheduled rate under which the charges were made is the real subject of dispute, and the value of such maintenance determines the jurisdictional amount of the controversy. Where such

value is not liquidated or fixed by law, the alleged value is conclusive on demurrer to the bill.

8. RAILROAD COMPANIES—OVERCHARGE—LONG AND SHORT HAUL—TEXAS STATUTE.

The making of a "group rate," or the charging of the same price for a shorter as for a longer haul, is not within the provisions of Rev. St. Tex. art. 4257, prohibiting the charging of oneshipper a greater rate than another for the same or a shorter haul. *Railroad Co. v. Kuteman*, 14 S. W. Rep. 693, 79 Tex. 465, distinguished.

4. SAME—MULTIPLICITY OF SUITS—INJUNCTION—ADEQUATE REMEDY AT LAW.

A railroad company which is threatened with separate suits under the Texas law before a justice of the peace for every car load as to which overcharge is alleged, has no adequate remedy at law, and may obtain an injunction to restrain the prosecution of such suits. *Railroad Co. v. Dowe*, 7 S. W. Rep. 368, 70 Tex. 5, followed.

5. SAME—PLEADING.

In such a case, a bill alleging that complainant has a good defense to each and all of such suits, and that its rates are necessary, just, and wholesome, presents an issue of fact for the determination of which testimony must be taken, and is sufficient to withstand a demurrer, except as to suits already begun in the justice's court. *Railroad Co. v. Dowe*, 7 S. W. Rep. 368, 70 Tex. 5, followed.

Appeal from United States Circuit Court, Eastern District of Texas.

In Equity. Bill by the Texas & Pacific Railway Company to restrain R. B. Kuteman from prosecuting certain suits in a state court. A demurrer to the bill was sustained, and the bill dismissed. Complainant appeals. Reversed.

W. W. Howe, S. S. Prentiss, R. S. Lovett, and T. J. Freeman, for appellant.

H. Chilton, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The Texas & Pacific Railway Company, the appellant, exhibited its bill to one of the judges of the circuit court for the eastern district of Texas against the appellee, R. B. Kuteman, showing that appellant was operating a line or lines of railroad in Texas and Louisiana, penetrating the pine-growing and lumber-producing regions in those states, and extending beyond these into the western part of Texas, where no lumber is produced, but much is needed and used. That no lumber mills are operated on appellant's lines west of Mineola, and that appellant had adopted and was charging on all lumber shipments made or received on its line from all points east of Mineola on its railroad to the Texas state line, to be carried west of Mineola, what is known as a "group rate." That the group rate to Dallas, Tex., to which appellee's shipments were chiefly made, is 20 cents a hundred pounds in car-load lots. That said rate is much below the maximum prescribed by law. That it is reasonable and just, and a group rate is necessary to develop the lumber production in the pine region, and to fairly furnish the western market, and to increase the traffic on appellant's

road. That no greater charge is made for hauling a shorter distance than a longer, and that making the same charge for the shorter as for the longer distance in the case stated prevents an unjust and oppressive discrimination against the producers of lumber in eastern Texas and the consumers of and dealers in lumber in the western and other parts of the state, where lumber is not produced. That the appellee has mills at and near Lake Fork, the most western point east of Mineola where lumber is received by appellant, and he claims that he should be given a lower rate than the rate charged on shipments made at points further east, in proportion to the respective length of the haul, substantially claiming that any rate but a mileage rate unjustly discriminates against him. Claiming further that 12½ cents a hundred pounds for lumber in car loads is the highest rate that is reasonable on shipments from his mills to Dallas, and that the difference between this and 20 cents, charged by appellant, is the measure of the unjust discrimination made against him by appellant. That appellee has already brought five suits against the appellant on account of shipments made, and threatens to bring and to induce others to bring many more. That appellee's practice heretofore has been, and his threatened plan is, to sue on each separate car-load shipment, or on only such a number as that the amount claimed by him in each suit will be below the amount necessary to permit the appellant to appeal to a court of last resort, or to one in which a judge or judges learned in the law sit; and that the local judges of the inferior courts in which appellee's suits have been brought and are threatened to be brought, and of the only court to which they can be appealed, are not required by law to be learned in the law, and in fact are not so learned. That they have so far disregarded appellant's defenses, and have given judgment against appellant, which appellant either has paid or will have to pay, and that appellee boasts—by no means extravagantly—that these ignorant or prejudiced judges will continue to give judgment against appellant in the numerous cases threatened; thus practically enforcing a rebate in favor of the appellee on all of his shipments, without appellant having any remedy or power to prevent it by any proceeding at law. That since July 1, 1889, appellee has shipped 105 car loads of lumber from Lake Fork to Dallas or other points west of Mineola. That he is a continuous, constant shipper, and that he claims a reduction of the rate charges on each car, averaging between \$15 and \$35, for which he avows his purpose to sue, which, if enforced, will injure appellant more than \$5,000 per annum. And that appellant's right to fix such rate is of the value of more than \$10,000. Prayer is made for injunction and for general relief.

On May 3, 1890, the judge ordered:

"On consideration of the foregoing bill it is ordered that the same be filed and served by copy upon R. B. Kuteman, with usual subpoena. It is further ordered that the said defendant, R. B. Kuteman, do show cause, on Monday, the 12th day of May, at 11 o'clock A. M., or as soon thereafter as counsel can be heard, before the circuit court for this district, at Tyler, why the injunction pendente lite prayed for in said bill should not issue; and in the mean time let a restraining order issue enjoining and prohibiting the said defend-

ant from instituting or prosecuting the action described in said bill until further order of the court."

It does not appear when notice of this order or process of subpoena was served on the defendant. On September 10, 1890, there was filed what is labeled, "Answer to Order to Show Cause." On September 17th was filed the defendant's demurrer to complainant's bill, stating the grounds:

"(1) That the same is wholly insufficient, and the facts stated therein show no cause of action; (2) that the circuit court of the United States has no jurisdiction to issue a writ of injunction against proceedings in the state courts; (3) that the amount involved is not sufficient to give the circuit court of the United States jurisdiction of complainant's bill; (4) that the penalties or suits which complainant alleges to be threatened by respondent are quasi criminal and statutory, and the United States court has no jurisdiction to enforce or restrain them."

No further action of the circuit court or of any of its judges appears in the case until September 12, 1892, on which day the decree appealed from was passed in these terms:

"This cause came on to be heard at this term, and was argued by counsel for the plaintiff and the defendant, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows: That the demurrers filed by defendant herein on September 17, 1890, and put in to the whole of the plaintiff's bill, be held good and sufficient, and that the injunction or restraining order heretofore granted do stand dissolved, and that said demurrers be sustained, and the bill dismissed. It is further ordered, adjudged, and decreed that said plaintiff, the Texas & Pacific Railway Company, take nothing by this suit, and that said defendant, R. B. Kuteman, go hence without day, and recover of plaintiff all costs in this behalf expended, which costs may be taxed by the clerk, and for which execution may issue."

The appeal was duly allowed and perfected, and the appellant contends that the circuit court erred in sustaining the demurrers of defendant, and dissolving the injunction theretofore granted, and dismissing complainant's bill. The appellee contends that the demurrers were properly sustained and the bill dismissed, and submits these propositions:

"(1) The federal courts are not authorized to restrain proceedings in state courts, except to sustain a first-acquired federal jurisdiction; and the preliminary injunction herein was properly dissolved, and demurrer sustained. (2) The demurrer was properly sustained, because the amount in controversy was less than the sum necessary to give federal court jurisdiction. (3) Plaintiff's bill lacked equity, in that a legal remedy existed in its behalf by consolidation of the suits in justice's court. (4) That under the statute of Texas regulating railroad rates the railway company was liable to Kuteman for unjust discrimination, and complainant's bill showed no cause of action against him. (5) That the preliminary injunction was properly dissolved, because of the answer of defendant denying the allegations that he intended to bring suit for discrimination on 105 cars of lumber, and charging that there were not more than five of such cars. (6) That the injunction was properly dissolved, because the matters of controversy set up in complainant's bill were shown by the defendant's answer to have been already adjudicated adversely to complainant in the state court."

It is not clear that the bill in this case seeks to stay or enjoin any pending proceedings in state courts, though the language of the prayer that the defendant be enjoined "from instituting or prosecuting such action pending this cause" is susceptible of that construction. Mani-

festly the chief purpose was to prevent the further institution of the many threatened suits, and, if the plaintiff sought relief as to suits already brought, as well as to suits threatened, the two purposes and prayers are not so united or dependent that they must stand or fall together. The language of the statute is plain, and the decisions uniform, that, with the exception named in the statute, a writ of injunction shall not be granted to stay pending proceedings in any court of a state. Rev. St. U. S. § 720; *Diggs v. Wolcott*, 4 Cranch, 179; *Peck v. Jenness*, 7 How. 620; *Haines v. Carpenter*, 91 U. S. 255; *Dial v. Reynolds*, 96 U. S. 340; *The Mamie*, 110 U. S. 742, 4 Sup. Ct. Rep. 194; *Dillon v. Railway Co.*, 43 Fed. Rep. 109. These cases all relate to the stay of proceedings begun in the courts of a state before any resort was had to the United States courts by parties whose citizenship gave the national courts concurrent jurisdiction of the parties and the subject-matter. In *Fisk v. Railway Co.*, 10 Blatchf. 520, Judge Blatchford says:

"The provision of section 5 of the act of March 2, 1793, that a writ of injunction shall not be granted to stay proceedings in any court of a state, has never been held to have, and cannot properly be construed to have, any application except to proceedings commenced in a state court before the proceedings are commenced in the federal court; otherwise, after suit brought in a federal court, a party defendant could, by resorting to a suit in a state court, defeat, in many ways, the effective jurisdiction and action of the federal court after it had obtained full jurisdiction of person and subject-matter. Moreover, the provision of the act of 1793 (now section 720, Rev. St.) must be construed in connection with the provision of section 14 of the act of September 24, 1789, that the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions. 1 U. S. St. at Large, pp. 81, 82." Section 716, Rev. St. U. S.

This is cited with approval by Judge Field in *Sharon v. Terry*, 36 Fed. Rep. 365. It is in harmony with *French v. Hay*, 22 Wall. 250, and *Dietzsch v. Huidekoper*, 103 U. S. 494, and appears to be substantially conceded by the terms of appellee's first proposition. This being so, as to all suits threatened, no proceeding having begun as to them in any court prior to the filing of appellant's bill, the exhibiting the bill in the circuit court, if jurisdiction otherwise is shown, gives that court "a first-acquired federal jurisdiction," to which section 720 cannot reasonably be applied. Nor does it make the case different that the only relief the appellant needs or seeks is a permanent injunction against the institution of a multiplicity of suits which the appellee is threatening to bring in a state court. When the United States courts acquire jurisdiction of the parties and of the subject-matter, so far as acquired, the jurisdiction is complete. "There is not in our system anything so unseemly as rivalry and contention between the courts of the state and the courts of the United States," (*Sharon v. Terry*, *supra*), and in a case where the circuit court would have jurisdiction to enjoin a party from bringing a multiplicity of suits which he was threatening to bring in the United States courts, and should exercise that jurisdiction, it is manifest how inadequate the relief would be if the party enjoined was left free to institute proceedings on the same cause of action in a state court having concurrent jurisdiction. It seems clear to us that no such element of weakness affects the jurisdiction of the United States courts; that

in a proper case for injunction, of which, by reason of the subject-matter or of the citizenship of the parties, the United States courts have jurisdiction, the injunction may issue, and will be effectual to prevent the institution of a multiplicity of suits, or of any suit, in any other court; and that there is drawn to the court, otherwise properly issuing the injunction, the consideration of and jurisdiction over the whole subject-matter on account of which or out of which said suits are apprehended.

Is the subject-matter of this suit of sufficient value to support the jurisdiction of the circuit court? The bill charges that the defendant has often and notoriously avowed and declared, and still avows and declares, that he will sue the complainant to recover sums of money averaging between \$15 and \$35 for each car of lumber heretofore or hereafter shipped by him over its railway; that since the 1st of July, 1889, defendant had, up to the filing of complainant's bill, May 5, 1890, shipped 105 cars; that defendant is engaged in the lumber business at Lake Fork station, and continues and will continue to ship lumber therefrom to points west of Lake Fork. In the letter of the defendant attached to complainant's pleadings and made a part of its bill, he claims an overcharge on one car of \$24. Taking that as an average, and deducting the \$488.15 already sued for in the state courts, would give the amount of \$2,031.85. But the complainant also avers that the rates established and charged by it are not one half so much as the maximum rate it is authorized by law to charge; that it is reasonable, fair, and just, and that complainant's right to establish and maintain such rate is a valuable one, and of the value of more than \$10,000. In a suit for an injunction the amount in dispute is the value of the object to be gained by the bill. *Fost. Fed. Pr.* § 16. An injunction may be of much greater value to the complainant than the amount in controversy in cases of dispute which have already arisen. *Symonds v. Greene*, 28 Fed. Rep. 834; *Whitman v. Hubbell*, 30 Fed. Rep. 81. The maintenance of its rates is the real subject of dispute, and the object of the bill and the value of this object must be considered. *Railroad Co. v. Ward*, 2 Black, 485. This value not being liquidated or fixed by law, the alleged value, especially on demurrer to the bill, must govern.

On the allegations of appellant's bill, was it liable to Kuteman for unjust discrimination under the statute of Texas? Appellee so contends, and cites the statute relied on, and the case of *Railway Co. v. Kuteman*, 79 Tex. 465, 14 S. W. Rep. 693. The case cited does not support this contention. So much of article 4257 of the Revised Statutes of Texas as was drawn in question in that case is quoted in the opinion, and thereon the court says:

"We cannot agree with appellant in its contention that it is only where the freight is being transported between the same points that the prohibition against charging more for a less distance than a greater one applies."

No question of group rates, or the charging of the same for a less as for a greater distance is here touched on. The case was not decided on any construction of the statutes, but was made to rest entirely on the view that the appellant in that case had an adequate

remedy at law, and that the injunction was on that account rightly refused. The whole section cited reads as follows:

"Railroad companies may charge and receive not exceeding the rate of 50 cents per 100 pounds per 100 miles for the transportation of freight over their roads; but the charges for transportation on each class or kind of freight shall be uniform, and no unjust discrimination in the rates or charges for the transportation of any freight shall be made against any person or place on any railroad in this state, and it shall be prima facie evidence of an unjust discrimination for any railroad company to demand or receive from one person, firm, or company a greater compensation than from another for the transportation in this state of any freight of the same kind or class in equal or greater quantities for the same or a less distance, which prima facie evidence may be rebutted by competent testimony on the part of such company, showing that the discrimination, if any, was not an unjust one, and the question upon an issue as to whether any alleged discrimination is unjust or not shall be a question of fact to be tried and determined as any other issue of fact in a case: provided, that when the distance from the place of shipment to the point of destination of any freight is 50 miles or less, a charge not exceeding 30 cents per 100 pounds may be made for the transportation thereof."

It seems clear to us that whether the rate charged by appellant, as shown by its bill, is an unjust discrimination against appellee under the law above quoted, is a question of fact to be solved in the prescribed way on issue joined and proofs taken, and is not apparent as matter of law on the face of the pleadings challenged by the demurrer of appellee.

The case of *Railway Co. v. Dowe*, 70 Tex. 5, 7 S. W. Rep. 368, is conclusive authority against appellee's third proposition.

The fifth and sixth propositions need no further notice than to recall the fact that the defendant has not answered the bill,—has not been required to answer,—as his demurrer to the bill was sustained and the bill dismissed. Was there error in this action of the circuit court? What we have already said disposes of the special grounds of the demurrer, and leaves only the question whether the appellant in its bill presents a case that warrants the issuance of the injunction sought against the further institution of the threatened suits? We are of opinion that the case of *Railway Co. v. Dowe*, supra, and the authorities therein cited and approved, fully warrant the granting of an injunction to stay the institution of such a multiplicity of suits if the appellant shows that it has a good defense to each and all of them. The appellant so alleged in its bill, and says that, so far as it may be held that its rate on lumber discriminates against the defendant or any shipper, it is a just, necessary, and wholesome discrimination; thus presenting an issue of fact which the court cannot determine without the taking of testimony. We are of opinion that the court erred in sustaining the demurrer to the whole bill, and in dissolving wholly the restraining order, and in dismissing the bill; that the demurrer should have been sustained so far as the bill may seek to stay the prosecution of suits begun in the state courts before the granting of the restraining order in this case, and that said restraining order should have been construed, and, if deemed necessary, should have been so amended, as to restrain only the institution of suits after the granting of said order, and the bill should have been

retained to proceed to final hearing according to the rules and settled practice of equity proceedings in the United States courts.

It is therefore ordered that the decree appealed from is reversed, and the cause is remanded to the circuit court, to be proceeded with in accordance with the views expressed in the foregoing opinion.

WHITNEY v. WILDER et al.

(Circuit Court of Appeals, Fifth Circuit. November Term, 1892.)

No. 102.

FEDERAL COURTS — JURISDICTION — INJUNCTION AGAINST OFFICER OF STATE COURT.

The prohibition of injunctions against the state courts (Rev. St. § 720) extends to all cases over which such courts first get jurisdiction, and applies to the officers and parties in the courts as well as to the courts themselves. Therefore, a federal court has no power, on the complaint of a legatee and an executor under a will probated in one state, to enjoin an administrator appointed in another state from distributing the funds under his control to the heirs at law.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Equity. Bill by W. H. Wilder, executor of the estate of Myra Clark Gaines, deceased, under her will, probated in New York, and Myra Clark Gaines Mazerat, a legatee of said Myra Clark Gaines, suing by her father, Joseph Numa Mazerat, as her next of kin, against William Wallace Whitney, administrator of deceased's estate under the appointment of a Louisiana court, to enjoin respondent from distributing the funds of the estate. Decree for complainants. Respondent appeals. Reversed.

Thos. J. Semmes and Rouse & Grant, for appellant.

Browne & Choate and R. De Gray, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge. The complainants are a legatee and the executor under the last will and testament of Myra Clark Gaines, deceased, which will was probated in the state of New York, the place of the testatrix's domicile at the time of her death. The defendant is the administrator of the estate of said deceased under the appointment of the civil district court in and for the parish of Orleans, in the state of Louisiana.

The substance of the bill is that said Myra Clark Gaines left a large personal estate in the state of Louisiana, which her said administrator has collected, and which, in the administration of the same, it is proposed to distribute and pay over to the heirs of the intestate in disregard of her last will and testament as probated in the state of New York; that the heirs of said intestate have filed a petition in the said civil district court praying to be put into possession, as heirs at law, of all the assets of her said estate after pay-

ment of his debts, and that this is done with the wrongful and fraudulent intent of defeating the execution of said last will and testament, and of depriving the complainants of their rights under the same. The bill prays that said administrator may be restrained by injunction *pendente lite* from distributing and paying over the funds of the said estate to any person whatsoever beyond the payment of the debts of the deceased. The injunction, as prayed for, was granted by the court below, and from that decree this appeal is taken.

While the injunction is directed to the administrator of the succession and estate of Myra Clark Gaines, deceased, restraining him from paying out to the heirs at law of said estate any moneys belonging to it, its purpose and effect are to interfere with the pending administration of the estate in the probate court of the state of Louisiana, which is vested with exclusive jurisdiction of the same, and by whose order alone the administrator would be duly authorized to distribute and pay over any money belonging to it. The heirs at law of the deceased petition the probate court that, after the payment of all debts, the property of the estate be turned over to them. The practical effect of the injunction is to stay proceedings under this petition. Should a decree be granted on the petition by the probate court, and the administrator be ordered to comply with the same, he would be subject to diverse and conflicting decrees,—that of the state court, directing him to distribute the funds of the estate in its custody and under its control according to its decree, and that of the federal court, directing him to refrain and desist from distributing such funds. It was said by this court in the case of *Railway Co. v. Kuteman*, 54 Fed. Rep. 547, (decided at this term,) that “there is not in our system anything so unseemly as rivalry and contention between the courts of the state and the courts of the United States.” The framers of our statute laws, foreseeing the evils of such conflicting jurisdiction, have wisely prohibited, in express terms, the granting of injunctions to stay proceedings in any court of a state. Rev. St. § 720; *Railway Co. v. Kuteman*, *supra*. This prohibition of the statute extends to all cases over which the state court first obtains jurisdiction, and applies not only to injunctions aimed at the state court itself, but also to injunctions issued to parties before the court, its officers or litigants therein. *Diggs v. Wolcott*, 4 Cranch, 179; *Peck v. Jenness*, 7 How. 625; *Dial v. Reynolds*, 96 U. S. 340.

As, in our opinion, the circuit court was without power to grant the injunction, and the decree must, for that reason, be reversed, we have deemed it unnecessary to consider in detail all the assignments of error found in the record and discussed at the bar.

The decree is reversed, and the cause remanded to the circuit court, with directions to dissolve the injunction.

CLARKE et al. v. CENTRAL RAILROAD & BANKING CO. OF GEORGIA et al.

CENTRAL RAILROAD & BANKING CO. OF GEORGIA v. FARMERS' LOAN & TRUST CO. OF NEW YORK.

(Circuit Court, S. D. Georgia, E. D. April 17, 1893.)

1. RECEIVERS—POWER TO MAKE LOANS AND PLEDGE ASSETS.

Where a bill was filed by the president and directors of a railroad company, alleging that, as a result of an unlawful lease and the diversion of its income, it has been embarrassed, but, if properly managed, it may extricate itself from its difficulties, and the court appoints its president receiver for the purpose of preserving the property, and with the aid of the court placing it upon a prosperous footing, and no lien creditors are parties, it is competent for such president receiver, with the authority of the court, to pledge collateral and equitable assets of the company to secure loans necessary to its operation, and also to incur a liability for the expenses of a refunding scheme.

2. SAME—RIGHTS OF LIEN CREDITORS.

If, however, before such expenses are paid, creditors holding liens upon the property are made parties, the court will not ex parte allow the expenses of such refunding scheme to be paid by the receiver.

(Syllabus by the Court.)

In Equity. Petition by H. M. Comer, receiver of the property of the Central Railroad & Banking Company of Georgia, for an order authorizing the payment of certain expenses. Denied.

For prior opinion, see 50 Fed. Rep. 338.

Lawton & Cunningham and Denmark & Adams, for the motion.

SPEER, District Judge. On March 31, 1893, H. M. Comer, receiver, made his sworn statement and petition to the court, asking that certain expenses, amounting to \$7,975.15, stated to have been incurred by a reorganization committee which had, at the request of the Central Railroad & Banking Company of Georgia, through the formal action of its board of directors, undertaken to formulate and perfect a plan to relieve that corporation from the financial embarrassment under which it was then suffering, should be approved by the chancellor, so as to make the same chargeable against the equity of redemption belonging to the Central Railroad & Banking Company of Georgia, in certain securities pledged by that company to said reorganization committee for moneys advanced. This is the first application for the allowance of such expenses. The court has taken time for consideration, and, after careful deliberation, declines, in the present state of the record, to grant the approval asked. The reasons for this action are the following: On January 10, 1893, when the order of that date, above referred to, authorizing the pledge of said securities, was passed, the attitude before the court of the proceedings then filed was as follows: Rowena M. Clarke et al., minority stockholders, had filed their bill alleging that the board of directors of the Central Railroad & Banking Company of Georgia, acting when the bill was presented, had been illegally elected. A majority and controlling interest in the stock of the Central Railroad

& Banking Company of Georgia, it was alleged in said bill, had been bought up by the Richmond Terminal Railway & Warehouse Company, a company controlling lines of railway competitive to the Central Railroad & Banking Company of Georgia. That this purchase was in contravention of the constitution and laws of the state. The bill further charged that said stock, so illegally acquired, had elected the then acting board of directors. This board had proceeded to turn over the entire properties of the Central Railroad & Banking Company of Georgia to the Richmond & Danville Railroad Company, operating one of the competitive lines controlled by said terminal company. This abandonment of the franchises of the Central Railroad & Banking Company of Georgia, the bill alleged, had been accomplished by a pretended and illegal lease.

To this bill the Richmond & Danville Railroad Company answered, and did not deny that it was in illegal possession of the property, but, on the contrary, disclaimed all right to the possession which it exercised, and stated that it had been for nine months operating the properties merely at the request of another railroad company. It formally relinquished the properties to the custody of the court and the Central Railroad & Banking Company of Georgia. Upon the hearing, the court, the circuit judge and district judge presiding, reached the conclusion, as appears by the decree of the court, that the then acting board of directors had been illegally elected, and that the majority stock above referred to was not entitled, under the constitution and laws of this state, to vote in elections controlling the operation of the Central Railroad & Banking Company of Georgia. The voting power of the stock was enjoined, a new election ordered, and the court appointed receivers, not for the purpose of subjecting the properties to the claims of creditors, but to protect and to preserve them until they could be turned over to a legally elected board of directors, as proper trustees, who would have the right under the law to take and operate the railroad in the interest of all concerned. The court further directed that, when this new election should have taken place, said new board of directors might apply to the court to have the property returned to the control of the properly constituted officers of the corporation.

This election was held, and the new board of directors elected by stock legally entitled to vote; but the new board of directors, instead of applying to the court for the property, presented and filed an ancillary proceeding or bill in behalf of the corporation. By this bill the court was informed that on account of the embarrassed condition of the company's finances, brought about by the abandonment of the control of the property by the former board of directors and the misappropriation of its income, the said new board of directors, as directors, could not undertake the management of the properties, and that, while the corporation was not insolvent in the ordinary acceptation of that term, yet it was insolvent in the sense that its debts due, and about to be due, were so pressing and so great, and its credit had been injured to such an extent, that it could not, in the ordinary way, meet its obligations. The bill further alleged that one of the chief values of the properties consists

in the fact that they constitute a great system of railways. This system was held together by means of stock ownership and otherwise, the right of possession and control of the Central Railroad & Banking Company of Georgia extending over the entire system; and the various parts were held together by the fact that the equity existing in each belonged to the Central Railroad & Banking Company of Georgia. The bill also asked the court to continue to hold possession of the property, discharging all of the board of directors previously appointed receivers, with the exception of Mr. H. M. Comer, who was the president of the Central Railroad & Banking Company of Georgia. The bill asked also that certain creditors of the Central Railroad & Banking Company of Georgia, whose debts were due, or about to be due, should be made parties defendant; that they should come into court and say what was best to be done for the interest of all concerned in the then status of the property. While the proceedings in court were in this situation, and before any of the creditors of the Central Railroad & Banking Company had filed proceedings to foreclose any lien on the properties, or the appointment of a receiver to reach any of these equitable assets, the receiver who was continued under the Rowena Clarke bill, and under the bill, above described, of the Central Railroad & Banking Company, and who was also president of the latter company, applied to the court to confirm the contract proposed in his petition of January 10, 1893, by virtue of which this application is presented, stating in his application, among other things, that it was necessary to continue the operations of the road. At that time it was contended by the Central Railroad & Banking Company of Georgia that it was abundantly able to pay all its creditors, if its property could be rehabilitated; and, although the Central's bill had been filed for several months, no creditor had come into the proceedings to dispute that contention. Moreover, it did not appear that any creditor had any special lien upon the equity of redemption of the securities of the Central Railroad & Banking Company of Georgia sought to be pledged by this contract. The receivership, as it then existed, constituted a trust of a somewhat unusual, but entirely salutary, character. It was created, as stated, in an effort to tide over the present difficulties of vast, valuable, and probably solvent, though badly embarrassed, properties, an embarrassed condition mainly occasioned by unlawful causes. It was not designed to deter the lawfully elected president and board of directors, by the use of the available assets, values, and equities in their control, from meeting any pressing debts, and renewing and extending liabilities, so that the company might continue its duty to the public as a common carrier, and to preserve its properties until it had an opportunity to use its strong advantages as a railroad. At no time, until a creditor's bill was filed, did the president and directors cease to avail themselves of this right. Contracts made by the receiver president were reported to the directory. That body designed a rehabilitation plan, and it also adopted and promulgated a refunding scheme, known as the "Reorganization Plan." In view of these facts, there seemed to be no reason why the Central Rail-

road & Banking Company of Georgia, through its president and receiver, was not competent to borrow money which, as stated in the petition, was to be used on account of the Central Railroad & Banking Company, and to contract to pay the expenses of the committee selected by the corporation, and acting for it in the rehabilitation of the properties, and the refunding of its indebtedness. The court therefore authorized the contract proposed by the receiver and president of such corporation for it, except as to the expenses provided for in said sixth clause, the court reserving the right to pass upon these expenses thereafter, and this application is presented for that purpose. It is true, however, that since the order of January 10, 1893, was made, the attitude of the parties has been greatly changed. Since then the Farmers' Loan & Trust Company of New York has filed a bill on its mortgage, and the receivership existing under the former proceeding has been extended to that bill, and modified so as to enable that creditor to reach certain equitable assets of the Central Railroad & Banking Company through the receivership. Other creditors have also intervened, or filed collateral proceedings upon liens against various properties of the Central Railroad & Banking Company of Georgia. Whether, in view of the changed aspect of the receivership, it would be competent for the court to allow these expenses, it is now unnecessary to decide. It is sufficient to say that these changes in the litigation have introduced new parties into the suit, with new equities, and that they are entitled to be heard upon this question. For these reasons the allowance of these expenses will not be made, unless upon notice to all parties to the record, or until the final decree of the cause; and it will be so ordered. In open court, this 17th day of April, 1893.

HART v. BOARD OF LEVEE COM'RS FOR PARISH OF ORLEANS.

(Circuit Court, E. D. Louisiana. February 7, 1893.)

No. 12,168.

1. EMINENT DOMAIN—LEVEES—SERVITUDE OF RIPARIAN LANDS.

Const. La. 1879, art. 156, providing that private property shall not be taken or damaged for public purposes without compensation, has no application to the location of a levee on land by the proper authorities, for such location makes the land "riparian," although it is not actually washed by the river, within the meaning of Civil Code, § 457, which provides that "on the borders of the Mississippi and other navigable streams, where there are levees established according to law, the levees shall form the banks;" and as such it is subject to the servitude of having a levee placed upon it without compensation to the owner. *Bass v. State*, 34 La. Ann. 498, followed.

2. SAME—EXTENT OF SERVITUDE.

Const. La. 1879, art. 214, gives to the levee commissioners the "supervision of the erection, repairs, and maintenance of the levees in said districts," and power to tax for that purpose property within the alluvial portions of said districts, subject to overflow. *Held*, that the servitude of having levees placed upon such lands without compensation is coextensive with the liability to such taxation.

In Equity. Bill by Judah Hart against the board of levee commissioners for the parish of Orleans to enjoin them from constructing a levee on the complainant's land without compensation. Injunction denied.

Farrar, Jonas & Kruttschnitt, for complainant.
Bernard McCloskey, for defendants.

BILLINGS, District Judge. The question submitted is whether the levee commissioners have the right to construct the levee upon the complainant's land without previous compensation for damages. Article 156 of the constitution of 1879 is as follows: "Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." This is a limitation upon the exercise on the part of the state of the right of eminent domain. That right is the superior (eminent) domain or dominion of the state over all the property within the state, by which it is entitled, through constitutional agencies, to appropriate any part necessary to the public use. By this article of the constitution the right of eminent domain is limited so that it cannot be exercised by the state through any agency by the taking or damaging of property without previous compensation. If this was the whole of the case, the complainant would be entitled to an injunction, for his land is about to be damaged, as there has been no previous compensation. But wherever the taking or damaging of property is merely the enforcement of a servitude which that property owes, or to which it is subject, there is no exercise of the right of eminent domain, and the limitation making the compensation a condition to be previously performed has no application; for if the land or the owner is about to be compelled to submit to only an obligation by the law impressed upon property by the original grant, or by a statute under which it has been acquired or held, and independently of the right of eminent domain, there is no propriety in considering whether a previous compensation has been paid, for no compensation of any sort is due.

The question in this case is narrowed down to whether the land of the complainant owes the servitude of having the levee placed upon it. If it does, he is entitled to no relief. If it does not, he must have the injunction. There is a vast amount of learning concerning this question as related to lands located on rivers,—the learning of the civilians, and the learning of the common law. In *Hollingsworth v. Parish of Tensas*, 17 Fed. Rep. 109, the court dealt with the authority to locate levees as a question relative to an exercise of the right of eminent domain. In an unreported case (*Eldridge v. Engineers*¹) in the western district of this state, Mr. Justice Lamar and Judge Pardee held, in substance, that the placing of levees upon riparian lands was but subjecting them to a servitude which they owed. As to riparian lands, this last is the view of the supreme court in *Bass v. State*, 34 La. Ann. 498. In the case before the court it is conceded by the complainant that riparian lands are

¹No opinion filed.

subject to a servitude as to levees which makes it unnecessary to make any compensation; but he contends that, as to those lots owned by him which do not abut or lie upon the river, they, not being riparian, owe no such servitude, and there must be previous compensation. Before considering the question at issue, it may be observed that in *Morgan v. Livingston*, 6 Mart. (La.) 235, Judge Martin says that the servitude was impressed upon the riparian lands in the original grant from the Spanish government. It would seem that, if the large tracts thus originally granted by the sovereign had this servitude impressed upon them, the dividing them into smaller tracts or lots would not relieve from this servitude even those lots which were separated from the river by other lots. The servitude would remain upon each and every part as it did upon the whole.

But there is a simpler view which, it seems to me, disposes of the whole question. Those lands are riparian which actually extend to the river; that is, which come down to the banks of the river. Now, since 1825 the banks of the Mississippi river have been defined to be as follows: Civil Code, art. 457, provides:

"The banks of a river or stream are understood to be that which contains it in its ordinary state of high water; for the nature of the banks does not change, although for some cause they may be overflowed for a time. Nevertheless, on the borders of the Mississippi and other navigable streams, where there are levees established according to law, the levees shall form the banks."

The lands of the complainant have been bought and sold since 1825, and were acquired by the complainant under this rule or law of definition. It follows that, no matter what would be the law in other states, in Louisiana, so far as relates to the Mississippi river, the levees established according to law are the banks. Wherever the levees are located, there are the banks of the river. It is conceded that the proper levee authorities have located this levee upon the complainant's lots. Therefore the proper authorities have determined that the present bounds of the river bring it to the land of the complainant, and it is in the strictest statutory sense "riparian." In other states the river comes to land only when by the flow of its water it touches the soil or earth which composes it. In this state, by law and according to legal intendment, the Mississippi river touches land when its artificial banks or levees touch it. Under the operation of this statute the complainant's land is riparian. It is as if the statute had said: "Whenever the lands of any person are adjacent to the artificial banks of the Mississippi river, they are to be deemed and held to be adjacent to the river itself." This would make the land of complainant, upon his own showing, *ex vi termini* riparian, and subject to the servitude. When it is considered that the Mississippi river is such a vast body of water, continually changing its bed or channel, not alone by abrupt movements, but by those insidious and impalpable changes which require new banks to be built to protect not alone the land immediately adjacent, but that lying in the rear over which the floods, if unrestrained, would sweep and flow, it is seen how wise, and, at the same time, how just, is the

statutory determination of the banks of the Mississippi river, and consequently the statutory definition of what shall be "riparian lands." This definition of the banks seems to have been adopted from an early period as being the controlling direction as to what courts shall consider the bed of the Mississippi river. As an example, in *Henderson v. Mayor*, 3 La. 567, the court say:

"The only question remaining on this point relates to what must be considered as the banks of the Mississippi. To solve this question, we need only refer to the Louisiana Code. The article 448 defines what is meant by the bank of a river generally, and is particular in relation to the shores of the Mississippi. It is there declared that, where there are levees, the levees shall form the banks. According to this definition, all the space between the levees and the natural banks of the river at low water, which, in most places, is annually inundated at a certain season of the year, must be alternately a part of the bed or a part of the bank, according to the periodical changes between the highest and lowest stages of the water."

In *Bass v. State*, 34 La. Ann. 498, 499, the supreme court, through the chief justice, reaffirmed this doctrine.

The state board of engineers, including the city engineer, had located the levee of the Mississippi river upon the complainant's lots. They became in law as truly riparian as if the Mississippi river, as it flowed, came in physical contact with them. They are riparian. If riparian, the complainant conceded the servitude, and that compensation is not a prerequisite to the construction of the levee. It is true that the eighth section of Act No. 93 of 1890, under which the levee board of this district is created and is acting, gives to that body the authority to expropriate land; but, as it seems to me, that power is not exercised nor is it needed in the location of a levee. That may be done without any expropriation, for the obligation to suffer or permit the levee has been impressed upon and inheres in the land. The power to expropriate was given to the board in order that it might obtain earth for building levees, if necessary, from places outside the district, or beyond the extent of the servitude. In precise accordance with this view, the constitution of 1879 (article 214) delegates to the levee commissioners of the various levee districts the "supervision of the erection, repairs, and maintenance of the levees in said districts;" and to that effect they may impose a tax upon the taxable property situated within the alluvial portions of said districts subject to overflow. As it seems to me, the territory subject to the servitude is coextensive with the territory declared subject to the tax. All the lands within the alluvial portions of the districts subject to overflow may be taxed for the levees, and the law and the reason of the thing subject the same extent of land to the servitude.

With reference to the Mississippi river, the obligation to submit to the location of levees—the servitude that is being considered—has a much greater geographical expansion or extent than the ordinary obligations with reference to smaller streams. The obligations of the proprietor of land with reference to ordinary streams spring, as do the injuries, from the abrasion of the stream and the change of its bed; but the obligations of the proprietors of lands lying upon or in the vicinity of the Mississippi river originate, as do

the dangers, not from mere abrasion of the earth and the change of the channel, but from the fact that the body of the stream is so vast, and the bulk of the water so immeasurable, that the inundation and devastation are threatened upon all the low-lying lands, whether they be immediately proximate to the river or miles distant. The forced diffusion of the danger from a cause acting so resistlessly has caused the statute to impress upon the lands a servitude for a common protection equally extended. My opinion, therefore, is that, the levees of the Mississippi having been located by the lawful authorities upon the complainant's lands, notwithstanding their remoteness from the natural bed of the river, they are by statute wisely made riparian, and subject to the levee servitude, which dispenses the defendants from making compensation for the damage which the location of the levee may cause to complainant.

The injunction must therefore be refused.

SEYMOUR v. HENDEE et al.

(Circuit Court, D. Vermont. March 6, 1893.)

PLEDGE—WHAT CONSTITUTES—DELIVERY.

A mere understanding between a principal and surety that a part of certain bonds of the principal held by a bank shall be held for the security of the surety does not operate as a pledge when none of the bonds are delivered for that purpose either to the bank, for the surety, or to the surety.

In Equity. Suit by Horatio P. Seymour against George W. Hendee, receiver, and Bradley B. Smalley. Bill dismissed.

Wilson & Hall, for orator.

Albert P. Cross and F. W. McGettrick, for defendant Smalley.

Geo. W. Hendee, pro se.

WHEELER, District Judge. This cause has been heard on bill and answers. The answers in such cases are taken as true. The bill is brought to recover bonds or their avails, alleged to have been pledged to a surety on notes to the orator, held by the defendant Hendee as receiver of a national bank, and sold to the defendant Smalley, being a part of a lot pledged to the bank. There may have been an understanding between the principal and surety that a part of the bonds held by the bank should be held for the security of the surety; but none were, according to the answers, delivered to the bank for that purpose, or for the surety, or to the surety. "It is of the essence of the contract that there should be an actual delivery of the thing to the pledgee. Until the delivery of the thing, the whole rests in an executory contract, however strong may be the engagement to deliver it; and the pledgee acquires no right of property in the thing." Story, Bailm. § 297. As the surety acquired no right to the bonds, the orator could be subrogated to none.

Bill dismissed.

SOWLES v. FIRST NAT. BANK OF ST. ALBANS et al.

(Circuit Court, D. Vermont. March 10, 1893.)

1. EQUITY—PLEADING—RIGHTS OF LEGATEES.

A bill in equity by a legatee to reach assets of an estate converted by an executor, and transferred to a bank, which alleges that the oratrix sues in her own right, and as an assignee of other legatees named, and that the executor has paid a large number of legacies, and a large number remain unpaid, fails to allege an assignment, or that the legacies of complainant or the assignors have not been paid, and hence states no ground of action.

2. EQUITY JURISDICTION—SETTLEMENT OF ESTATES—PROBATE COURTS.

The jurisdiction of the probate courts of Vermont in settlement of estates being exclusive, assets cannot be brought into chancery for distribution by those having equitable claims against the same, and such exclusive jurisdiction will be fully recognized by the federal courts.

3. WILLS—LEGACIES—WHEN A CHARGE ON PROPERTY.

The mere fact that there is a residuary legatee does not make the specific legacies a lien on the estate in the hands of the executor. *Lewis v. Darling*, 16 How. 1, distinguished.

4. EXECUTORS—CONVERSION OF PROPERTY—SETTLEMENT OF ACCOUNTS—LEGACIES.

Where an executor converts property of the estate so as to hold it as his own, and thereafter, on a settlement of his accounts, is decreed to pay, and does pay, legacies exceeding the amount of the converted property, the property thereupon becomes his own, and an unpaid legatee cannot follow it into the hands of a third person, to whom he transfers it.

5. SAME—RIGHTS OF LEGATEES—LACHES.

In Vermont a legatee acquires a right of action against the executor from the date at which the probate court orders the legacy to be paid; and when, after such order, the executor transfers property of the estate to a third person as his own, a delay by the legatee of six years after such transfer, in bringing suit to charge such property, will render his claim stale.

In equity. Bill by Susan B. Sowles, in her own right, and as assignee of Jennie Bellows and Hiram Bellows, against the First National Bank of St. Albans, Chester W. Witters, as receiver of the bank, Edward A. Sowles, and Margaret B. Sowles, to have the avails of certain specific personal property transferred by Edward A. Sowles, executor of Susan B. Bellows, in his individual capacity, to such bank, applied to the payment of unpaid legacies. The cause was removed from the state court of chancery. 46 Fed. Rep. 513. Dismissed as to defendant Witters, and the residue of the cause remanded.

Edward A. Sowles and Henry A. Burt, for oratrix.
Chester W. Witters, pro se.

WHEELER, District Judge. The oratrix, Jennie Bellows, and Edward Bellows, were each, among others, legatees of money in the will of Hiram Bellows, in which Susan B. Bellows was residuary legatee, and in the will of Susan B. Bellows, in which Margaret B. Sowles was residuary legatee, of both of which Edward A. Sowles, husband of Margaret B. Sowles, was executor. The probate court having jurisdiction, on representation of much more than sufficient

assets to pay all the specific and general legacies, without any inventory, which was expressly waived by Margaret B. Sowles, on March 31, 1881, ordered the executor to pay the several legacies, and decreed the residue of the estate of Hiram Bellows to him as executor of the will of Susan B. Bellows, and the residue of her estate to Margaret B. Sowles, who thus became residuary legatee of the whole. The oratrix, in her own right, and as "assignee of Jennie Bellows and Edward Bellows," brought this bill in the court of chancery of the state alleging that the executor "has paid and discharged a large number of legacies, and there are a large number in each of said wills, for said executor to pay, which remain unpaid," and that he is insolvent, to reach alleged assets transferred by him in 1884 to the First National Bank of St. Albans on his individual indebtedness. Margaret B. Sowles brought suit to reach the same property, recovered for a part of it, and failed as to the rest. *Sowles v. Witters*, 39 Fed. Rep. 403. The evidence and decree in that case have been filed in evidence in this, which show the facts relating to the situation and transfer of the assets substantially as there stated. The oratrix alleges nothing in respect to her rights as assignee, or the payment or nonpayment of legacies by the executor, except as before quoted. The answers add nothing to the bill in this respect, if they could. She can stand only upon the allegations, (*Adams v. Adams*, 22 Vt. 59;) and these do not set forth but that her legacy, and those of her assignors, are among those fully paid. She has, therefore, no standing, upon her bill, with reference to any assets. This, of itself, is a sufficient ground for dismissing the bill. If the proofs could properly be gone into as to this, however, her legacy is nearly, and perhaps wholly, satisfied. No assignment is shown, and nothing appears as to what she is assignee of, or whether she has anything in that behalf sufficient to give her any right to any of the assets.

The bill seems to be framed upon the idea that equitable claims to assets of estates are sufficient for bringing them into chancery for distribution. However this may have been in England, and may be in some of the states, it is not so in Vermont. The jurisdiction of the probate courts in the settlement of estates in that state is exclusive. *Adams v. Adams*, 22 Vt. 51. And, although the statutes of the states cannot restrict the equity jurisdiction of the courts of the United States, the rights of parties, as they are given or restricted by the exclusive jurisdiction of the probate courts of the states, are fully recognized in those courts. *Tate v. Norton*, 94 U. S. 746.

The oratrix further alleges that all the legacies were "liens" upon the property of the estates, and relies upon the terms of the wills, and *Lewis v. Darling*, 16 How. 1, to make this out. None of the legacies are made a charge upon any of the property. The lien is claimed to arise out of the giving of the legacies to the general legatees, and the remainder to the residuary legatees. As the residuary legatee is only to have what there is beyond the legacies to others, that share is always subject to the other legacies. *Lewis v. Darling* was brought against the husband of the residuary legatee,

who had the whole estate. What was said about the lien of the legacy related to that property, so situated. Such lien exists only between the residuary legatee and the others, and rests wholly upon property that has come to the residuary legatee. In *Dunbar v. Dunbar*, 3 Vt. 472; *Scott v. Patchin*, 54 Vt. 253; *Casey v. Casey*, 55 Vt. 518; and *Lovejoy v. Raymond*, 58 Vt. 510, 2 Atl. Rep. 156,—the liens enforced were created by express charge upon the property. All this property sought here to be reached came to the bank directly from Edward A. Sowles,—a part from him individually, and the rest from him as executor. That part which came from him individually had been converted to his own use before the decree of the probate court, and stood in his own name at the time of conveyance. Margaret B. Sowles was the residuary legatee of both estates; recovered in her suit before mentioned a part, and for the rest, of that which came from him as executor. *Sowles v. Witters*, 39 Fed. Rep. 403. The oratrix has not alleged nor proved but that the other property of the estates has come to the residuary legatee, nor but that she has it yet, nor that she is insolvent. The oratrix had no lien, as such, upon any of this property in the hands of the executor or of the bank, and shows no ground for recovering it again of the bank or the receiver. The residuary legatee recovered what she did in her own right, and it has to some extent been, by further proceedings, applied upon her debt to the receiver, for which it was liable, the same as any of her property, so far as appears. It was decreed to her by the probate court, and the oratrix, whether her legacy is paid or not, shows no ground for following it into other hands. The settlement of the executor's account, and the decree of distribution, such as they came to be, were made upon due notice, and were binding upon all, in respect to the amount in the executor's hands for distribution, as proceedings in rem. 2 Redf. Wills, 895. He was liable to be charged for the amount of the assets of the estates which had been converted by him, and changed into property in his own name. He was exonerated from such specific charge, leaving the property in him as his own. *Sowles v. Witters*, 39 Fed. Rep. 403. He was, however, in effect, charged with it, by being ordered to pay legacies to a much greater amount. This was in reality a judgment against him for the value of the property, and, according to many authorities, merged the claim in the judgment, and made the property his. 2 Kent, Comm. 387; *Adams v. Broughton*, 2 Strange, 1078. He would be entitled to the property to pay the legacies with, to the extent required; and, according to all authorities observed, it would become his as fast as he should pay them. *Steam Stone-Cutter Co. v. Windsor Manuf'g Co.*, 17 Blatchf. 24. He had paid them to an amount much greater than this property, and, so far as is shown, appears to have been well entitled to the property, and to the right to dispose of it as his own.

Moreover, several rights to proceed in equity or at law against the executor for the recovery of the legacies in these wills accrued to each of the legatees, so far as has been shown, when they were ordered to be paid by the probate court, on March 31, 1881. *Bellogs v. Sowles*, 57 Vt. 411; *Weeks v. Sowles*, 58 Vt. 696, 6 Atl. Rep. 603.

The conveyances to the bank are alleged to have been made in January, February, and March, 1884, and this suit was commenced March 26, 1890. No allegation of insolvency of the executor prior to the bringing of this bill is alleged, and this property appears to have been but a small part of the estates. In view of these dates and circumstances, this claim seems quite stale. The bill is dismissed as to the defendant Witters, and the residue of the cause is remanded to the court of chancery of the state, from which it was removed.

ST. LUKE'S CHURCH v. WITTERS et al.

(Circuit Court, D. Vermont. March 13, 1893.)

EXECUTORS—TRUSTEES—RIGHTS OF BENEFICIARIES TO FOLLOW PROPERTY.

The beneficiary of a permanent fund intrusted by a will to the executor, with sole and exclusive power of investment, and not made a charge upon any property, cannot follow into the hands of a third person property derived from the estate, which the executor transferred in his individual capacity after a decree of the probate court on settlement of the accounts, ordering payment of this and other legacies.

In Equity. Bill by St. Luke's Church against Chester W. Witters, as receiver of the First National Bank of St. Albans, and others, to reach assets alleged to be a portion of the estate of Susan B. Bellows, and have the same applied to a trust fund created by the will. Bill dismissed.

H. Charles Royce, for orator.
Chester W. Witters, pro se.

WHEELER, District Judge. Susan B. Bellows bequeathed \$5,000 to Edward A. Sowles, her executor, with full, sole, and exclusive power of investment as a permanent fund, the annual interest to go towards the expenses of the orator church, without bonds. This bill is brought to reach alleged assets of the estate in the hands of the defendant Witters, as receiver of the First National Bank of St. Albans, for the benefit of this fund, and has been submitted upon the same evidence as *Sowles v. Bank*, 54 Fed. Rep. 564, (heard at this term.) For the reasons given in that case, and others in relation to this subject, the bill must be dismissed.

Further, March 31, 1881, with ample assets in the hands of the executor, payment of this legacy, with others, was decreed by the probate court of the state, having jurisdiction. The substance of the complaint is that the executor afterwards became insolvent, and this legacy is unpaid. The probate court could do no more than it did about decreeing payment; and no more could be done about payment than that the executor should have in his hands, as trustee, the amount of this bequest, which he did, for he was both, and had enough for all. The legacy was not charged upon any of the property, and the trustee did not invest this bequest with the bank. Nothing is alleged about investment, but as the trustee had the amount of the legacy to invest somewhere, if he did not invest it

elsewhere, he must have left it invested with himself. He had, by the will, absolute control. The church does not seem to have a right to follow the rest of the estate for want of a safe investment of its legacy, merely. Bill dismissed.

SOWLES v. WITTERS et al.

(Circuit Court, D. Vermont. March 11, 1893.)

MORTGAGES—FORECLOSURE—EXTINGUISHMENT.

An executor holding two mortgages, with condition broken, on Vermont lands, took another mortgage of the same and other lands, individually, upon an agreement that the original mortgages should remain in force until the new mortgage was paid. Subsequently he foreclosed the last mortgage, and, after expiration of the time of redemption, took possession. *Held*, that this operated as a purchase of the land in satisfaction of the debt, and extinguished the original mortgages.

In Equity. Bill by Edward A. Sowles, executor, etc., against Chester W. Witters, receiver of the First National Bank of St. Albans, and George Bremmer, to foreclose certain mortgages. Decree dismissing bill.

Edward A. Sowles and Henry A. Burt, for orator.
Chester W. Witters, pro se.

WHEELER, District Judge. The orator, as executor, held two mortgages against the defendant Bremmer, with condition broken. Thereupon the mortgagor made another mortgage, of the same and other lands, for the same amount, with extended times of payment to the orator, individually. He foreclosed the latter, and, after the time of redemption expired, took possession. After that he mortgaged the whole to the First National Bank of St. Albans. The defendant Witters, as receiver, has foreclosed this mortgage, and the time of redemption has expired. This bill is brought to foreclose the two original mortgages, alleging an agreement between the orator and the mortgagor, at the time of the making of the second mortgage, that the original mortgages should not be discharged, but should remain in force until the second should be paid, and that, as fast as the principal and interest should be paid on the latter, the same should apply, and be payment upon the former, and that the mortgage to the bank was given upon individual indebtedness of the orator, with notice of the origin of the property.

A decree of foreclosure, with expiration of the time of redemption and possession, operates as a purchase of the estate in satisfaction of the debt. *Lovell v. Leland*, 3 Vt. 581; *Paris v. Hulett*, 26 Vt. 308; *Devereaux v. Fairbanks*, 52 Vt. 587. Thus the whole estate of the mortgagor, by the proceedings upon the orator's mortgage, passed to the orator, individually. The original mortgages were personal assets in the hands of the executor, and could be collected, assigned, or disposed of, as such, by him. *R. L. Vt. § 2150*; *Collamer v. Langdon*, 29 Vt. 32. When he converted the mortgages to his own use, he became chargeable for them, as for other personal assets. He

was, in effect, charged with them, by being ordered to pay legacies to a much larger amount, and exonerated from such charge by the residuary legatee. *Sowles v. Witters*, 39 Fed. Rep. 403; *Sowles v. Bank*, 54 Fed. Rep. 564. No estate was left in the original mortgagor, for the original mortgages to operate upon. It went in execution of the agreement, if made, by paying the second mortgage, and, according to the terms of the agreement, pro tanto, the original mortgages. Bill dismissed.

PLATT v. PHILADELPHIA & R. R. CO. et al.

(Circuit Court, D. Massachusetts. March 2, 1893.)

No. 3.112.

RECEIVERS—ANCILLARY—APPOINTMENT IN EX PARTE PROCEEDINGS.

The circuit court for the first circuit will follow the general practice in the federal courts, of granting an ancillary receivership on ex parte applications, but without prejudice to a full consideration of the legality of the practice on subsequent motion to dissolve the order.

In Equity. Bill by Thomas C. Platt against the Philadelphia & Reading Railroad Company and others for the appointment of an ancillary receiver. Prayer of bill granted, and receiver appointed.

William M. Richardson and Charles E. Hellier, for complainant.

Robert M. Morse and Elmer P. Howe, for defendants.

Before PUTNAM, Circuit Judge, and NELSON, District Judge.

PER CURIAM. In *Mercantile Trust Co. v. Kanawha & O. Ry. Co.*, 39 Fed. Rep. 337, Justice Harlan and Judge Jackson held in a formal opinion that the circuit courts of the United States cannot take jurisdiction of a bill whose only purpose is an ancillary receivership; but in other districts such bills have been frequently entertained and acted upon, generally, if not always, on ex parte proceedings, and without argument. The same has been done ex parte on several occasions in this court. We will at present follow this practice, stating, however, that this is without prejudice to a full consideration of the question if hereafter a motion is made to dissolve or annul the order. The order offered may be entered with such modification as to its details as Judge Nelson shall require, if any.

GRANT et al. v. EAST & WEST R. CO. OF ALABAMA et al.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1893.)

No. 45.

1. RAILROAD COMPANIES—STOCK—PAYMENT IN PROPERTY—OVERVALUATION.

Code Ala. 1876, § 1824, requires subscriptions to railroad stock, which are payable in labor or property, to be taken at their money value, which must be stated in the subscription list. A railroad company adopted a resolution to sell all its property to another company for \$750,000, one half in stock and one half in bonds of the purchaser, and subsequently entered a subscription for \$375,000 of stock, "to be paid for in the railroad property" of the seller, "of the value of the said sum of \$375,000."

Held, that the subscription was to be read in connection with the resolution, and its language was not conclusive that the value of the entire property was not over \$375,000, so as to render void the issue of \$375,000 in bonds under the constitutional provision forbidding overcapitalization.

2. SAME—BONDS.

Under Const. Ala. art. 14, § 6, forbidding corporations to issue stock or bonds except for money, labor, or property actually received, and declaring all fictitious increase of stock or indebtedness void, and Code Ala. 1876, § 1824, requiring that all subscriptions to the stock of railroad companies shall be paid in money, labor, or property at their money value, railroad property sold by one company to another and paid for by an issue of stock and bonds may be valued according to its net earning power, and the cost of building it de novo, and it is immaterial that the seller originally acquired it for much less than its actual value. 52 Fed. Rep. 531, affirmed.

3. CORPORATIONS—CAPITAL STOCK—RIGHTS OF CREDITORS.

Although unpaid subscriptions to the capital stock of an insolvent corporation constitute a trust fund for the payment of its debts, yet where the corporation law of a state allows subscriptions to be paid in property other than money, such payment in good faith at an honest valuation puts an end to the trust. A gross overvaluation of the property thus received would, however, be strong evidence of fraud in an action to enforce the personal liability of the stockholder.

In Equity. Bill by the American Loan & Trust Company of New York, for which George S. Coe was substituted pending the suit, against the East & West Railroad Company of Alabama, James W. Schley, Joel Brown, and S. I. Stevens, for the foreclosure of a mortgage. Frederick and James Grant, doing business under the name of Grant Bros., filed an auxiliary and dependent bill against the same respondents and others, to declare void certain bonds, and foreclose the mortgage for the benefit of the holders of other bonds. For prior opinions, see 37 Fed. Rep. 242; 40 Fed. Rep. 182, 384; 46 Fed. Rep. 102. The auxiliary bill was dismissed, and the mortgage foreclosed for the equal benefit of all bondholders. 52 Fed. Rep. 531. A motion to dismiss the appeal of Grant Bros. was denied. 50 Fed. Rep. 795, 1 C. C. A. 681. The appeal is now on final hearing. Affirmed.

Pat Calhoun, Jack J. Spalding, and Alex. C. King, for appellants.

Wager Swayne, Robt. Ludlow Fowler, and Frank Sullivan Smith, for appellees.

Before McCORMICK, Circuit Judge, and LOCKE and BILLINGS, District Judges.

McCORMICK, Circuit Judge. On the 2d day of June, 1888, the American Loan & Trust Company of New York, a corporation created under the laws of New York, exhibited its bill in the United States circuit court for the southern division of the northern district of Alabama against the East & West Railroad Company of Alabama, a corporation created under the laws of Alabama, and against James W. Schley, a citizen of Georgia, and Joel Brown and S. I. Stevens, citizens of Alabama, for the foreclosure of a certain consolidated mortgage made by said railroad company in favor of complainant as trustee to secure an issue of bonds to the extent of \$15,000 to the mile of completed road owned and built or to be built by said railroad

company, making the usual allegations as to the issuance of bonds thereunder, default in the payment of interest, the request of the bondholders and the condition of the property, which devolved on complainant the duty of seeking in the court a decree of foreclosure of said mortgage for the equal benefit of the holders of any or all of said bonds. The bill further showed that the complainant "is informed that the entire series of bonds secured by the said mortgage or deed of trust were issued and put upon the market in due course of business, and that the same are entitled to the benefit of the said mortgage, but yet so it is that some person or persons will and do claim adversely to some of the said bonds, and make claims unknown to your orator, the nature and validity of which claims your orator cannot and ought not to determine, and therefore submits the same to the honorable court for its final adjudication in the premises."

On July 26, 1888, the appellants, Grant Bros., petitioned to become a party to said suit, and to be allowed to file "an auxiliary and dependent bill," and leave being granted, filed their "auxiliary and dependent bill" against the said railroad company and the said trust company and against William C. Browning, Edward F. Browning, Eugene Kelly, and James Byrne, citizens of New York, J. Hull Browning, a citizen of New Jersey, and Amos G. West, a citizen of Georgia. The bill is long, and it is not necessary to give its details. It charges, in substance, that there are outstanding 734 bonds, of which said Grant Bros. hold 30 issued under said consolidated mortgage, which are now in the hands of innocent holders for value, without notice of any defect in them, and which are entitled to benefit under said mortgage. That default has been made in the payment of interest, and a decree of foreclosure should pass for the benefit of these holders, but that the defendants Brownings and West and Kelly and Byrne claim to hold or own some interest in 966 bonds, and the said trust company claims to own 50 bonds purporting to have been issued under said mortgage, which are not valid, and are not entitled to the benefit of the foreclosure of said mortgage, for that the bonds for which these 966 bonds and these 50 bonds were given were issued by said railroad company fraudulently and without consideration to the Brownings and West, of which Kelly and Byrne and the trust company had full notice. That under color of a contract between the said railroad company, of which the said Brownings and West were then shareholders and controlling directors and officers, with a corporation known as the Cherokee Iron Company, the stock in which was all owned by said Brownings and West, said Brownings and West, in the name of said iron company, subscribed for 3,750 shares of the capital stock of said railroad company, \$375,000, to be paid for in the railroad property of the Cherokee Railroad Company of Georgia, of the money value of said sum of \$375,000. That all of the railroad property of the Cherokee Railroad Company of Georgia was not of greater money value than the said sum of \$375,000, but that said East & West Railroad Company of Alabama, in addition to satisfying said subscription to its stock by the receipt of said railroad property, issued to said Cherokee Iron Company its first mortgage bonds to the par value of \$375,000, and at the same time said East

& West Railroad Company made a contract with one Michael Duff, who is charged by appellants to have been a mere figurehead for Brownings and West, to extend its road, in connection with which contract said Duff subscribed for 238 shares,—\$23,800,—to be paid for in labor of the money value of said sum of \$23,800, and for 5,750 shares,—\$575,000,—to be paid for in labor on and property necessary in constructing and equipping the railroad of the East & West Railroad Company of Alabama, said labor, property, and equipment to be of the money value of said sum of \$575,000, which said two subscriptions of stock by said Michael Duff more than equaled in par value the real money value of all the labor, property, and equipment furnished said East & West Railroad Company of Alabama under said contract with said Michael Duff; and yet, in addition to satisfying his said subscription for stock by the receipt of the newly-constructed road and equipments, said defendant railroad company issued therefor 734 of its first mortgage bonds, all of which 734 bonds and said 375 bonds, in all 1109 first mortgage bonds, went into the hands of said Brownings and West without consideration, in violation of the laws of Alabama, and in fraud of the rights of subsequent creditors. That said Michael Duff's subscription for stock and contract for construction was speedily transferred to a so-called Southern Railroad Construction Company, which is alleged to be only another name for said Brownings and West, and that said Brownings and West claim that said defendant railroad company was indebted to them for money borrowed of them to loan to said construction company, and for other advances made, and for interest on same, and for unpaid matured interest coupons on said first mortgage bonds, amounting in all to \$325,000, and for this pretended debt, which they called the "floating debt," said defendant railroad company issued to said Brownings and West 500 certain debenture bonds at 65 cents on the dollar. That these said first mortgage bonds and said debenture bonds were afterwards substituted by said consolidated mortgage bonds and 966 of these still are held by said Brownings and West, or by Kelly and Byrne as their assigns, charged with notice, and 50 are held by said trust company, charged with notice, of the fraudulent character of said bonds. That, in order to unload these fictitious and fraudulent bonds on the public, said Brownings and West made false representations to the New York Stock Exchange, and procured the listing of said bonds on said exchange, and caused simulated sales of said bonds to be quoted as made thereof on said exchange at a premium, whereby appellants and their fellow bondholders, for value, without notice, were induced to invest in said bonds. Wherefore they pray that only they and other holders similarly situated, as innocent purchasers, without notice, of said bonds, be allowed the benefit of said foreclosure, and that all of said other bonds be decreed to be fictitious, fraudulent, and void.

All the equities urged in this auxiliary bill were fully denied by the several answers of the different defendants thereto, and the whole suit progressed according to the usual course in such proceedings. On October 22, 1891, the whole case came on for hearing in the said circuit court, and on the 12th of March, 1892, said court ren-

dered its decree foreclosing said consolidated mortgage for the equal benefit of the holders of any or all of said consolidated bonds, denying all the relief prayed for in the auxiliary bill, and dismissing said auxiliary bill, with costs. From this decree James Grant and Frederick Grant, composing the firm of Grant Bros., prosecuted this appeal. They have assigned well-prepared separate specifications of error touching the action of the circuit court on the various features of their bill, substantially to the effect that the circuit court erred in denying them the relief for which they prayed, because the proof showed that the 375 first mortgage bonds issued for the purchase or lease of the Cherokee Railroad, and the 734 first mortgage bonds issued for the extension of the road under the Michael Duff contract, and the 500 debenture bonds issued to Brownings and West for the so-called "floating debt," were all fraudulently issued, without any legal consideration therefor, and in violation of the constitution and laws of Alabama, in which frauds the present holders of said 966 consolidated bonds participated, or of which they are chargeable with notice; and because the proof shows that the appellants, and those in like situations with them, were induced to purchase the bonds held by them by the listing of said bonds on the New York Stock Exchange, and that said listing was procured by the false statements and representations made by E. F. Browning, acting for himself and for J. H. Browning and A. G. West, and as president of the defendant railroad, of which the other defendants are chargeable with full knowledge.

The Cherokee Iron Company was a Georgia corporation, incorporated by a special charter, operating a furnace at Cedartown, and entirely owned by Messrs. Brownings and West. It was authorized to buy and extend any railroad leading to its furnace at Cedartown. The Cartersville & Van Wert Railroad Company, a corporation created under an act of the assembly of the state of Georgia, had completed a railroad from Cartersville, in Georgia, to Rockmast, a distance of about 24 miles, and had completed the grade for said road to Cedartown. This railroad the Cherokee Iron Company purchased for \$22,500, and extended it to Cedartown, and changed its corporate name to the Cherokee Railroad Company. To perfect the title to this road, and to restore, extend, and equip it from Cartersville to Cedartown, cost something over \$350,000 in money, which money was furnished almost entirely by the Brownings. After this, on the 14th of February, 1882, the East & West Railroad Company of Alabama, one of the appellees, was incorporated under the general laws of the state of Alabama, with an authorized capital stock of \$50,000, of which at that time \$26,200 had been subscribed. The three Brownings and West had subscribed \$1,000 each, and were, with three others, elected directors, and E. F. Browning was elected president, A. G. West, vice president, J. Hull Browning, treasurer, and M. R. Crow, who had subscribed \$20,000 of the \$26,200 of the stock then subscribed, was elected secretary, and held that place until some time in the year 1883. On June 17, 1882, the stockholders of the East & West Railroad Company of Alabama met and increased the capital stock of said company from \$50,000 to \$1,000,000.

On the 25th of October, 1882, the Cherokee Iron Company passed this resolution:

"Resolved, that this company subscribe for \$375,000 of the capital stock of the East and West Railroad of Alabama, to be paid for in the property named, by delivering to said East and West Railroad Company of Alabama the railroad property now known as the Cherokee Railroad, including the railroad, stock, franchises, rights, and property of every description, and telegraph lines connected therewith, with a lease by this company for ninety-nine years at an annual rent of one dollar, with privilege of renewal for ninety-nine years at the same rent, at the price of \$750,000,—\$375,000 thereof for said capital stock, as subscribed for, and the remaining \$375,000 to be paid by the said East and West Railroad Company of Alabama in bonds or obligations of the denomination of \$1,000 each, having thirty years to run, bearing interest at six per cent., payable semiannually, and secured by a first mortgage on the property and franchises of said East and West Railroad Company of Alabama, including said lease. Resolved, that the president of this company be, and is hereby, authorized on behalf of this company to subscribe for said stock on the terms above stated, and to execute, seal, and deliver all contracts, agreements, and other writings."

On November 6, 1882, the Cherokee Iron Company made its subscription to the stock of the defendant railroad company in these words:

"Ashville, Ala., November 6, 1882. The Cherokee Iron Company, per J. K. Barbour, Secretary, Cedartown, Georgia, 3,750 shares; amount, \$375,000, to be paid for in the railroad property of the Cherokee Railroad Company of Georgia, of the value of said sum of \$375,000."

On the same day that this subscription was made the defendant railroad company also passed resolutions formally accepting the sale of this Cherokee Railroad for a consideration of \$375,000 in the stock of the defendant railroad company, as subscribed for, and \$375,000 in its first mortgage bonds, and the necessary instruments were afterwards duly executed to that effect. These resolutions of the Cherokee Iron Company, its subscription to the stock of the defendant railroad company, and that company's resolutions formally accepting the sale of the Cherokee Railroad were, under the evidence in this case, viewed by the circuit court as one contract, the evidence of one transaction, not a sale for stock more than for bonds, but in reality for both. The constitution of the state of Alabama (article 14, § 6) prescribes:

"No corporation shall issue stock or bonds except for money, labor done, or money or property actually received, and all fictitious increase of stock or indebtedness shall be void."

Section 1824 of the Code of Alabama (1876) provides:

"All subscriptions to the capital stock of any railroad proposed to be organized under the provisions of this article shall be taken payable in money, labor, or property at their money value, to be named in the list of subscriptions, and, in the event of the failure to perform the labor and deliver the property according to the terms of the subscription, the subscriber shall be bound to pay the amount named in the subscription list in money."

Appellants do not seek in their suit to recover on behalf of the defendant railroad company any amount remaining unpaid of the subscription to the stock. They have not made the said Cherokee Iron Company a party to their suit. Their contention is that, by the terms of said subscription, the value of the railroad property

of the Cherokee Company is fixed at \$375,000, exactly equal to the stated value of the stock subscribed; that said subscription, therefore, fully paid for said property, and left no consideration to support the issue of said 375 first mortgage bonds. The language of the memorandum of said subscription of stock would not clearly support this contention if it stood alone, and, when read in connection with the resolutions of the company authorizing said subscription to be made,—as we are of opinion it must be read,—this contention finds no support. Appellants contend further, that if the value of said property is not so limited by the very terms of the subscription, in point of fact said property was not worth more than \$375,000, and that the taking of it at double that price, payable in equal amounts of stock and bonds of said company, was illegal under the Alabama laws, and, by absorbing into said bonds the full real value of the property secured on said subscription, worked a fraud on the rights of subsequent creditors, for whose protection that stock of the company and its proceeds constituted a trust fund independent of any state, organic, or statute law.

It has long been the settled doctrine in the United States courts that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who do not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation that the stock shall be treated as fully paid and nonassessable, or otherwise limiting their liability therefor, is void as against creditors. *Sawyer v. Hoag*, 17 Wall. 610; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, Id. 56; *Webster v. Upton*, Id. 65; *Chubb v. Upton*, 95 U. S. 665; *Pulman v. Upton*, 96 U. S. 328; *Graham v. Railroad Co.*, 102 U. S. 148-161; *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739.

And the trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith. *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. Rep. 585. This well-settled doctrine of the general law relating to subscriptions to the stock of corporations as announced by the United States supreme court in the cases above cited has been embodied in the constitutions and codes of many of the states; and issues of stocks and bonds, under constitutional and statutory provisions substantially similar to those of Alabama, have been sustained when they have been disposed of by a corporation after its organization for the best price that could be obtained, though for less than their face value. *Railroad Co. v. Thompson*, 103 Ill. 187; *Railroad Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482; *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. Rep. 530; *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. Rep. 468; *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. Rep. 476.

When the charter of a corporation or the general law under which it is created authorizes the capital stock to be paid for in property, and the shareholders honestly and in good faith pay for their subscriptions in property instead of money, there is an end of trust in favor of anybody, and third parties, even subsequent creditors,

have no ground of complaint, although a gross and obvious overvaluation of such property would be strong evidence of fraud in an action by a creditor to enforce personal liability. *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. Rep. 231.

The provisions of the constitution and the Code of Alabama, relied on by the appellants in this case, have been the subject of construction by the supreme court of that state in a number of cases, and the result of their decisions is well stated in the opinion of the judge who passed the decree from which this appeal is taken:

"In cases of subscription to the capital stock of incorporated companies in Alabama, payable in property, in order to release the subscribers from liability to creditors, there must be no fraudulent valuation of the property, no deliberate nor intentional overvaluation. The property delivered in payment must be of a value to correspond with that named in the subscription. There must be more than a formal or illusory compliance with the law. There must be a fair exercise of judgment and discretion, honestly directed, to secure a substantial compliance with the law." *Grant v. Railroad Co.*, 52 Fed. Rep. 531; *Fitzpatrick v. Publishing Co.*, 83 Ala. 604, 2 South. Rep. 727; *Williams v. Evans*, 87 Ala. 725, 6 South. Rep. 702; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, (Ala.) 9 South. Rep. 129; *Nelson v. Hubbard*, (Ala.) 11 South. Rep. 432.

The property of the Cherokee Railroad Company embraced a line of operative railroad 37½ miles in length, equipped for operation, well located for securing and doing business, then doing a thriving trade, out of which it was making, and for several successive years had been making, net earnings to the amount of near \$40,000 a year. Its original promoters and managers had expended on it several hundred thousand dollars. It was acquired by the Cherokee Iron Company under such circumstances as enabled that company to get it at a bid which it can hardly be seriously contended measured its real worth or intrinsic value to a purchaser able and willing to complete it and operate it. There could be no fraud or badge of fraud in such a purchaser claiming the benefit of his bargain, and valuing his property, when repaired and extended, according to its capacity to make net earnings, and according to what it would cost to build and equip such a road, then and there, if it had never been built, and the right of way had yet to be acquired, and the road built from the stump. On this subject it can hardly be claimed that the testimony is conflicting. To an impartial mind accustomed to weighing evidence the overwhelming weight of the proof shows that the property was worth more than \$375,000. And after a careful study of all the evidence offered we fully concur in the finding of the judge who heard the case at the circuit that "the weight of the testimony of experts and of others acquainted with the property is to the effect that the Cherokee Railroad was not overvalued."

Most of what we have said in reference to the subscription by the Cherokee Iron Company applies with equal force to the Michael Duff subscription and construction contract. A multitude of competent and credible witnesses testify to the intrinsic fairness of these transactions, and, like the trial judge, we "find no evidence in the record * * * to the contrary, * * * and it seems there was a fair exercise of judgment and discretion on the part of the railroad com-

pany, fairly and honestly directed, to secure a substantial compliance with the law of Alabama." It follows that the transaction between the defendant railroad company and the Brownings by which the debenture bonds were acquired was entirely just and lawful, for the only semblance of a serious contention as to them rests on the complainants' mistaken view as to the subscriptions of stock and the issue of the first mortgage bonds.

It remains only to notice the contention of appellants that they and their fellow bondholders were induced to take the bonds held by them by false and fraudulent representations made by E. F. Browning, by which he, or Grovesteen & Pell, got said bonds listed on the New York Exchange, of which the defendants all had knowledge, or are chargeable with knowledge. The trial judge, after fully stating all the testimony on that subject, concludes that the evidence is not sufficient to show that the appellants, or any person similarly situated, bought said bonds held by them on any representations the Brownings had made either to procure the listing of the bonds or otherwise. In this finding of his we fully concur.

It is unnecessary to consider other features of the case, as what has already been concluded requires that the decree of the circuit court be, and it is, affirmed.

PARDEE, Circuit Judge, having sat in the circuit court rendering the decision appealed from, took no part in the hearing and decision of this appeal.

PUTNAM SAV. BANK v. BEAL.

(Circuit Court, D. Massachusetts. March 1, 1893.)

No. 2,994.

1. ASSIGNMENT—WHAT CONSTITUTES—BANKS—INSOLVENCY.

To constitute an equitable assignment of property, there must be an appropriation or separation, and the mere intent to appropriate is not sufficient.

2. SAME.

Plaintiff bought of a bank \$25,000 of five-year city of Duluth bonds, and paid the \$25,000. The bank, not having in its possession enough of the five-year bonds, proposed to set aside \$17,000 five-year bonds and \$8,000 one-year bonds, and to exchange the latter for five-year bonds as soon as received. A clerk was directed to make a package of such bonds, and mark it with plaintiff's name, and set it aside as his property, and the officers of the bank supposed this had been done. When defendant, as receiver, took possession of the bank, there were found two packages of bonds. The first package contained \$18,500 five-year bonds, with a slip of paper on which was written a memorandum, "Property of Putnam Ct. Sav. Bank; 6,500 more due them 5 year bonds." The second package contained bonds amounting to \$23,611.50, of which three, amounting to \$10,255.90, had one year to run; six, amounting to \$2,280.81, had five years to run; the remaining bonds running two, three, and four years. With this package was a slip of paper on which was written a memorandum of the date, amount of bonds, and the time when due, and also the words, "6,500 due Putnam." *Heid*, that these facts did not show an equitable assignment by the bank to the plaintiff of the remaining \$6,500 worth of bonds.

In Equity. Suit by the Putnam Savings Bank against Thomas P. Beal, receiver of the Maverick National Bank. On demurrer to petition. Sustained.

C. M. Reed, for complainant.

Hutchins & Wheeler and Frank D. Allen, U. S. Atty., for defendant.

COLT, Circuit Judge. The Maverick Bank agreed to sell to the plaintiff \$25,000 five-year city of Duluth bonds, for which the plaintiff remitted its check for \$25,000. Not being able at once to procure all the bonds, the bank proposed to set aside \$17,000 five-year bonds, and \$8,000 one-year bonds, and to exchange the one-year bonds for five-year bonds as soon as received. This proposition was accepted. Accordingly the clerk having charge of the bond department of the bank gave directions to another clerk, under him, to make a package of \$17,000 five-year bonds and \$8,000 one-year bonds, mark it with the plaintiff's name, and set it aside as the property of the plaintiff; and the officers of the bank and managing clerk supposed this had been done. When the defendant, as receiver, took possession of the Maverick Bank, November 2, 1891, there was found a package of \$18,500 five-year bonds, with a slip of paper on which was written:

Sept. 30, 1891.

Property of

Putnam Ct. Sav. Bank

25,000 Duluth 6s sold

Duluth 6 due Oct. 5, '96

6,500 more due them 5 year bonds

18,500.

There were also found two other packages of these bonds. One of these packages contained bonds amounting to \$23,611.50, of which three, amounting to \$10,255.90, had one year to run; six, amounting to \$2,280.81, had five years to run; the remaining bonds running two, three, and four years. With this package was a slip of paper on which was written a memorandum of the date, amount of bonds, and the time when due, and also the words, "6,500 due Putnam." The other package contained ten \$1,000 bonds, having four years to run, and two \$500 bonds, having five years to run. Accompanying this package were two slips of paper, one marked with a memorandum of the amount and date of the bonds, while on the other was written the following: "Hold for the Travellers' Ins. Co. 25,000. 4 & 5 yr. bonds bot." The Travellers' Insurance Company never paid for, and makes no claim to, these bonds. The package of \$18,500 bonds has been delivered to the plaintiff by the receiver, and this suit is now brought to recover the remaining \$6,500 of the \$25,000 purchased. The case was heard on demurrer to the bill.

A receiver takes the property subject to all the equities which exist against the bank. *Winsor v. McLellan*, 2 Story, 492; *Dugan v. Nichols*, 125 Mass. 43; *Beach*, Rec. § 474. The question in the present case is whether the facts show an equitable assignment by the Maverick Bank, in favor of the plaintiff, of \$6,500 Duluth city bonds.

To constitute an equitable assignment of property, there must be an appropriation or separation, and the mere intent to appropriate is

not sufficient. *Christmas v. Russell*, 14 Wall. 69, 84; *Scudder v. Worcester*, 11 Cush. 573; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Ex parte Hardcastle*, 44 Law T. (N. S.) 523; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Miller v. Congdon*, 14 Gray, 114; *Aldridge v. Johnson*, 7 El. & Bl. 885; *Dickenson v. Phillips*, 1 Barb. 454; *Benj. Sales*, (4th Amer. Ed.) §§ 352-354. In this case the bank in fact appropriated \$18,500 of these bonds when it placed them in a separate package, and marked it as the property of the plaintiff. But the bank stopped there, and the reason is obvious, since it had no other five-year bonds which would make up the balance due. To be sure, it agreed to substitute one-year bonds to cover this deficiency, and directed that this should be done; but it is plain that this could not be done from the one-year bonds then on hand, which are set out in the bill, because the \$7,000 bond was too large, and all the smaller bonds, put together, would not equal the amount required. The indorsement, "6,500 due Putnam," on the package of miscellaneous bonds, was not a separation or appropriation of bonds to that amount in favor of the plaintiff. It was manifestly not so intended. There was no bond or combination of bonds inside the package which would make up that amount. This writing was a mere memorandum that such an amount of bonds was due the plaintiff. This interpretation of the words is the natural one, and is in accord with the condition of things as they existed at the time. It is made clear by the indorsement on the \$18,500 package, which says, "Property of Putnam Sav. Bank." The memorandum as to the \$6,500 of bonds was no more an appropriation than an entry to that effect on the books of the bank, or a slip of paper found in the paying teller's drawer, which should have upon it a writing that a certain sum of money was due a depositor. It showed no intent to pass title to any specific amount of bonds, but was merely a writing declaring what was due.

The plaintiff relies on the language of Lord Cranworth in *Hoare v. Dresser*, 7 H. L. Cas. 290, 317, and on *Rayner v. Harford*, 27 Law J. Ch. 708. The doctrine laid down in these cases seems to be that where there is an agreement to appropriate a part of a larger cargo, as, for example, an order to sell part of a cargo of wheat to arrive, equity will interfere, and give a lien to the person so entitled. In such a case there must be an agreement to appropriate the whole or a part of a specific thing, and it is not sufficient that the vendor may have property available for the specific performance of his contract. The difficulty in the present case is that, while the *Maverick Bank* agreed to do a certain thing, it was not, so far as appears, in a condition to execute its agreement, and never, in fact, did so. Nor can equitable relief be invoked on the ground of accident or mistake for the reason that this case does not come within that class of cases. Here there was no accident or mistake in the performance of what the parties intended, but an entire failure of performance.

Demurrer sustained.

MUTUAL BEN. LIFE INS. CO. v. ROBISON.

(Circuit Court, N. D. Iowa, E. D. March 21, 1893.)

1. LIFE INSURANCE—POLICY—FOREIGN COMPANIES—WHAT LAW GOVERNS—APPLICATION.

Where an application for insurance is made in one state, by a resident and citizen thereof, through agents located therein, to an insurance company of another state, the policy, though actually issued in such other state, to take effect by its terms upon payment of first premium, and the policy is delivered and premium paid in the state where the application is made, the law of that state governs the interpretation and force of the contract.

2. SAME.

An insurance company undertaking to do business in a state other than that of its home and policy issuing office is subject, with reference to such business, to the terms and conditions by the laws of such state imposed on such business.

3. SAME.

An insurance company doing business in a state other than that of its home office will not be permitted to withdraw the business done in such state from the obligatory force of the statutes of that state, by the insertion, in its forms of application or policy, of a clause expressly providing that the law of the state of its home office shall govern its contracts of insurance.

4. SAME—CANCELLATION OF POLICY—ESTOPPEL.

Where an insurance company has accepted the premiums, and the insured has relied on the indemnity contract provided in the policy, the insurance company is as much estopped to cancel the policy after the insured has become in such a physical condition that he cannot obtain desirable insurance upon his life in any reputable company as it would be estopped to avoid the policy after the insured's death.

In Equity. Suit by the Mutual Benefit Life Insurance Company against Charles W. Robison to cancel insurance policies. Bill dismissed.

Henderson, Hurd, Daniels & Kiesel, for plaintiff.

Utt Bros. & Michel, for defendant.

WOOLSON, District Judge. The plaintiff, a corporation organized under the laws of the state of New Jersey, and being a purely mutual insurance society or corporation, has brought this action, in equity, to cancel four policies of insurance, of \$5,000 each, which were by plaintiff issued to, and which are held by, defendant, who is a resident and citizen of the state of Iowa. The evidence shows that on March 17, 1890, the defendant signed a written application to the plaintiff company for \$20,000 life insurance upon his own life, and that, as requested by him, the plaintiff company duly issued to him, and on his own life, four policies of life insurance in the plaintiff company, each policy being dated March 24, 1890, and the same being numbered, respectively, Nos. 157,618, 157,619, 157,620, and 157,621, of said plaintiff company; that, at the date of said application, defendant was, and for over 30 years theretofore had been, a resident of the city of Dubuque, Iowa; that, at said date, one T. F. McAvoy was the general agent for the state of Iowa of the plaintiff company, and Charles J. Brayton was the agent at Dubuque of said

company; that, prior to said date, said agent Brayton and defendant had interviews on the subject of defendant's taking out insurance in said plaintiff company; that, at that date, the plaintiff had two local medical examiners in its employ at said city; and that said Brayton had informed defendant that the medical examination, required of all applicants for insurance, might be made by either of these two examiners; and that defendant elected to have the same made by Dr. G. M. Staples, one of said medical examiners, and who for many years had been the family physician of the defendant.

On said March 17, 1890, defendant presented himself before Dr. Staples for such medical examination, which was had, and the results thereof were entered upon one of the company's blanks, which had been furnished for that purpose by Agent Brayton. Said examination having been completed, defendant subscribed said application at the several places thereupon required. Said medical examiner and said Agent Brayton and said State Agent McAvoy signed it also; and, said state agent having forwarded it to the home office of the plaintiff company, the four policies above described were issued, and were forwarded by plaintiff to said state agent, who, in turn, sent same to said Agent Brayton, at Dubuque, who collected from defendant the premiums therefor, and thereupon delivered said policies at Dubuque to defendant. Shortly before the second payment of premium, or premium falling due in March, 1891, became due, the plaintiff company had received information, as its officers believed, that certain answers by defendant subscribed in said application were untrue; and thereupon plaintiff tendered back to defendant the premium received, with interest, and refused to receive said second premium or payment, (which defendant tendered,) and brought this action to cancel said policies. The answers whose untruthfulness plaintiff urges as the grounds for such cancellation are two:

"Have you ever had * * * spitting of blood?" Answer: "No."

"For what have you sought medical advice during the past seven years? (b) Dates? (c) Duration? (d) Physicians consulted?" Answer: "Debility from overwork. (b) February, 1888. (c) 10 days. (d) G. M. Staples."

A third ground was alleged in petition, relating to varicose veins; but this ground was abandoned, no evidence relating thereto was taken, and counsel stated the same was not pressed.

The claim of the plaintiff is that by the terms of the application which defendant signed, as well as by the face of the policies, such answers are made warranties whose untruthfulness avoids the contract of insurance, and entitle plaintiff to a decree of cancellation. The phraseology of the application does not materially differ on this point from that in general use by life insurance companies:

"I hereby agree that the answers given herewith to the questions of the agent and examiner, which I declare and warrant to be true, shall be the basis of my contract with the company."

So that, if these answers are not true, and plaintiff is entitled herein to urge their falsity, a decree canceling said policies should be entered.

At the very threshold of our investigation, we are met with the opposing claim of the parties as to the state whose laws are to be held applicable to the construction and force of the contract of insurance sought to be canceled. Plaintiff contends that, by the very phraseology of the application which defendant signed, this question is decided against defendant. The application states (and immediately following the quotation above given therefrom) that "such contract shall at all times and places be held and construed to have been made in the city of Newark, New Jersey." Therefore plaintiff, applying the laws of the state of New Jersey, and the construction thereof as given by the supreme court of that state, argues with much force for the decree of cancellation. Defendant contends that the laws of the state of Iowa, and the construction thereof as given by the supreme court of that state, are to be applied. The seeming importance of this contention demands that this point shall be first settled. The underlying principle which plaintiff claims is conclusive of this contention has frequently, in its general scope, been before the supreme court of the United States. Perhaps it has received no clearer consideration than that given in *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. Rep. 102. Speaking of this point, as now urged by plaintiff, Mr. Justice Matthews says:

"The law we are in search of which is to decide upon the nature, interpretation, and validity of the engagement in question is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 48, where he defined it as a principle of universal law: 'The principle that in every forum a contract is governed by the law with a view to which it is made.' * * * And in *Lloyd v. Guibert*, L. R. 1 Q. B. 120, in the court of exchequer chamber, it was said that 'it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have intrusted themselves in the matter.' It is upon this ground that the presumption rests that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms or in the explanatory circumstances of its execution, inconsistent with that intention."

And plaintiff urges further that since the policies were signed at and issued from the home office of the plaintiff company in New Jersey, and by their terms the premiums thereon are to be paid at that office, and any loss thereon is also to be paid at said New Jersey office, therefore these facts, in connection with the agreement above quoted from the application, compel the decision in favor of its contention. The general principle of law above stated is too well settled to admit of dispute, as to any contract and set of facts to which it applies; but, like all other general principles, it may have its exceptions, and it is not properly applicable to every contract of insurance. At the date of said application for insurance, defendant resided in the state of Iowa. The soliciting from defendant by plaintiff's agent of insurance, the examination of defendant, the propounding of the questions to him, the giving of his answers thereto, and his subscribing such application, all these took place in Iowa. Defendant's entire connection with the application was in Iowa. The policies were sent by plaintiff to its Iowa state agent, were re-

ceived by him in Iowa, and thence forwarded to the agent at Dubuque, Iowa, who collected at Dubuque, Iowa, from defendant the premiums, and thereupon delivered to defendant, at said Dubuque, the policies. By the very terms of each of the policies, "this policy does not take effect until the first premium shall have been actually paid;" so that the contracts of insurance now sought to be canceled were not to become, and did not become, effective until the payment had been made in Iowa of the first premium thereon. *Wall v. Society*, 32 Fed. Rep. 273, in the facts last recited, is with the case at bar. In that case the question was squarely presented, "Is the contract sued on governed and to be construed by the laws of the state of New York, or by the laws of the state of Missouri?" Mr. Justice Brewer, (then circuit judge,) on this point says, (page 275:)

"In respect to the first question, these, I think, must be taken as the accepted facts: The defendant is a New York corporation, doing business in the state of Missouri. The insured was a resident and citizen of Missouri, and made his application here, which was forwarded to New York. The application was accepted, the policy fully prepared and signed in that state, and sent to Missouri, and delivered to defendant here. By the terms of the policy all premiums are payable at the defendant's office in New York. If the sum insured should become payable, the payment is to be made at its office in New York. None of the terms of the policy can be modified except by one of the four general officers of the society, and no modification is claimed. Under these facts, I have little doubt as to the true answer to be made to this question."

And thereupon, holding the insurance contract to be governed by the laws of Missouri, he proceeds to apply the laws of that state. On the trial, judgment having been rendered against the company, the case was taken by the company to the supreme court of the United States. The judgment was there affirmed. Mr. Justice Gray, in delivering the unanimous decision of that court, (140 U. S. 231, 11 Sup. Ct. Rep. 822,) substantially restates the facts as the same are contained in the above extract from Judge Brewer's opinion, adding, however, that "the application declares that the contract shall not take effect until the first premium shall have been actually paid, during the life of the person herein proposed for assurance;" and the opinion concluded that, "upon the record, the conclusion is inevitable that this policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and, consequently, that the policy is a Missouri contract, and governed by the laws of Missouri." *Berry v. Indemnity Co.*, 46 Fed. Rep. 440, contains a clear and positive announcement on the point in question. The point was squarely before the court whether the Missouri statute applied to the case. The trial was had in the western Missouri district. Circuit Judge Caldwell, in a decision giving judgment against the company, says:

"If this Missouri statute is applicable to the policy in suit, it puts an end to the company's defense. The company contends that it is not applicable. * * * It is said the policy is an Illinois contract. But clearly this is not so. The company established an agency and carried on its business in this state, [Missouri.] It was through that agency the assured, who was a citizen and resident of this state, made his application, and received his policy. The fact

that the policy was signed by the officers of the company in Chicago has no significance. It was transmitted to the company's agent in Missouri, who received the premium, (called in the policy 'an entrance fee,') and delivered the policy to the insured, at his home in this state; and it took effect at that place and from that date."

This case was taken to the circuit court of appeals for the eighth circuit, and judgment affirmed. 50 Fed. Rep. 511, 1 C. C. A. 561. In the opinion rendered by that court, Judge Shiras specially considers this point:

"It appears from the findings of fact that the company is a corporation created under the laws of Illinois; that it was engaged in soliciting business in Missouri, having agents in the latter state for that purpose; that, by the express terms of the charter of the company, the contract of insurance does not become binding until the delivery thereof to the insured; and that the policy sued on in this case was delivered by the agent of the company to [insured] at Trenton, Missouri, at which place the application for the issuance of the policy had been made and delivered to the agent of the company. Under these circumstances, it cannot be successfully maintained that the contract was made in Illinois. In its inception and completion it was made in Missouri, and is therefore to be construed in connection with the provisions of the statutes of that state. The facts of this case bring it clearly within the ruling of the supreme court in Assurance Co. v. Clements, 140 U. S. 226, 11 Sup. Ct. Rep. 822, in which it is held that a policy issued in New York, by a corporation of that state, upon the life of a resident of Missouri, it being provided that the contract should not take effect until actual payment of the first premium, did not become a completed contract until the payment of the first premium and delivery of the policy; and that, as these acts were done in Missouri, the policy must be deemed to be a Missouri contract, and to be governed by the laws of that state."

We are therefore justified in holding that, unless the clause in the application (with reference to construing the contract as made in New Jersey) shall take the case out of the rule as clearly established with reference to the point under consideration, the contracts set out in petition herein must be construed by the laws of the state of Iowa.

So far as this point under consideration affects the grounds on which the plaintiff company claims cancellation of defendant's policies, it may be here stated (leaving details for later mention) that, if defendant's contention is sustained, the agent, state agent, and medical examiner are to be regarded as agents of plaintiff in their dealings with defendant in the matters complained of in the petition, and the facts and conversations attending the medical examination of defendant may be admitted in evidence; while, if plaintiff's contention is sustained, evidence as to these attendant facts and circumstances will, as plaintiff claims, become incompetent as against the written answers in the application. The materiality of this contention is evidenced by the thoroughness and force with which each party has presented his side of the discussion. Section 1 of chapter 211 of Acts of 18th General Assembly of Iowa (Laws 1880) is as follows:

"Any person who shall hereafter solicit insurance or procure applications therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application or on a renewal thereof, anything in the application or policy to the contrary notwithstanding."

No like statutory provision is shown to be contained in the laws of New Jersey.

Assuming that plaintiff's contention, if sustained, will have the broad effect which it claims for such contention, the question to be solved is whether the defendant is to be permitted to claim the benefits of the Iowa statute, notwithstanding that the application signed by him declares—so plaintiff claims—that the laws of New Jersey shall govern the interpretation and force of the contract. In other words, does not the language of this declaration in defendant's application waive any benefit he might otherwise claim from the Iowa statute? And is it not competent for defendant thus to waive the Iowa statute, and place the contract under the force of the statutes of New Jersey, whence the policies were to and did issue, so that defendant is thereby estopped from claiming that the Iowa statute shall apply thereto? We are not required to consider this question as an original one now first proposed for solution. The law seems well settled in this circuit. In 1882, in *Fletcher v. Insurance Co.*, 13 Fed. Rep. 526, Judge Treat had occasion to consider this question, and the cogent reasoning of his opinion was fully concurred in by Circuit Judge McCrary:

"Inasmuch as the policy sued on declares that it rests on the basis of answers made to the application, and that said policy was to be issued at the home office in New York, on return thereto of the application, can the plaintiff avail himself of the force of the Missouri statute? The defendant company was doing business in Missouri, with the privileges granted to it here, when said insurance was effected. It may be that the formal acceptance of the proposed contract was, by the letter of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the state, on prescribed conditions. If, despite such conditions, they can, by the insertion of clauses in their policies, withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantages of the license, then a foreign corporation can upset the statutes of the state, and become exempt from the positive requirements of law. Such a proposition is not to be countenanced. The defendant corporation chose to embark in business within that state, under the terms and conditions named in the statute. It could not by paper contrivances, however specious, withdraw itself from the operation of the laws, by the force of which it could alone do business, within the state. To hold otherwise would be subversive of the right of a state to decide on what terms, by comity, a foreign corporation should be admitted to do business or be recognized therefor within the state jurisdiction. Each state can decide for itself whether a foreign corporation shall be recognized by it, and on what terms. Primarily, a foreign corporation has no existence beyond the territorial limits of the state creating it, and, when it undertakes business beyond, it does so only by comity. The defendant corporation, having been permitted to do business in Missouri, under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses in its form of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance, therefore, is a Missouri contract, and subject to the local law."

This case was taken to the supreme court of the United States, and is found in 117 U. S. 519, 6 Sup. Ct. Rep. 837. The point just quoted from Judge Treat's opinion is touched upon but slightly, but the justice writing the opinion uses this language:

"The company is a corporation under the laws of New York, but it also transacts business in Missouri, through agents residing there, and, of course, with reference to the business done in that state, is subject to its laws."

In *Wall v. Society*, 32 Fed. Rep. 273, (to which reference was above made,) Circuit Judge Brewer had occasion to consider this question. The defendant company had set up as grounds of defense against the claim on the policy that the contract of insurance was to be construed under and governed by the laws of the state of New York, and therefore, because of nonpayment of premium, the insured was entitled but to the surrender value which was named in the policy; whereas, if the Missouri law applied, the holder of the policy would be entitled to a much larger amount, under the provisions of the Missouri statute. The company's answer set up its contention on this point, and its claim to have the policy construed by the New York law. The holder moved to strike out these portions of the answer. Judge Brewer held, as we have seen, *supra*, that the contract was to be governed by the Missouri law. The court was then brought directly to the point as to whether the stipulation in the contract providing for the payment, in case of forfeiture for nonpayment of premium, of the amounts therein stated, (which we may call "forfeiture values,") constituted a waiver of the provisions of the Missouri statute, and was binding on the insured. After quoting the Missouri statute as to forfeiture values, he says:

"Now, in the policy sued on, there is a nonforfeiture clause, but containing a different provision; and it is alleged that in the application the insured waived and relinquished all right or claim to any other surrender value than that provided in the policy, whether required by the statute of the state or not. This is the doubtful question. It is strenuously insisted by the defendant that the statute of Missouri neither forbids nor declares null, nor makes anywise illegal, such a waiver as the one in question; that it merely gives a right or privilege to the insured, which, like any other personal right or privilege, he may, for sufficient consideration, waive; and that such waiver, not being forbidden by the statute, is not contrary to public policy, in any such sense as that the courts should refuse to enforce it. Back of this argument, and strongly supporting it, is that liberty of contract which courts are strenuous to uphold."

After considering arguments, based on what he calls "a purely technical construction" of the statute, Judge Brewer states:

"I am disposed to rest my conclusion more upon the matter of public policy. And here the history of insurance must be taken into consideration. It is notorious that many insurance companies were rigorous in insisting upon forfeitures, sometimes under very inequitable circumstances, and there was no little public clamor by reason thereof. Such clamor prompted many legislatures to interfere, and to seek by legislation to protect what they supposed to be the rights of the insured. Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases,—absolute and universal because if it applied only in the cases where the policies were silent, or, if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, though no words of penalty are attached, no express denial of the right to waive, in fact no words of negation in any direction, yet it seems to me fair to say that the affirmative words of the statute disclose a public policy which no court ought to question or refuse to enforce. *Railway Co. v. Peavey*, 29 Kan. 169. The legislature has by

this language declared a rule in respect to forfeitures in life insurance policies. It has thus established the policy which it believes should obtain in this state; and, though sitting on the federal bench, it is my duty to administer the laws of this state in the spirit in which they were enacted, and to uphold both their letter and spirit. It is voluntary with any foreign insurance company whether it shall come into this state to transact business. Coming in, it should be willing to comply with all the statutes as to all business arising within this state, and no court, least of all a federal court, should hasten to release it from this obligation. From these views, and with this feeling, I am constrained, though with grave doubts, to sustain the motion to strike out."

While this case was pending in the supreme court of the United States, on writ of error, the case of *Berry v. Indemnity Co.* was decided by Circuit Judge Caldwell, (46 Fed. Rep. 439.) In his decision, after holding the contract of insurance to be a Missouri contract, and not a contract of the state in which the home office of the company issuing the policy was located, Judge Caldwell proceeds (page 441) as to the point we are now considering:

"Corporations are artificial creations, and have no natural rights, and their constitutional and legal rights, in some respects, fall short of those of natural persons. A state cannot deny to the citizens of other states the right to do business within its limits, but it may deny such right absolutely to corporations of other states, or it may admit them to do business on such terms and conditions as it is pleased to prescribe; and, when an insurance company of one state does business in another, the laws of the latter prescribing the terms and conditions upon which it is allowed to do business in the state are obligatory upon it. These conditions may extend to the form and legal effect of the company's policies; and if, in the course of its business in the state it issues policies on the lives or on the property of the citizens of the state which contain conditions prohibited by or in contravention of the laws of the state, such conditions are void. Doing business in the state brings the policy within the operation of its laws, notwithstanding the policy may be signed, and the loss made payable, in another state. In such cases the company cannot, by any contrivance or device whatever, evade the effect and operations of the laws of the state where it is doing business. *Wall v. Society*, 32 Fed. Rep. 273."

Within a few days after Judge Caldwell rendered this decision, the supreme court of the United States decided the *Wall Case*, and same is contained in 140 U. S. 226, and 11 Sup. Ct. Rep. 822, under the title *Equitable Life Ins. Co. v. Clements*. As to the binding force of the Missouri statutes, and the stipulations in contract purporting to waive it, the court says:

"The manifest object of this statute, as of many statutes, regulating the form of insurance policies on lives or against fires, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company, with the assent of the insured; but it is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter. * * * It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute in case of default of payment of premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive' and relinquish all right and claim to any other surrender value than that so provided, whether required by a statute of any state or not, is an ineffectual attempt to evade and nullify the clear words of the statute."

As evidencing the positiveness with which the rule so stated by the supreme court is followed in this circuit, it may be noted that in

May, 1892, the circuit court of appeals of this circuit, in *Indemnity Co. v. Berry*, 50 Fed. Rep. 511, 1 C. C. A. 561, affirmed the decision of Circuit Judge Caldwell, as above given. A clause in the policy declared in most unequivocal terms that the policy should become null and void "in case of self-destruction of the holder of the policy, whether voluntary or involuntary, sane or insane;" while the Missouri statute provided that it should be no defense that the insured committed suicide, "unless the assured contemplated suicide at the time he made the application for the policy; and any stipulation in the policy to the contrary is void." Judge Shiras, speaking for the court of appeals, says:

"When, therefore, the policy sued on in the present case was issued and delivered to [the assured] in Missouri, the clause found therein touching the liability for death by suicide was nugatory, under the provisions of the statutes of Missouri then in force, provided the policy or contract of insurance is of such a nature as to be subject to the section of the statute in question."

We are, then, justified in holding that, so far as the Iowa statute above quoted may apply to the contracts of insurance at bar, the Iowa law is the law which is to govern and to furnish the rule of construction, "anything in the application or policy to the contrary notwithstanding;" and the waiver thereof, as claimed by plaintiff, is ineffectual.

We come now to the particular facts as proven in evidence touching the two grounds of action urged herein. The evidence shows an entire absence of any intent or desire on the part of defendant to defraud the plaintiff company. While the petition, and some portions of the argument on the hearing, allude to defendant as having intentionally deceived and misled the company into issuing the policies in suit, I find nothing in the evidence justifying such statements. The evidence, as presented, relates to but one circumstance or incident as to which the plaintiff claims the answers above quoted of defendant are untrue. The medical examination of defendant occurred in March, 1890. The question as to seeking medical advice related to the preceding seven years, while the question of spitting of blood was without limit in the question itself. But plaintiff has attempted to prove and urges but one incident or transaction as proof of the untruthfulness of these answers. This occurrence is shown to have happened in October, 1887. I find such occurrence, as proven, to have been that at that time defendant's wife was approaching confinement, and, as defendant was starting for his office one morning, he was directed by the attending physician to procure some chloroform as he went to his office, and if during the day the presence of defendant was needed at his home the physician would telephone for him. Defendant procured the chloroform; and early in the afternoon the physician telephoned defendant to come home immediately. Defendant was then at his office, nearly a mile from his home. He at once started for his horse, which he had left standing in a shed near by, but found some one had taken the horse out. Hastening to a near street, he hoped to catch a street car which ran past his residence. No car was in sight. He then started on a run for his

home, in his eager haste running a couple of blocks, and then walking a block to rest himself and regain his breath, keeping a lookout meanwhile for a car or vehicle on which he might be carried. After having thus proceeded a half mile or more, and when in a highly nervous and excited condition, to a point almost of physical exhaustion, in attempting to step upon or over a curb, he tripped and fell. As he rose and started again, he noticed that he expectorated some blood. Not knowing where this blood came from, and being alarmed at the unusual occurrence, he crossed over the street to the office of Dr. Waples, and asked him what it meant. Dr. Waples told him he was greatly excited, and had him lie down and quiet himself. This blood expectoration soon ceased. Defendant says it was saliva, mixed with blood; and, at plaintiff's question, he attempts to particularly describe it. He also says that in quantity it was "not as much as there comes from the ordinary pulling of a tooth." Dr. Waples accompanied defendant home, where defendant remained a couple of days, his wife meanwhile passing through her confinement. On the second day thereafter, defendant went to his business place, on his way stopping at the office of his family physician, Dr. G. M. Staples, to whom he narrated the occurrence in detail. (The evidence does not disclose why the family physician had not attended the wife, nor is it material.) Dr. Staples carefully examined defendant's lungs, and pronounced them sound and unaffected. On examining the throat he stated to defendant that he found a scar, apparently of a rupture in a small blood vessel in the throat, which the doctor then pronounced as the cause of the expectoration of blood; and he assured defendant that the occurrence did not amount to anything; that he "frequently had such cases in his office of perfectly healthy persons expectorating blood from the throat," and for defendant to go on about his business, which defendant did. The evidence, given by defendant, is uncontradicted that never before nor since that time, up to the medical examination, had he ever spit blood, except as he had had a tooth drawn or bit his tongue. His words answering this question are:

"I have spit blood out of my mouth previously to that time. If you mean whether I ever spit blood out of my mouth, whether from the pulling of a tooth or biting my tongue, I will answer I have. If you mean that I have spit blood coming from my throat, or any of my respiratory organs, or from my stomach, I will answer that I have not."

The facts relating to this occurrence have thus been stated somewhat in detail, as I find them from the evidence, as some evidence was introduced tending to show a state of physical exhaustion of defendant immediately followed this occurrence. This exhaustion is to me not surprising, succeeding, as it did, immediately after the severe physical nervous and excited efforts of defendant to reach his home as speedily as possible with the chloroform, and under the peculiar circumstances under which the effort was made. But I find no statement in substantial contradiction as to the occurrence as I have given it; and the testimony of Dr. Staples, as to his part in the matter, is in substantial accord with defendant's statement. The medical examiner of the plaintiff company who

conducted the examination of defendant, and wrote the answers to which the plaintiff now objects, is the same Dr. Staples who had been the family physician of defendant for many years, and who is referred to in the above statement of the occurrence. According to the testimony of Holden, (medical director of plaintiff,) Dr. Staples had been since 1865 the medical examiner at Dubuque for plaintiff. I find further from the evidence that at the time of such medical examination of defendant for insurance from plaintiff, on March 17, 1890, when the questions to whose answers, as written in the application, plaintiff now excepts, were propounded to defendant by Dr. Staples, defendant recalled to the examiner the particulars of the occurrence, above stated, and again related them to him; that defendant then appealed to the examiner to know what was meant by the term "spitting of blood," and whether the term included this occurrence; that the examiner stated to him that the term did not refer to or include, as used in the application, such an occurrence, but, as there used, meant "the raising of blood from the lungs or bronchial tubes,—diseases supposed to be the precursor of consumption;" and that said examiner said the proper answer was, "No," and he then directed that answer to be written as the same appears on the application. (Owing to the examiner being then afflicted with "writer's cramp," his son wrote, at his dictation, the answers.) The testimony of the examiner on this point is as follows:

"Interrogatory 38. State what was said. Answer. I explained to him that this question, 'Spitting of blood,' was in my judgment, as medical examiner for the company, (it was put there for the purpose of determining whether there was any evidence of consumption,) that the question could not be answered categorically, if you meant spitting of blood from the mouth. Probably no person living but what has spit blood on some occasion when a tooth has been extracted, or after having the nose bleed. Spitting of blood did not mean that. It meant as evidence of hemoptysis or diseases of the pulmonary organs."

I further find from the evidence that, when the question with reference to having sought medical advice was asked defendant, he stated to the medical examiner that except the one time when defendant had consulted Dr. Waples, as above narrated, he had sought no medical advice except from him, (the examiner,) and that he (the examiner) knew more about that than defendant did; that after some talk between them, and the consultation of the examiner's books, (wherein he kept his accounts for medical services rendered,) the examiner stated to defendant that the question did not refer to every slight matter on which a physician's advice had been sought. Here, also, the testimony of the examiner may properly be given:

"Interrogatory 58. Do you remember what was said when the eleventh question was asked Mr. Robison.—'For what have you sought medical advice during the last seven years?' Answer. My recollection is that he said to me that I had attended him during the 7 years, and that I could answer for him. I could tell about what he had sought medical advice for. Int. 59. Did you make an examination of the books at the time to see what he had consulted you for? A. I do not recollect whether I made the examination or not. I had in mind about what I had treated him for. Int. 60. State whether you

talked over with him at that time, and tried to determine what you had treated him for. A. I think I did. Int. 61. State whether he left the answer to that question to you or not. State what Mr. Robison did in relation to the answer to that question. A. We talked over what we prescribed for him, and I think this was the result we came to as to what had been his trouble. Int. 62. State whether it was the result you came to as well as he. A. I said, 'We.'

On cross-examination the following occurs:

"Interrogatory 11. If you attended Robison within the time you stated, in 1888 and 1889, why did you not remind him of that fact when he answered question 11? Answer. I cannot answer that without a sort of an explanation. Mr. Robison came to our office quite frequently, complaining of some trivial illness, which was largely in his imagination. He is rather cowardly when he is sick or thinks he is. He imagines he has all the illnesses that the human family is heir to. He came to my office frequently, and I could find no trouble that would be worth reporting, and I did not think it necessary to number up all the details of all these little trivial matters that he complained of. That is perhaps an explanation. Int. 12. State if you explained this to Mr. Robison. A. I did. * * * Int. 14. So, in your opinion, these times in 1888 were not of enough importance to appear in answer to this question. A. Most of these times I regarded as such. Int. 15. You have stated that Mr. Robison came frequently. Would he not on a good many of these occasions simply come to have his truss adjusted, or ask about that? A. He came to me sometimes to have his truss adjusted. Sometimes he would want a new truss. Sometimes he would come to talk about an operation, so that he would not have to wear a truss. Sometimes he would complain about something wrong about his heart. I would make an examination, and find nothing wrong about his heart; and he would consult me about little trivial matters, that I did not regard as of enough consequence to write out a volume of and send to the home office. Int. 16. You so informed him when this question No. 11 was asked him? A. I informed him that I did not think it necessary."

I further find from the evidence that, at the time this medical examination was made of defendant by Examiner Staples, plaintiff's agent Brayton and State Agent McAvoy were at the examiner's office. That after Dr. Staples had completed the personal examination, and he and defendant had come out from the private room in which the examination had been held, defendant met Brayton and McAvoy. That conversation was had between them as to defendant's insurance. That it was then understood defendant was to take \$5,000 insurance only. That, in the course of the conversation, defendant narrated to the state agent, and in presence of Agent Brayton and the medical examiner, the occurrence above narrated as to the spitting of blood, and his consultation of Dr. Waples about it; and that he had, very shortly after, related the occurrence to Dr. Staples, and had been then examined by him with reference to it; and that, under Dr. Staples' explanation of the term "spitting of blood," he had answered to the question, "No;" and that the state agent then said to defendant, (I now quote from the testimony of Agent Brayton:)

"McAvoy said: 'Dr. Staples has explained to you. You are perfectly right in so stating it, as the question means, "Did you ever have spitting of blood from the lungs;" and where you have apparently answered the question wrong, under the meaning of the question, it is right, as Dr. Staples explained to you. This is one question we have settled satisfactorily with Dr. Staples;' and it was settled satisfactorily to Mr. Robison. I do not remember if there was anything else said on the subject. I have this in my mind because of the fact that I had heard that Mr. Robison had had hemorrhage."

—And that, after the talk between the agents and defendant in which the foregoing occurred, the state agent induced Mr. Robison to increase his application for insurance in the plaintiff company from \$5,000 (the amount he had intended) to \$20,000, (the amount of the policies in the suit.) The testimony of the plaintiff's medical director Holden shows that McAvoy was state agent for Iowa for plaintiff. Holden disputes the local agency of Brayton; but that is overthrown, and the contrary proven, by the original application produced by plaintiff, whereon appears the certificate and recommendations of defendant's application for insurance as made to plaintiff, and signed by Brayton as agent of plaintiff.

Here, then, we have a case in which the applicant not only has not concealed any facts with reference to himself, but has with special minuteness put plaintiff's agents—local agent, state agent, and examiner—in possession of all the facts because of whose omission in the written application plaintiff now seeks to avoid the policies it has issued to defendant. In this entire transaction defendant appears to have acted towards plaintiff company with the utmost good faith. The evidence fails to sustain any imputation that in any particular defendant sought to impose on plaintiff. A business man himself, defendant seems to have been unusually careful that all the facts touching the matters referred to in the application should be fully and minutely in the possession of plaintiff's agents. Indeed, the evidence shows that defendant was not satisfied during the progress of the examination with the answer, "No," as the examiner had directed it to be written, but called the examiner's attention to it; and, when the examiner stated that he could not make any other answer to the question, defendant asked the examiner if he could not make the company a better answer than the words in the answer in the application; and that Dr. Staples replied he did not think it necessary, but that he could write on the margin of his examiner's report to the company about the blood spitting, or would write a letter to the company, stating how defendant came to spit blood, and when and where, and that he had examined defendant's throat and lungs two days thereafter, and that he had given them a thorough examination, and that, in his opinion, the blood spitting was a trivial matter. That no letter was thus written with these promised contents is not chargeable to the defendant, nor can its absence sustain any imputation of bad faith on his part. This absence is perhaps to be accounted for in the fact developed in Dr. Staples' testimony that, after defendant had concluded to increase the amount of his insurance, the doctor took further time, and more thoroughly performed his examination, and was thereby more thoroughly impressed with the desirability and safety of the risk; hence he might readily have concluded the letter to be more than ever unnecessary. The supreme court of Iowa has in various cases given its construction to the Iowa statute above quoted. In *Cook v. Association*, 74 Iowa, 746, 35 N. W. Rep. 500, that court has declared that this statute applies to life, as well as fire, insurance; and in *Insurance Co. v. Sharer*, 76 Iowa, 282, 41 N. W. Rep. 19, that court, speaking of the same statute, has declared:

"The purpose of the statute was to settle as between the parties to the contract of insurance, the relations of the agents through whom the negotiations were conducted. Many insurance companies provided through their applications and policies that the agent through whom the application was procured should be the agent of the assured. Under this provision they were able to avail themselves, in many cases of loss, of defenses which would not have been available if the solicitor had been regarded as their agent, and many cases of apparent hardship and injustice arose under its enforcement; and that is the evil intended to be remedied under the statute, and it ought to be so interpreted as to accomplish that result."

In 1886 the Iowa supreme court, in *Donnelly v. Insurance Co.*, 70 Iowa, 693, 28 N. W. Rep. 607, considered a case where the application for insurance gave the cash value of the building to be insured at \$8,000, its erection as in 1872, and the additions thereto as in 1880. The facts, as specially found by the jury, were that its value was \$2,000, its erection was in 1844, rebuilt in 1865, and additions made at a later date. The jury further found that the application blank was signed in blank by the plaintiff, and then left with the company's agent, who, on information gained by him, on investigation and from knowledge, wrote the answers to the questions. The company contended that, the statements (warranties) being false, plaintiff could not recover, and the evidence to show that the answers were filled out by the agent, and the manner of such filling out, was incompetent, as varying by parol a written contract. To the first point the supreme court say:

"It will be conceded that the agent was a soliciting agent only, and that he had no power to bind the defendant by any contract he might take. But he made no contract. All that he did was to solicit insurance, and fill up a blank application furnished him by the company. Where an insurance company appoints an agent to solicit insurance, and furnishes him with blank applications, it must be assumed that he is vested with the power to fill up the applications in accordance with the information furnished him by the applicant; and such is the usual practice. For this purpose he is the agent of the company, and if, instead of obtaining the requisite information of the applicant, he obtains it from others, or fills up the application in accordance with his own knowledge and information, and thereon a policy is issued by the company, and the premium paid by the applicant, the company is bound by the statements contained in the application, and the accused is not, in the absence of fraud. It will be conceded that the defendant, when it issued the policy, believed that the plaintiff had furnished the information contained in the application; and that, if it had known the facts, it would not have entered into contract of insurance. But this is immaterial, because the deception was practiced by its own agent, and not by plaintiff."

And the court cites a number of decisions of the court as sustaining the point now stated. To the second point above stated, the court say:

"Counsel are mistaken in the assumption that parol evidence was introduced for the purpose of contradicting the written contract. The force and effect of the statements contained in the application are in no respect impaired, but, under the circumstances disclosed in the evidence, the defendant is estopped from setting up their falsity as a defense to this action."

The supreme court of Iowa, in *Hagan v. Insurance Co.*, 81 Iowa, 321, 46 N. W. Rep. 1114, applied the Iowa statute above cited to a case where the soliciting agent of the insurance company prepared several applications for plaintiff in various companies, in-
v.54F.no.4—38

cluding defendant company, of which this solicitor was agent, all upon the same property. The assured stated to the agent the gross amount of insurance he desired to carry, and the agent distributed it among the various companies. In the policy in suit the agent entered in the application a statement of concurrent insurance greatly below the actual amount. The court, announcing the rule obtaining in Iowa in the application of the statute to these facts, hold the policy to be effective, and say:

"The company, being charged with the knowledge of its agent, must be considered as having knowledge of the amount of insurance applied for; and, having issued this policy with this knowledge, will be deemed to have waived the condition against concurrent insurance beyond the sum named."

Key v. Insurance Co., 77 Iowa, 174, 41 N. W. Rep. 614, is a case having some features in common with case at bar. Key had bought property on which was situated a dwelling house then occupied by him. He held but a title bond for the premises. When the application for insurance was being made out, Key stated these facts fully to the soliciting agent, who then said to plaintiff, "That did not tell in the policy," but further informed plaintiff that, if at any time he desired to borrow money on the place to complete the payments on it, he would have to get permission from the company before making this loan. The application stated that plaintiff was the sole owner of the premises, and that the same were unincumbered. The application also contained the usual provision making all statements warranties, and avoiding policy if any statement was untrue, etc. In upholding an instruction to the effect that, if the soliciting agent was thus told truthfully the facts relating to plaintiff's title, then his knowledge would be the knowledge of the company, and the company, in issuing and delivering the policy, would be held to have waived any misstatements in the application, the supreme court say: "In taking the application, the agent acted for defendant company. Therefore it is chargeable with knowledge of the facts made known to the agent at the time." And judgment on the policy is sustained. Further reference to cases adjudged by the Iowa supreme court would seem unnecessary; but it may be noted that the Iowa decisions are uniform as to the construction of this statute.

Applying the Iowa statute, as thus construed, to the facts by this court found and above stated, we are brought to the inevitable conclusion that, in the matters relating to and connected with the examination of defendant and the application for insurance herein, Agent Brayton, State Agent McAvoy, and Medical Examiner Staples were the agents of the plaintiff company, and that the statements made known to them by defendant, as above found, were thereby made known to, and became the knowledge of, the plaintiff company; so that, when the policies in suit were issued to defendant, the company must be held to have waived the nonstatements in the application of which it has herein complained.

But counsel for plaintiff insist that the doctrine of Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. Rep. 837, is applicable to the case at bar, and entitles plaintiff to a decree of cancellation. On

examination of that case, it will appear that the facts therein involved, and with reference to which the decision therein rendered must be read, differ materially from the case at bar. The previous decisions of that court, as rendered in *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Mahone*, 21 Wall. 152; and *Insurance Co. v. Baker*, 94 U. S. 610,—had strongly asserted the doctrine that, where the applicant had no knowledge of any limitations upon the agent's authority, insurance companies, acting through agents at a distance from the home office, were bound by the acts of these agents, within the general scope of the business intrusted to them; and when such agents prepared the application wherein the statements are made warranties, and where truthful answers were given by the applicant, but the agent inserted other answers therein, that, even though the applicant signed the application, he was not estopped from showing the actual facts of the occurrence, since the applicant had the right to assume that the answers as thus written had the meaning for the purpose of obtaining the policy of what the agent stated them to be; and that if the agent attempted to construe and interpret the applicant's answers, and inserted his construction and interpretation of them instead of the answers themselves, the company, and not the applicant, would be held responsible therefor, as having prepared the application, and, though the applicant signed it, this would not defeat the policy. In the *Fletcher Case*, on the contrary, there was brought directly home to the applicant the limitation which the company had placed on the powers of its agents; for the application there signed expressly notified the applicant that as only the officials at the home office have authority to determine whether a policy shall issue on any application, and as they rely only on the written statements and representations referred to, no statements or representations made or information given to the persons soliciting or taking the application for the policy should be binding on the company or in any manner affect its right unless they were reduced to writing, and presented at the home office in the application. And the policy in that case was overthrown, on the expressed and special ground that, under this provision of the application, no statements which the applicant had verbally made at the time the application was made out and signed could be received to affect the application as signed and sent to the home office, and therefore the untrue statements (warranties) therein, by the terms of the contract, rendered the contract of insurance void. What would have been the effect upon the *Fletcher Case* if that case had arisen in Iowa, and the attempt was made to apply the Iowa statute to it, we do not find it necessary to inquire, for the *Fletcher Case* and case at bar are otherwise distinguishable, as we have just seen. In *Sawyer v. Insurance Co.*, 42 Fed. Rep. 30, will be found a clear and forcible presentation of the distinguishing points between the *Fletcher Case* and those preceding it, (which I have named above,) and conclusively showing that the *Fletcher Case* does not overrule its said predecessors. In the case at bar I find that there is no evidence that defendant had any knowledge of any limitation, if such limitation existed, upon the powers of the

company's said agents within the scope of the business by the plaintiff company intrusted to them.

The case of *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. Rep. 87, is largely decisive of the case at bar, and much of its reasoning is directly applicable herein. That was an action upon a policy of life insurance, wherein was involved the Iowa statute above quoted. The company's agent, in taking the application, had answered the question relating to whether the applicant had other insurance upon his life, by writing the words "None other." In fact the applicant at that date held insurance in co-operative insurance companies to the amount of \$12,000. The answers were by the contract made warranties, and their falsity avoided the contract. The company resisted payment because of this false answer. The evidence showed that the applicant had, in response to this question, truthfully and fully informed the agent of the amount of co-operative insurance he was carrying, and that the agent had declared that he did not regard, nor did the company regard, such co-operative companies as insurance companies, so that the applicant did not, therefore, really hold any insurance whatever at that time; and relying on the construction given by the agent, and under his direction, the applicant had signed the application with the words therein to which the company objected. One of the provisions contained in that application is as follows:

"And it is hereby further covenanted and agreed that no statements or representations made or given to the person soliciting this application for a policy of insurance, or to any other person, shall be binding on the said company, unless such statements or representations be in writing in this application when the said application is received by the officers of the said company at the home office of the said company, in Hartford, Conn."

Having quoted this Iowa statute, the supreme court of the United States, in applying that statute to the case in hand, say, (page 310, 132 U. S., and page 89, 10 Sup. Ct. Rep.):

"The statute was in force at the time the policy in suit was given, and therefore governs the present case. It dispenses with any inquiry as to whether the application or the policy, either expressly or by implication, made Boak the agent of the assured in taking the application. He could not by any act of his shake off the character of agent for the company. Nor could the company by any provision in the application or policy convert him into an agent for the assured. If it could, then the object of the statute would be defeated. In his capacity as agent for the insurance company, he had filled up the application,—something which he was not bound to do, but which service, if he chose to render it, was within the scope of his authority as agent. If it be said that, by reason of having signed the application after it had been prepared, Stevens is to be held as having stipulated that the company should not be bound by his verbal statements and declarations to the agent, he did not agree that the writing of the answers to questions contained in the application should be deemed wholly his act, and not in any sense the act of the company by its authorized agent. His act in writing the answer which is alleged to be untrue was under the circumstances the act of the company. If he had applied in person to the home office for insurance, stating, in response to the question as to other insurance, the same facts communicated to Boak, and the company by its principal officer, having authority in the premises, had then written the answer, 'No other,' telling the applicant that that was the proper answer to be made, it could not be doubted that the company would be estopped to say that insurance in co-operative companies was insurance of the kind the question referred to, and about which it desired information

before consummating the contract. The same result must follow where negotiations for insurance are had, under like circumstances, between the assured and one who in fact, and by force of the law of the state where such negotiations take place, is the agent of the company, and not in any sense an agent of the applicant. * * * In view of the statute and of that understanding upon the faith of which the assured made his application, paid the first premium, and accepted the policy, the company is estopped by every principle of justice from saying that its question embraced insurance in co-operative associations. The answer, 'No other,' having been written by its own agent, invested with authority to solicit and procure applications, to deliver policies, and, under certain limitations, to receive premiums, should be held as properly interpreting both the question and the answer as to other insurance."

The subheading of that part of the application in the case at bar, wherein is contained the answers to which plaintiff herein excepts, is as follows:

"The answers to the questions on this page must be written by one of the company's examiners. (Note. The examiner will ask the person to be insured the following questions, and will see that the answers are free from ambiguity, and that diseases are distinguished from mere symptoms.)" etc.

As bearing on the possible force of this direction of plaintiff, which imposes on the medical examiner the duty of determining what answers are proper answers to be written in the application to the questions propounded to applicant, the following extract from Chamberlain's Case, supra, is highly instructive:

"It is true that among the 'Provisions and Requirements,' printed on the back of the policy, is one to the effect that the contract of the parties is completely set forth in the policy and application, and 'none of its terms can be waived except by an agreement in writing, signed by the president or secretary of the company, whose authority for this purpose will not be delegated.' But this condition permits—indeed, requires—the court to determine the meaning of the terms embodied in the contract between the parties. The purport of the word 'insurance' in the question, 'Has the said party any other insurance on his life?' is not so absolutely certain as in an action on the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. Such proof does not necessarily contradict the written contract. Consequently the above clause, printed on the back of the policy, is to be interpreted in the light of the statute and of the understanding reached between the assured and the company by its agent when the application was completed, namely, that the particular kind of insurance inquired about did not include insurance in co-operative societies."

In the case at bar, the facts with reference to the questions propounded were fully and truthfully made known to the agents of the plaintiff company, and the answers written were written by such agents and assented to by defendant's signature after the intent, purpose, and scope of the questions had been announced by plaintiff's said agents. Defendant's manifest good faith in the matter, his sincere and persistent attempts to have the facts fully and truthfully presented to the company, and his reliance on the construction given to the questions propounded as the same were construed for him by the agents, bring the case at bar within the reasoning of the Chamberlain Case.

Lastly, counsel for plaintiff insist that the ruling idea underlying the Wilkinson, Mahone, Chamberlain, and similar cases is that, as the companies have during the lifetime of the assured accepted the premiums, and the assured has relied during his lifetime on the

indemnity contract provided in the policies, the company, after the death—the loss contemplated in the contract—has occurred, are estopped from avoiding the policy; since, to use the language of the North Carolina supreme court, in *Bergeron v. Banking Co.*, 15 S. E. Rep. 883, this “would be to lend the sanction of the law to a palpable fraud.” And thereupon the argument of counsel follows:

“In the case at bar the company has tendered back the premium without delay, and during the life of the policy holder, and is seeking to restore him, as well as the company, to his original condition.”

It may be pertinent here to notice that the evidence shows, and the arguments at the hearing conceded, that defendant was at the institution of this action in such physical condition that he was no longer an insurable risk; that is, he could not then present such a physical condition as would be requisite to enable him to obtain desirable insurance upon his life in any reputable company. So far as defendant is concerned, his condition, looking at his insurance alone, could scarcely have been brought more forcibly within the reasons on which plaintiff claims the doctrine of estoppel rests. Let decree be entered finding the equities with defendant, and dismissing bill herein, at plaintiff's costs.

**CENTRAL TRUST CO. OF NEW YORK v. CHICAGO, K. & T. RY. CO.,
(HOLTON-WARREN LUMBER CO., Intervener.)**

(Circuit Court, W. D. Missouri, W. D. March 2, 1893.)

1. MECHANICS' LIENS—TIME OF FILING—SEPARATE CONTRACTS.

Under Rev. St. Mo. § 6743, requiring a mechanic's lien against a railroad to be filed “within ninety days next after the completion of the work, or after the materials are furnished,” such lien must be filed within 90 days after the last item furnished under each separate contract.

2. SAME.

Where separate orders for entirely different kinds of material are given, about a month apart, for railroad supplies, such orders are separate contracts; and, in order to obtain a mechanic's lien under the above act, separate, itemized accounts must be filed within 90 days from the date of the last item furnished under each order.

3. SAME.

Where a contractor has so far abandoned the prosecution of his work as to allow the statutory period to run against the filing of a mechanic's lien, he cannot, *sua sponte*, for the mere purpose of securing a lien, furnish some material after the statute has run against the last preceding item.

4. SAME—RAILROAD CONSTRUCTION.

Under Rev. St. Mo. § 6741 et seq., giving a mechanic's lien for materials furnished to a railroad company, it is not necessary to show that the materials were incorporated in the construction of the road.

5. SAME—PARTIES.

Where a railroad company is in the hands of a receiver, and being operated by him, he alone is a necessary defendant in an action to foreclose a mechanic's lien under Rev. St. Mo. § 6747, which provides that any person or corporation “owning or operating” the railroad shall be made a party to such proceedings.

In Equity. Bill by the Central Trust Company of New York, against the Chicago, Kansas & Texas Railway Company to foreclose

a mortgage. The Holton-Warren Lumber Company intervened, and claimed a mechanic's lien. Heard on exceptions to the master's report. Sustained in part, and overruled in part.

Butler, Stillman & Hubbard and Phillips, Stewart, Cunningham & Elliot, for complainant.

K. McC. Deweese and Lathrop, Morrow & Fox, for defendants.

Ashley & Gilbert, for intervener.

PHILIPS, District Judge. This controversy arises on exceptions to the master's report. The master has found that the intervener, the Holton-Warren Lumber Company, furnished railroad ties and other timber to the Chicago, Kansas & Texas Railway Company between the dates of November 28, 1890, and June 13, 1891, on a running account, leaving a balance due to intervener of \$1,774.90, with interest thereon. The master also finds that the intervener is entitled to a mechanic's lien against the railroad and its appurtenances for the payment of said sum, which lien, he reports, should have priority over the mortgages sought to be foreclosed in the original proceeding. To this finding and report of the master, the petitioner, the Central Trust Company, files exceptions, which exceptions will be considered in the order of their importance.

The first exception is that the mechanic's lien was not filed within the time prescribed by the statute of the state. The statute (section 6743) requires that such lien shall be filed "within ninety days next after the completion of the work, or after the materials are furnished." It appears from the itemized account, as filed by intervener, that beginning on the 28th day of November, 1890, it delivered materials to said railroad, from time to time, up to and on the 9th day of February, 1891. The next item, and the last in the account, is June 13, 1891, for 150 cross-ties.

The contention of exceptor is that the lien should have been filed within 90 days after February 9, 1891, whereas, as shown by the master's report, it was not filed until the 8th day of July, 1891, five months after the 9th of February.

This presents a mixed question of law and fact, as to whether or not the account in question is what is known in law and common usage as a "running account" under a continuous contract. If the materials were furnished under a single contract, and in fulfillment thereof, the items of the account would be continuous, and the material man would have 90 days from the date of the last item within which to file his account, and perfect his lien. *Stine v. Austin*, 9 Mo. 558; *Carson v. The Daniel Hillman*, 16 Mo. 256; *Squires v. Fithian*, 27 Mo. 134. On the other hand, if the several items of the account, or a portion of them, are for materials furnished under separate contracts, then the lien should have been filed within 90 days from the date of the last item under each independent contract. *Livermore v. Wright*, 33 Mo. 31. In respect to this branch of the inquiry, I shall accept the finding of facts, as reported by the master, to be correct. He finds that one Hanson was at the times in question superintendent of said railroad, and that the American Supply Company

was a broker in furnishing railroad supplies, and was also acting as agent for the intervener, in placing orders for sales of lumber. The master finds that the contracts in question are predicated of written orders in the form of letters from said Hanson to said lumber broker. It is important in this connection to observe, not only that these letters or orders are of different dates, but that they call for separate characters of material. The first is of date September 20, 1890, and calls for 577 pieces of white oak and yellow pine, in various quantities and sizes, and for certain description of pilings. The next order was October 15, 1890, for 3,500 second-class ties, at specified prices. The next was November 19, 1890, which directed that the said American Supply Company would please arrange to furnish the railroad company 5,000 first-class ties, "with such second-class as may come in loading the first-class ties," at 54 cents, to be paid January, 1891; also, certain switch ties, and 500 3" x10", 16", at \$21 per M. The final order was dated November 22, 1890, which called alone for a given number of piles. The orders of October 15th and November 19th called exclusively for ties, with the exception of item "500 3" x10", 16".

There is no apparent connection between these respective orders, unless it be as to the two calling for railroad ties. It must, therefore, be considered that they are so far independent transactions as that, had suit been predicated of them, they could not have been declared on in one count, but each order, at least in so far as it calls for a class of materials different from another order, would necessarily have to be counted on separately, as an independent contract; and, constat, a recovery on one of the bill of items furnished under one order would constitute no estoppel to an action on items furnished under another order; whereas, if the account be a continuous one, or ended under one contract, it could not be split up, and sued on in detail, and a recovery on one item would be a bar to any further suit on other items. *Flaherty v. Taylor*, 35 Mo. 447. The letter of September 20, 1890, called for a given number and particular description of pieces of white oak and yellow pine lumber, and a given quantity and description of pilings. The letter of November 22d called only for a given number of piles, of specified lengths. The letters of October 15th and November 19th called for a given number of ties, with the single exception of the "500 3" x10", 16";" and as this last material—"500 3" x10", 16";"—was furnished in kind, as shown by the account, that part of the order was filled, and the transaction concluded. Pilings were delivered, according to the account, in December, 1890, ending on December 6th. Oak pieces, but no pine, were furnished, beginning February 3, and ending February 9, 1891. No item of this character was delivered after these dates. The account shows that the whole quantity of oak pieces ordered, and more, was furnished by February 9th. The whole number of pieces furnished amounted to 577. And it is quite inferential, from the subsequent conversations and correspondence between Hanson and the lumber brokers and intervener, that the parties regarded or treated this part of the contract as practically completed, as the whole conversations and correspondence indicated that the

expectations and calculations were in respect of the further delivery of railroad ties. To prolong the life of this part of the account, therefore, to the 8th day of July, 1891, when the lien was filed, the intervener is driven to rely upon the delivery of 150 ties made on June 13th, a delivery resting for its authority upon an independent order and contract. It must follow, as to the items of the account for "piles or piling" and oak pieces, the exception to the report is sustained.

Respecting the ties, the facts are different. The ties ordered October 15th were 3,500 second-class and 3,000 first-class. The order of November 19th was for 5,000 first-class ties, with such second-class as might come in loading the first. The whole number of first-class ties delivered up to and including February 9, 1891, was 1,654, and 749 second-class; so neither of these orders was completed on 13th day of June, when the final delivery of ties was made. As both orders of October 15th and November 19th call for first and second class ties, they may properly be regarded as continuing orders, and parts of one contract. "Where two distinct contracts are in fact made, as for different parts of the work, the work done under each contract must be considered as entire, of itself. But where work or material is done or furnished, all going to the same general purpose, as the building of a house, or any of its parts, though such work be done and ordered at different times, yet if the several parts form an entire whole, or are so connected together as to show that the parties had it in contemplation that the whole should form but one, and not distinct matters of, settlement, the whole account must be considered as a unit, or as being but a single contract." Phil. Mech. Liens, § 229. A cessation in the performance of delivery of material for any considerable period does not necessarily break the continuity of the account, provided an ultimate completion was within the contemplation of the parties to the contract; and especially so where the conduct of the parties, ad interim, shows that further performance was depended on or expected by each. Page v. Bettes, 17 Mo. App. 366, 367.

The master's report shows that, between February 9th and June 13th, Hanson wanted more ties, and the intervener was willing, and perhaps ready, to deliver more, and that the only impediment in the way of proceeding was the lack of money on the part of the railroad company with which to make payment.

It is in this connection that the principal contention of exceptor to this lien arises. The master finds that, in the spring of 1891, Hanson told the president of the American Supply Company that he had better not ship any more lumber until the railroad made payment, or was in a better position to pay. On April 21st the supply company wrote intervener that the railroad wanted the ties, but it was having trouble about getting money to carry on its projects, and it would not advise further shipment of material until the money was at hand. The president of the supply company then talked with Hanson about shipping more lumber, with a view to preserving intervener's right to a lien. Hanson did not object, but referred the president to Mr. Deweese, the attorney for the railroad company.

On June 1, 1891, the supply company wrote the intervenor as follows:

"Please ship one car load of bridge ties to the Chicago, Kansas & Texas road. We would advise you that you prepay the freight. You are aware that Mr. Winner is now out of this concern, and that the stockholders have taken hold of the thing, and, as it has been some time since the last bill of material was shipped, we think it better to ship one car of material, and that will give us ninety days' additional time in which to file a lien, if we do not get the money by that time. Think, however, we will get a large part of the money within the next thirty days, as the parties are all well off, financially, and are all here to-day, making up their arrangements as to what course to pursue. We will either have to do this, or you will have to file a lien, and we would advise this course."

The shipment of ties was accordingly made on June 13, 1891. The master finds that this last shipment of ties was received, and piled by the section men of the defendant alongside of defendant's track. These last ties were never put into the track, or otherwise used by the railroad company. The law is ever jealous of any transaction that smacks of fraud, deceit, or device. If the delivery of the 150 ties on June 13th was made to recover a lost, or to restore an abandoned, cause, the court should give the cunning device no countenance. In other words, to entitle the intervenor to connect its delivery of June 13, 1891, with the last preceding item, of December 10, 1890, it should affirmatively appear that it was done in good faith, in prosecution of the uncompleted contract; for it stands to the dictates of reason and justice that, where the contractor has so far abandoned the prosecution of his work as to allow the statutory period to run against the filing of a lien, he cannot, *sua sponte*, for the mere purpose of securing the lien, furnish some material after the statute had run against the last preceding item. The recent case of *McCarthy v. Groff*, (Minn.) 51 N. W. Rep. 218, is both alike and unlike this case. There the contractor prolonged his work for a year or more after it should have been completed, and did small amounts of work at long intervals of time, for the purpose of preserving the continuity of the account, with a view to a mechanic's lien. The lien was sustained by the court upon the distinct grounds, not only that the contract there was for the whole work, but because performance had been postponed for the accommodation of Groff, the apparent owner of the property, and both parties to the contract treated it as still in force, and expected it to be fully performed as soon as Groff was able to make payments. The master, in sustaining the case at bar, was evidently influenced by the inference drawn from the interviews between Hanson and the president of the supply company, that the intervenor had gotten out the ties, and held them in readiness for delivery, and that any delay in making delivery was chargeable to the railroad company's inability to pay. While it does not affirmatively appear that the shipment of June 13th was made with Hanson's consent, yet the supply company discussed with him the propriety of making it in order to preserve a lien, which Hanson did not reject, but only said he would refer the matter to the attorney for the road; and it further appears from the letter of the supply company to intervenor of June 1st, directing the shipment, that it

had confidence in the railroad company being in condition to make payments within 30 days. While I am free to say there is much in the conduct of intervener, and the letters of the supply company to it, which gives color of cunning in the shipment of June 13th, I shall defer, on the question of fact, to the conclusion reached by the master, affirming its integrity.

The further objection is made that the material shipped on the 13th of June was neither in fact delivered to the railroad company, nor was it used in construction. The master finds that the ties were unloaded by section hands on the right of way along the railroad track. In the absence of any countervailing testimony by Hanson, who was a witness before the master, the railroad's acceptance of the ties may reasonably be inferred.

The second of the foregoing objections presents a question as to the proper construction of the lien law of the state, which does not appear to have been passed on by the state supreme court. It has been held by that court, in respect of materials furnished under contract for a private building and the like, that it devolved on the lienor to show that the material went into the structure. *Simmons v. Carrier*, 60 Mo. 582. This ruling is predicated on the fact that the statute, in such case, makes it a criminal offense for the contractor to fraudulently divert the material furnished for a particular building to another building. The language in the statute in that case requires the material to be furnished for the building. The statute providing for liens against railroads for labor and material is under a separate chapter, and contains no penal provision, like the foregoing, for the misapplication of the materials. The language, too, of this statute, is significantly different from that above mentioned. It gives the lien to "all persons who shall furnish ties," etc., "or materials, to such railroad company." Rev. St. Mo. 1889, § 6741. Then section 6742 declares that the lien aforesaid "shall attach to the road-bed, etc., from the time such materials were furnished or delivered." These clearly show that the lien attaches when the delivery is made to the road, and prior to, and independent of, the fact of the materials being incorporated in the construction of the road.

It is finally objected that the railroad company is not made a party defendant to the suit to enforce the mechanic's lien. The statute (section 6747) is as follows:

"Parties to Suit—Who shall Be. Any person or corporation owning or operating a railroad to which said liens may apply shall, in each instance, be made a party defendant in all suits for enforcing said liens."

Is this statute applicable to a case like this? On the 10th day of August, 1891, on petition of the Central Trust Company, of New York, this road was taken possession of by this court, and placed in the hands of the receivers. On leave obtained from this court, intervener brought its foreclosure action in the proper state court against the receivers, who, by direction of this court, entered their appearance therein. By permission of this court, intervener filed its petition of intervention in said suit of the Central Trust Company, and the whole matter was thereupon referred to the master herein, before whom the parties and receivers appeared, and had a full hear-

ing. Where, on petition of creditors, a court of chancery takes possession of a railroad, and appoints receivers to run and operate it, the property passes in custodia legis, and the receivers become the representatives of the corporation for the very purpose of protecting and preserving the property for the benefit of both creditors and stockholders. While the corporation, as a legal entity, is not disturbed, and its board of directors still exist, with power to guard and preserve the franchise, and would resume jurisdiction in management upon the surrender of the property by the court, yet they do not operate or control it while so in court; and I think the evident purpose of the statute above quoted was to prevent the enforcement of such liens against the corpus of the corporation simply in rem. It seeks to have the railroad represented in court. To this end it points out who shall be such defendant. It is "any person or corporation owning or operating the railroad." The receivers, in this case, under the power and direction of this court, were at the time of the institution of the foreclosure proceedings in charge of this railroad, operating it. As such, it seems to the court they come within both the letter and spirit of the statute,—a person operating the railroad.

It results that so much of the exceptions as applies to the material sued for, aside from the railroad ties, is sustained, and overruled as to the ties.

Decree will be entered accordingly, and the costs equally divided.

GROOK, HORNER & CO. v. OLD POINT COMFORT HOTEL CO. et al.

(Circuit Court, E. D. Virginia. February 28, 1893.)

1. CONSTITUTIONAL LAW — JURISDICTION OF UNITED STATES OVER FORTS, ETC., —LANDS CEDED BY STATES.

The clause in the federal constitution (article 1, § 8, cl. 17) giving the United States exclusive jurisdiction over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, arsenals, etc., has only the meaning of an acquisition of land by actual purchase accompanied by a cession of jurisdiction by the state; and where land is acquired by the United States directly from the state as owner by an act of cession, (as in the case of Fortress Monroe,) the constitutional provision does not apply, and the United States holds the land only by the tenure prescribed in the act of cession. *Railroad Co. v. Lowe*, 5 Sup. Ct. Rep. 995, 114 U. S. 525, and *Railroad Co. v. McGlinn*, 5 Sup. Ct. Rep. 1005, 114 U. S. 542, followed.

2. SAME—FORTRESS MONROE—VIRGINIA LAWS IN FORCE.

The general laws of Virginia, other than criminal, which are not in conflict with those of the United States relating to forts, and which do not interfere with the military control, discipline, and use by the United States of Fortress Monroe as a military post, are in force at Old Point Comfort, and are especially in force in those parts and places at Old Point Comfort which have been appropriated to other than the military purposes of the United States.

3. SAME—MECHANIC'S LIEN LAWS.

Certain mortgages were given for the purpose of raising money to construct the Chamberlin Hotel at Old Point Comfort, and were duly recorded according to law in the clerk's office of Elizabeth City county court. Certain liens of mechanics and material men for work and labor performed on such hotel were also filed according to law. *Held*, that Code Va. 1887, § 2483, giving mechanics' liens priority over mortgages, applied in this case.

In Equity. Bill by Crook, Horner & Co. against the Old Point Comfort Hotel Company and others, praying for the adjudication of liens, the appointment of a receiver, the completion by the court of the unfinished hotel building of the defendant company, the sale thereof after its completion, and other relief. On exceptions to the master's report. Sustained in part.

White & Garnett, for complainant.

Tunstall & Thom, for defendant Old Point Comfort Hotel Co. and trustee.

Thomas Tabb, Harmanson & Heath, Sharp & Hughes, and R. S. Bickford, for claims of mechanics and material men.

HUGHES, District Judge. This case is heard on sundry exceptions to the report of the master in chancery appointed by the court, marshaling the liens resting on the property of the hotel company. This property consists exclusively of an unfinished hotel building of large dimensions and cost, called the "Chamberlin Hotel," and standing on land belonging to the United States by cession from the state of Virginia.

The principal question before the court is upon the priority of liens. The hotel building is under a mortgage from the defendant company to the Knickerbocker Trust Company of New York city as trustee, executed for the purpose of securing bonds to a large amount, which have been sold for moneys expended in constructing the building. In competition with the mortgage are a number of liens filed by mechanics and others who have expended labor and used material upon the unfinished structure. This mortgage and these liens have been filed and registered in the clerk's office of the county court of Elizabeth City county, Va., in which the lands of the United States at Old Point Comfort lie. They have been registered in pursuance of registration laws in force in Virginia. A principal question in the case is whether the general laws of Virginia, especially her registration laws, are in force in the territory at Old Point Comfort, or Fortress Monroe, held by the United States under cession from Virginia.

The history of the cession, and the legislation ensuing upon it, is as follows: On the 1st of March, 1821, the general assembly of Virginia passed the following act:

"Whereas, it is shown to the present general assembly that the government of the United States is solicitous that certain lands at Old Point Comfort and at the shoal called the 'Rip Raps' should be, and with the right of property and entire jurisdiction thereon, vested in the said United States for the purpose of fortification and other objects of national defense: (1) Be it enacted by the general assembly, that it shall be lawful and proper for the governor of this commonwealth, by conveyance or deeds in writing under his hand and the seal of the state, to transfer, assign, and make over unto the said United States the right of property and title, as well as all the jurisdiction which this commonwealth possesses over the lands and shoal at Old Point Comfort and the Rip Raps: provided, the cession at Old Point Comfort shall not exceed two hundred and fifty acres, and the cession of the shoal at the Rip Raps shall not exceed fifteen acres: and provided, also, that the said cession shall not be construed or taken so as to prevent the officers of the state from executing any process or discharging any legal functions within the juris-

diction or territory herein directed to be ceded, nor to prevent, abolish, or restrain the right and privilege of fishery hitherto enjoyed and used by the citizens of this commonwealth within the limits aforesaid: and provided, further, that nothing in the deed of conveyance, required by the first section of this act, shall authorize the discontinuance of the present road to the fort, or in any manner prevent the pilots from erecting such marks and beacons as may be deemed necessary. (2) And be it further enacted, that should the said United States at any time abandon the said lands and shoal, or appropriate them to any other purpose than those indicated in the preamble to this act, that then, and in that case, the same shall revert to and revest in this commonwealth. (3) This act shall commence and be in force from and after the passing thereof."

It is evident that this act contemplated the use of this land simply for a fort, and that its use for any other purpose should cause a reverter both of title and of jurisdiction to Virginia. Its use for hotel purposes in competition with other parts of Virginia equally favored by nature was not only not contemplated, but by the reverter clause was forbidden. This is the only act of cession by a state to the United States which contains such a clause. All acts of cession contain the provision allowing the service of process. But in the various acts none appear to have this reverter clause. It is to be observed also that the title of the government to the lands at Old Point was obtained by direct cession from the state, of land till then belonging to the state; and not by purchase from private individuals within the state, under consent from the state. The importance of this distinction will appear hereafter.

In connection with this subject it may be observed that Virginia, in a code of general laws passed on the 15th day of August, 1849, enacted, with reference to her cession of lands at Old Point Comfort, and over other places within her territory, designated in the act, as follows:

"It is hereby declared that this state retains concurrent jurisdiction with the United States over the said places, so far as it lawfully can, consistently with the acts [of cession;] and its courts, magistrates, and officers may take such cognizance, execute such process, and discharge such other legal functions within the same as may not be incompatible with the true intent and meaning of the said acts." Code 1849, p. 59.

The said hotel was erected, and the use of the public land of the United States on which the same stands, was acquired from the United States, and is held subject to its control and supervision, under and by virtue of the following act:

"Resolved by the senate and house of representatives of the United States of America in congress assembled, that the secretary of war be, and he is hereby, authorized to grant permission to John F. Chamberlin to build a hotel upon the lands of the United States at Fortress Monroe, Virginia, upon such site, and with such plans and dimensions, as may be approved by the secretary of war: provided, that the state of Virginia, by its general assembly and governor, shall by proper legal enactment give the consent of said state to the erection of such hotel, and that the building or buildings erected shall be removed at the expense of the owner or owners whenever the secretary of war shall so direct; and no claim for damages by reason of such removal shall be made upon the government of the United States: and provided, further, that the building so erected shall be subject to state and national taxation as other property. Approved March 3, 1887."

See 24 U. S. St. at Large, p. 648.

In accordance with this resolution, the secretary of war granted to John F. Chamberlin permission to erect said hotel on the site whereon it now stands, according to certain plans and dimensions, and subject to the restrictions imposed by the joint resolution. On the 30th day of March, 1887, the general assembly of Virginia gave its consent to the erection of the hotel on said lands, subject to certain restrictions and conditions, (see act of said assembly, chapter 11, Acts Ex. Sess. 1887,) as follows:

"Be it enacted by the general assembly of Virginia, that the consent of the state of Virginia is hereby given to John F. Chamberlin to erect a hotel upon the lands of the United States at Fortress Monroe, in accordance with a joint resolution of the congress of the United States, authorizing him to erect a hotel; but the said building, property, or business connected therewith or transacted therein shall be liable to the same taxes as any other property or licensed business in the commonwealth of Virginia. And this consent is granted upon the further condition that all taxes and assessments upon the said property in favor of the commonwealth of Virginia are to be paid in currency, and not in coupons."

On the 18th day of February, 1890, Chamberlin sold and conveyed all his rights and privileges under the resolution of congress and the permission granted by the secretary of war and the state of Virginia to the defendant company, the Old Point Comfort Hotel Company. Pursuant to the act of March 1, 1821, David Campbell, as governor, made a deed to the United States, which was admitted to record in the county court of Elizabeth City county on December 12, 1838. This deed recites the statute of cession, and grants, transfers, conveys, and cedes to the United States "all the right of property and title and jurisdiction" of the commonwealth of Virginia to the property ceded.

In respect to territory derived from the states by the United States, the following clause is embodied in the constitution of the United States, (article 1, § 8, cl. 17:)

"Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of congress become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock yards, and other needful buildings."

While congress has enacted a complete criminal code in relation to crimes committed within places within which it has exclusive jurisdiction and on the high seas, it has provided no laws for the government in civil matters of the inhabitants of forts, arsenals, magazines, and dock yards. These places, when acquired in the manner defined by the clause of the national constitution just quoted, are without laws in civil matters, except such general laws as may have been in force respectively in the states from which the United States derived them at the time of acquisition. The land at Old Point Comfort derived by the United States from Virginia has come, under various influences, to contain a good many inhabitants. Fortress Monroe is, in inclosed area, one of the largest fortresses known to exist. It has been made the seat of an artillery school of instruc-

tion, which brings together an unusual number of soldiers, officers, and their families. A very large hotel has been in operation there many years, established first for the accommodation of army officers and their families, but grown since into a watering place and sanitarium for the general public. The eastern terminus of the Chesapeake & Ohio Railroad has been established on this land by the consent of congress and of the state of Virginia. An electric railroad to Newport News, of much importance, has its eastern terminus on these grounds. Under the operation of these causes, a considerable number of inhabitants find themselves sojourning, for longer or shorter periods, at Old Point Comfort, upon land held by the United States. Congress having failed to enact any legislation for the government, in civil affairs, of persons sojourning permanently or temporarily at military posts, upon grounds held by the United States, it is important to inquire whether the inhabitants of Old Point Comfort are without law governing their social and civil life, and their transactions in business and commerce, except such as may have been in force in Virginia more than half a century ago. It will have been observed from the clause of the constitution which has been quoted that its language is that congress shall have power of exclusive legislation "in all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, arsenals," etc. This language has been construed by the supreme court of the United States in the cases of *Railroad Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. Rep. 995, and *Railroad Co. v. McGlinn*, 114 U. S. 542, 5 Sup. Ct. Rep. 1005, in which it was held that the word "purchase," as used in the clause of the constitution under consideration, has not the general technical meaning belonging to it at common law of any acquisition of lands other than by descent or inheritance, but has only the meaning of an acquisition of land by actual purchase. It held, moreover, that where land is acquired by the United States in any other manner than by such actual purchase, with the consent of the state, attended by a cession from the state of all jurisdiction over it, there the clause of the constitution giving the power of exclusive legislation to congress, and giving exclusive jurisdiction to the United States, does not apply. The court held that in this class of cases the United States takes the lands only under such a tenure, limited or unlimited, as the state confers by each special act of cession, and that such title is to be dealt with by the courts precisely as if the land had been ceded by the state to a private individual.

In the McGlinn Case, describing its decision in the Ft. Leavenworth Case, the supreme court said:

"In order that the United States may possess exclusive legislative power over the tract, * * * they must have acquired the tract by purchase, with the consent of the state. This is the only mode prescribed by the federal constitution for the acquisition of exclusive legislative power over it. When such legislative power is acquired in any other way, as by an express act ceding it, its cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended. We also held that it is competent for the legislature of a state to cede exclusive jurisdiction over places needed by the general government in the execution of its

powers, the use of the places being in fact as much for the people of the state as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes."

However much these decisions may have disturbed opinions previously entertained by the legal profession, they are the supreme law of the land, and must be enforced by the courts. An inspection of the act of cession of Virginia conveying to the United States the lands of Old Point Comfort, belonging to herself, and not purchased by the United States, with her consent, from any other owner, and ceding jurisdiction over them, will show that the case falls within the ruling of the supreme court in the two cases of *Railroad Co. v. Lowe* and *Railroad Co. v. McGlinn*; and that *Fortress Monroe* is held by the United States, not subject to clause 17, § 8, art. 1, of the constitution, but only by the tenure prescribed by Virginia's act of cession of March 1, 1821, and her governor's deed of cession of December 12, 1838. These acts contain quite a number of very material limitations of the power of the United States over the land at Old Point Comfort, and provide expressly for the reversion of the land to this commonwealth, and their reversion in her, in the event of their future abandonment by the United States, or appropriation to any other purposes than those of fortification and national defense.

As to the question what law prevails in places ceded to the United States, the supreme court says, generally, in the *McGlinn Case*, (page 546, 114 U. S., and page 1006, 5 Sup. Ct. Rep.):

"With respect to laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed;" citing *Insurance Co. v. Canter*, 1 Pet. 542.

It held specially that where laws thus left in force after the dates of cession reserved in one case a right of taxing certain property on the lands of the United States, and in the other case the right to recover damages for certain acts of negligence committed on such lands, such provisions of law could be enforced at any time after the cession.

But these cases, nor any other decisions of the supreme court that I can find, do not go to the extent of declaring that the laws of a state passed after lands and jurisdiction over them have passed from the state to the United States, affect the inhabitants and business transactions of the ceded localities. Whether such subsequent laws do, is the principal question presented by the case at bar, and, in that respect, is a case of first impression. This question will, of course, be considered by me only with reference to the lands at Old Point Comfort, ceded by Virginia to the United States. In the course of its decision in the case of *Railroad Co. v. Lowe*, *supra*, the supreme court says, (page 539, 114 U. S., and page 1002, 5 Sup. Ct. Rep.):

"Where lands are acquired in any other way by the United States within the limits of a state than by purchase with her consent, they will hold the lands subject to this qualification, [viz.] that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such

buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. * * * But when not used as such instrumentalities the legislative power of the state over the places acquired will be as firm and complete as over any other places within their limits. As already stated, the land constituting the Ft. Leavenworth Military Reservation was not purchased, but was owned by the United States by cession from France many years before Kansas became a state; and whatever political sovereignty and dominion the United States had over the place comes from the cession of the state since her admission into the Union. It not being a case where exclusive legislative authority is vested by the constitution of the United States, that cession could be accompanied by such conditions as the state might see fit to annex, not inconsistent with the free and effective use of the fort as a military post."

And on page 542, 114 U. S., and page 1004, 5 Sup. Ct. Rep., the court, after saying that over forts and arsenals not purchased by consent of a state, and over which, therefore, exclusive jurisdiction is not conferred by the constitution, it can perceive no reason why the states should not by their own act grant legislative authority and political jurisdiction to the United States, remarks that "such cession is necessarily temporary," and that the jurisdiction thus conferred can be exercised by the United States "only so long as the places continue to be used for the public purposes for which they were acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the state."

I think it is clear from the foregoing recital that the jurisdiction of the United States over the territory held by them at Old Point Comfort is not the absolute, exclusive jurisdiction conferred by the federal constitution over places purchased by consent of states; but is such jurisdiction only as was conferred by Virginia's act and deed of cession. It would seem to be equally clear that, except as to the parts of that territory not in actual use by the federal government for military purposes, whether appropriated to other purposes or not, the jurisdiction of the state is concurrent with that of the United States, and that such laws of Virginia as are not incompatible with those of the United States affecting that territory, and as do not conflict with the free use by the United States of the parts of the land actually used for military purposes, are themselves in force, and constitute the rule of conduct for the government of all inhabitants there who do not belong to the army of the United States.

It is plain that the resolution of congress of March 3, 1887, relating to the Chamberlin Hotel, and the act of assembly of Virginia of March 30, 1887, on the same subject, both treat this hotel and its site as a diversion of that part of the cession obtained from Virginia by the United States from the purposes for which it was ceded. If so, what is the jurisdictional status of that hotel? Has it not reverted to the state, to remain under its jurisdiction so long as it continues to be used for other than military purposes, subject to such laws of the state as do not interfere with or conflict with the free and full use by the United States, for military purposes, of the rest of the land ceded to and held by them at Old Point Comfort? If this be not the true jurisdictional status of the Chamberlin Hotel

and its site, it would be very difficult to conceive and to define what their status is. It seems to me to be a necessary and an inevitable conclusion that the Chamberlin property has reverted jurisdictionally to Virginia, subject to such continued control by the United States as may be necessary to the discipline of the military post and the effective use of the post for military purposes. Subject to these limitations, it results that the laws of Virginia of a general character, such as do not conflict with the purposes for which the United States hold the land at Fortress Monroe, are in force there, especially in the places, like the Chamberlin Hotel, which have been appropriated to other than the military purposes for which only they were ceded by Virginia. If these conclusions be not true, then, except state laws more than half a century old, the hundreds of inhabitants engaged in civil pursuits and residing at Old Point Comfort are living in a No-Man's Land, and, except in a criminal sense, are as complete outlaws as if they were at Botany Bay.

I am aware that the argumentum ab inconvenienti cannot be held to enact laws if they do not actually exist; but when reason and legitimate statutory construction show that state legislation is in force in places where, if not, there would be no law at all, the inconvenience of holding otherwise comes in aid of the adopted construction. Let me emphasize the fact that this decision goes no further than to hold that the general laws of Virginia, other than criminal, which are not in conflict with those of the United States relating to forts, and which do not interfere with the military control, discipline, and use by the United States of Fortress Monroe as a military post, are in force at Old Point Comfort, and are especially in force in those parts and places at Old Point Comfort which have been appropriated to other than the military purposes of the United States.

It is useless to discriminate the case at bar from that of *Foley v. Shriver*, 81 Va. 568, in which the supreme court of appeals of Virginia held that an ordinary civil process of garnishment could not be served within the Soldiers' Home at Hampton. That land was acquired by purchase with Virginia's consent and a cession of state jurisdiction, and the power of legislation over it became exclusive in congress by force of the federal constitution.

In a geographical sense, Fortress Monroe is a part of Virginia, and of Elizabeth City county of Virginia. So far as Virginia has concurrent legislative jurisdiction in the territory held from her at Old Point Comfort, that territory is part of Elizabeth City county; and under the laws of Virginia requiring wills, deeds, mortgages, and liens to be recorded in the clerk's office of the county court of the county in which they are to take effect, such instruments executed by inhabitants of Old Point Comfort are to be recorded in the clerk's office of Elizabeth City county court. The mortgage shown by the record to have been executed for the purpose of securing bonds sold for moneys employed in constructing the Chamberlin Hotel was recorded in the office of the clerk of the county court of Elizabeth City. Sundry liens of mechanics and material men were also filed within 30 days after the moneys claimed were

due, in the same office, for work and material put upon the building of the defendant company. The law of Virginia (section 2483, Code 1887) gives liens of the latter class priority over mortgages of the class first named, and this law must govern in the present case.

Such exceptions to the master's report, therefore, as claim priority for the liens for labor and material over the general mortgages, and were filed within one month after the filing of the master's report, are sustained.

KING et al. v. WOOTEN.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1893.)

No. 70.

APPEAL—CONTEMPT PROCEEDINGS—WHAT ARE.

Certain property in the possession of the receiver of a federal court was levied on and sold for taxes by a state sheriff, and the purchaser replevied it from the receiver, who gave a forthcoming bond. The receiver then filed a petition asking the protection of the court appointing him, and after hearing it was decreed that the sale was null and void; that the sheriff and purchaser were in contempt of court; that they desist from any interference with the property; that the purchaser dismiss his replevin action; and that the receiver pay all taxes due the sheriff. *Held*, that this was merely a contempt proceeding, from which no appeal would lie, for the decree was only for the purpose of protecting the possession of the receiver, and did not determine the ultimate rights of the purchaser at the sale.

Appeal from the Circuit Court of the United States for the Northern District of Mississippi.

In Equity. Petition by W. H. Wooten, receiver, asking the protection of the court against T. O. King and Leo Lesser and others as to certain property seized and sold by them for state taxes. A decree was entered finding respondents guilty of contempt, and enjoining further interference with the property. Respondents appeal. Dismissed.

W. H. Wooten was appointed receiver of a certain sawmill and appurtenances situated in Tunica county, Miss., in a suit styled Wooten & Tarrant vs. Frank Ingram Co. and others, pending in the United States circuit court for the western division of the northern district of Mississippi. While the receiver was in possession of this property by his agent it was levied upon and sold for taxes by T. O. King, the sheriff of Tunica county, through his deputy, W. A. Spratlin, and was purchased by Leo Lesser. The receiver having repossessed himself of the property immediately after the sale, Lesser replevied the same from him, and the receiver then gave a forthcoming bond, and had the property again delivered to him. He then filed a petition praying the protection of the court and alleging that he was unaware of the tax claim until the day following the sale; that he had subsequently made a tender of the amount of all taxes and charges, with 25 per cent. in addition, but that such tender was refused. The petition also set forth the replevin proceedings, and averred that there was a fraudulent combination on the part of the purchaser and the deputy sheriff, to put the title in the purchaser by means of the tax sale, and also that there were ample funds in the hands of the receiver to pay the taxes. The petition prayed, among other things, for a rule against the sheriff, his deputy, the purchaser, and his agent, to show cause why they should not be attached for contempt. The rule was granted, and after a hearing the court entered a decree ordering and adjudging as follows: "(1) That said sale be, and the same is hereby, declared

null and void. (2) That said T. O. King, W. A. Spratlin, Leo Lesser, and E. Doherty, be, and they are all declared to be, in contempt of this court. (3) That said defendants do pay all the costs of this proceeding, and desist from any other or further interference with any of said property in the hands of said receiver. (4) That said Leo Lesser do dismiss the replevin suit brought against said J. K. Wooten, agent of the receiver, for said property in the circuit court of Tunica county, Miss. After he shall have so dismissed said suit, and the defendants have paid all the costs of this proceeding, they, and each and all of them, shall stand acquitted of all contempt of this court. It is further ordered by the court that the clerk of this court do pay over to the sheriff of Tunica county, Miss., the taxes—\$77.08—due, as shown in the pleadings, which is a lien on said property, out of the money in his hands paid to him by said receiver for that purpose; and that defendants, who pray in open court an appeal to the next term of the circuit court of appeals, be and are now allowed said appeal, and thirty days within which to tender their bill of exceptions."

Calvin Perkins and T. J. Lowe, (Lowe & Cochran on the brief,) for appellants.

W. V. Sullivan, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The first line of the brief of counsel for the appellant concedes that, if this is nothing more than a contempt proceeding, it should be dismissed. It is not disputed that the property in controversy had been taken possession of by the circuit court through its receiver, the appellee, W. H. Wooten. There is some question raised about its being at the time leased under an order of that court, but this we consider wholly immaterial, as such leasing, if it had occurred, did not discharge the property from the custody of the court. The recognized mode of protecting property in the custody of the court is by treating as null all attempts to withdraw it without leave of the court, whether by color of other legal process or otherwise than by order of the court in possession, and, when necessary, such possession is protected by proceedings to attach and punish for contempt all persons who persist in attempting to disturb the possession of the law. This presents no difficulty on the question of taxes. The judiciary is a co-ordinate department of the government. The government is not at war with itself. Nor does any embarrassment arise out of the fact that the taxes claimed are state taxes, and the court holding possession is a national court. The national courts, as well as all other departments of the national government, are charged to recognize, observe, and enforce the rights of the states, of which the national government is the ultimate judge and supreme guarantor. In this case the tax lien, like all other liens on the property, would doubtless have received the attention due to it from the court on proper application, and the circuit court could not permit the property withdrawn from its possession in the manner attempted by the tax collector. The declaration by the circuit court that the tax sale was void had relation only to the proceeding then before the court, the object of which was to protect the court's possession of the property while engaged in settling the rights to it or liens on it under the issues joined or to be joined in the suit in

which appellee was appointed receiver. This proceeding was clearly a contempt proceeding, one which, in the very nature of the case, must be summary to be at all effective. It was manifestly not intended to conclude the ultimate rights of the purchaser at the tax sale, but was only to the effect and extent that he could not in that way dispossess the receiver. We conclude, therefore, that the appeal must be dismissed at the cost of the appellant, and it is so ordered.

WHITNEY v. CITY OF NEW ORLEANS, (MAILHOT et al., Interveners.)

(Circuit Court of Appeals, Fifth Circuit. March 13, 1893.)

No. 69.

1. ATTORNEY AND CLIENT—COMPENSATION—CONTINGENT FEE.

Where an attorney and client agree that the fee in a pending suit shall be fixed by a referee, an award made after a successful termination of the suit by an experienced master familiar with the litigation, and confirmed by the court, will not be disturbed as excessive on appeal, unless injustice clearly appears; especially when it was probably the intention that the fee should be contingent on success.

2. SAME—INTEREST.

There is no error in allowing interest on such an award when, at the time it is made, the client's claim has been reduced to judgment, is then or very soon collectible, and is bearing interest at the same rate.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. Affirmed.

Thos. J. Semmes and John D. Rouse, for complainant, appellant.

Ernest B. Kruttschnitt, (Edgar H. Farrar and Benjamin F. Jonas, on the brief,) for interveners, appellees.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

PARDEE, Circuit Judge. After Myra Clark Gaines had succeeded in her litigation for recognition as the heir of Daniel Clark, other important and intricate litigation was necessary in order to secure any substantial fruits of her legal victory, and thereafter numerous suits were instituted by her against various possessors of the property acquired from the city of New Orleans, and formerly belonging to Daniel Clark, to recover the property and the fruits and revenues, these suits being generally denominated "The Agnelly and Monseaux Cases." In this litigation the Honorable E. T. Merrick and Messrs. Fellows & Mills were solicitors for Mrs. Gaines. During its progress circumstances occurred which resulted in the retirement of the Honorable E. T. Merrick from the case, and the discharge, by Mrs. Gaines, of Messrs. Fellows & Mills, and the employment of John Ray, Esq., to represent Mrs. Gaines' interests. Before the cases were heard and determined, Mr. Mills (the firm of Fellows & Mills having been dissolved) was re-employed, his shortcomings, whatever they were, apparently condoned, and he continued to render services until final decrees were obtained. As to compensation for services in this litigation, Mrs. Gaines and Mr. Mills disagreed, and the matter, by

agreement, was left to the arbitration of the Honorable William B. Woods, then circuit judge. After the apparently successful termination of the litigation in the Agnelly and Monsseaux Cases, the property recovered being of comparatively small value, and the adjudged wrongful possessors poor or insolvent, a suit in equity was instituted by Mrs. Gaines against the city of New Orleans to charge the city as warrantor, and responsible for all Mrs. Gaines' claims, and Mr. Mills was the solicitor who was employed, and who filed the bill of complaint in the case No. 8,825 of the docket of the United States circuit court for the eastern district of Louisiana, in which case the intervention now in hand was filed.

On the day on which the bill was filed the complainant, Mrs. Gaines, and her solicitor, Mr. Mills, entered into an agreement as follows:

"It is hereby agreed between Myra Clark Gaines and Wm. Reed Mills that the amount of fees to be allowed and paid by Mrs. Gaines to said Mills for professional services as her attorney and solicitor in the certain suit in chancery about to be instituted by her against the city of New Orleans in the United States circuit court for this district, shall be determined and fixed by Judge E. C. Billings, or, in case of his death, by his successor in office. The amount to be named to be a fixed sum to be paid by a percentage, to be also fixed by Judge Billings, or his successor, until the payment amounts to the sum fixed. Thus done and signed in duplicate in the city of New Orleans, this 7th of August, one thousand eight hundred and seventy-nine. [Signed by the parties and the witnesses, W. H. Wilder and John C. Eve.]"

The suit was conducted by Mr. Mills to a final decree in the circuit court, Mrs. Gaines recovering in that court a decree against the city of New Orleans for nearly \$2,000,000. 17 Fed. Rep. 36. An appeal having been taken by the city of New Orleans, Mr. Mills remained in the case attending to the various details up to the death of Mrs. Gaines. After the death of Mrs. Gaines, her representatives secured the services of other and more distinguished counsel, and Mr. Mills was practically retired from the case. He, however, attended on the argument before the supreme court, and, though not recognized by the counsel for Mrs. Gaines' representatives, submitted a very lengthy brief, all of which is reproduced in the record. After the death of Mrs. Gaines, and in June, 1890, Mr. Mills made application to Judge Billings for a provisional award of compensation, whereupon Judge Billings entered the following:

"United States Circuit Court, Eastern District of Louisiana.

"Myra Clark Gaines versus The City of New Orleans. No. 8,825.

"Mrs. Myra Clark Gaines and Mr. William R. Mills having by an agreement, a copy of which is hereto annexed, left to me the decision as to how much his fee should be for what he did as solicitor in this cause, there being, as yet, no final judgment, but Mr. Mills feeling the necessity for a provisional award, after hearing Mr. Mills, and Mr. T. J. Semmes and Mr. J. D. Rouse for the heirs of Mrs. Gaines, I hereby fix the amount which he is to be entitled to out of the judgment in said case, when it becomes final and is collected, at twenty-five thousand dollars, (\$25,000,) not intending to fix the whole amount of his fee, which is to be determined when there is a final judgment in the cause, but to fix the lowest amount to which he will be entitled to be paid out of the judgment when final and collected.

"June 24, 1890.

[Signed]

"Edwards C. Billings."

The matter of compensation to Mr. Mills remained in this shape until after the decision of the supreme court, reported in 131 U. S. 191, 9 Sup. Ct. Rep. 745, which reduced the amount of Mrs. Gaines' recovery to the sum of \$576,707.92, with interest at 5 per cent. from January 10, 1881, subject to certain deductions, when Mr. Mills, in proper person, moved for a rule upon the heirs of Mrs. Gaines to show cause why his fee should not be determined and fixed by Judge Billings. This rule was, after due proceedings, made absolute, whereupon, on motion of the counsel for the defendants in the rule, not opposed, it was ordered that the matter be referred to a master in chancery to take evidence, and report to the court without unnecessary delay. The master, after taking evidence, reported to the court that Mr. Mills was entitled to the sum of \$66,600 and costs. Exceptions were filed by both parties to the report of the master, but it was confirmed by the court, and a decree rendered in accordance with the report. From this decree so rendered, William Wallace Whitney, administrator, prosecutes this appeal, and makes the following assignments of error:

"(1) The court erred in proceeding to try this rule, taken on 22d April, 1891, by William Reed Mills, and referring the same to a master to take testimony and report thereon. The claim of said Mills, if sustainable at all, should have been presented by independent bill or in an independent suit. (2) The court erred in proceeding to a decree after the death of said William Reed Mills before the cause was revived by proper proceedings for that purpose at the instance of his representatives. (3) That the court erred in allowing interest on the claim of said Mills. (4) The court erred in allowing said Mills a lien on a final decree which he never recovered. (5) The court erred in allowing said Mills, as compensation for his services, the amount reported by the master, because the master in making said allowance violated the principles stated in his report. (6) The court erred in confirming the master's report and rejecting the exceptions to said report, filed by complainant, because the allowance should not have exceeded \$40,000. (7) The court erred in treating the compensation of Mills as a contingent fee."

Of these assignments of error only the 3d, 5th, 6th, and 7th are urged in this court, and of these the 5th, 6th and 7th may be considered together, as they all relate to the main contention of the appellant that the allowance to Mills in the circuit court is excessive.

The amount allowed was practically fixed and determined by the Honorable E. C. Billings, who, by the original agreement of the parties, was an amicable compounder, and whose finding, if he had made one under the agreement, would have been final between the parties, and could not be attacked except for fraud.

The amount allowed was also determined by the circuit court, under whose supervision the services were rendered, after a hearing and investigation before an experienced master, who, from previous investigations in the Gaines Case, was familiar with the extent and character of the intervener's services, and whose favorable report for the amount allowed is, in our opinion, sustained by the evidence offered on the hearing. The original agreement between Mrs. Gaines and Mr. Mills leaving to Judge Billings to determine and fix the compensation of Mr. Mills is susceptible of two constructions,—as to whether the fee to be allowed was to be a certain fixed and determined fee, payable at all events; or a contingent fee, dependent

upon the results of the litigation. The order given by Judge Billings, making the provisional allowance, in 1890, goes far to show that his construction of the agreement was that the fee was to be contingent, at least so far as to depend upon the final judgment in the case. Mills' construction of the agreement evidently was that the fee was to be a contingent one; and the circumstances of the case all point to the same conclusion, because Mrs. Gaines was notoriously involved, if not insolvent, and her counsel well understood that the payment of fees in that case depended upon success,—no recovery, no fee. If the proper construction of the contract is that the fee was to be contingent, then the evidence in the record seems to sustain the master's report beyond any reasonable question. On the other hand, if the agreement between the parties, properly construed, contemplated a fixed, definite fee to Mr. Mills, payable without reference to the result of the suit, upon a quantum meruit, then, considering the evidence, together with the fact of the circuit court's indorsement, we are unable to say that the amount allowed by the decree appealed from is excessive to such a degree as would warrant a reversal, based, as such reversal must be, largely on our individual opinions.

Appellate courts are generally not disposed to disturb the findings of lower courts in the matter of compensation for services of trustees, solicitors, receivers, and masters rendered in the conduct of litigation in said courts, whether based on findings of masters or verdicts of juries, unless injustice clearly appears, for the reason that the court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have. See *Trustees v. Greenough*, 105 U. S. 527-537; *Cowdrey v. Railroad Co.*, 1 Woods, 341; *Head v. Hargrave*, 105 U. S. 45.

As to the allowance of interest from judicial demand, complained of in the third assignment of error, we need only notice that at that date, April 22, 1891, the amount of the decree in favor of Mrs. Gaines against the city of New Orleans was definitely ascertained. was then, or very soon after, exigible, and was bearing interest at the same rate as allowed in the Mills decree.

For all of these reasons, we are of the opinion that the decree of the circuit court should be affirmed, and it is so ordered.

KIRCHER v. MURRAY et al.

(Circuit Court, W. D. Texas, Austin Division. March 21, 1893.)

No. 2,219.

1. ALIENS—NATURALIZATION—HUSBAND AND WIFE.

A citizen of Illinois, who entered the military service of Texas, as a volunteer, in her war of independence, after the adoption on November 7, 1835, by the convention, of the declaration promising citizenship and donations of land to volunteers, and who died in her service in 1836, became a

citizen of Texas, and his wife's citizenship followed his, although she never came to Texas.

2. DESCENT AND DISTRIBUTION—TEXAS BOUNTY LANDS.

By an act passed February 13, 1858, the Texas legislature authorized the issuing of a land certificate to such volunteer, by name, and his heirs and assigns, for services rendered in the army. *Held*, that the question of heirship to the land was governed by the law of descent and distribution in force at the time of the volunteer's death.

3. SAME—COMMUNITY PROPERTY.

The property acquired under the above grant was the community property of the volunteer and his wife, and not the separate estate of the former. *Nixon v. Cattle Co.*, 19 S. W. Rep. 560, 84 Tex. 408.

4. SAME—PATENTS—INCEPTION OF TITLE.

The passage of the above act, granting the certificate, was in fulfillment and discharge of the state's pre-existing obligation to the volunteer; and hence the right to bounty lands did not originate with the act granting a certificate, but the volunteer's title had its inception during his lifetime, although the patent was issued after his death.

5. SAME—COMMUNITY PROPERTY—RIGHTS OF SURVIVOR.

In the absence of debts and all other proper charges against the community estate, upon the death of one of the spouses a one-half interest in the community property vests absolutely in the survivor, and the remaining half passes to the heirs of the deceased.

6. SAME—EQUITABLE INTEREST.

The interest which the volunteer's wife acquired in the community property was of an equitable nature, the legal title to the whole having passed to the husband. *Hill v. Moore*, 62 Tex. 610, followed.

7. SAME—WHO ARE HEIRS—SPANISH LAW.

Under the Spanish laws in force in Texas in 1836, a wife could not be heir to her husband, and under no circumstances could succeed to his separate property, except to the marital one fourth when necessary as a relief against poverty.

8. FEDERAL COURTS—LEGAL AND EQUITABLE CAUSES.

In the federal courts the distinction between legal and equitable proceedings is strictly maintained, and the action of trespass to try title cannot be sustained upon an equitable title, but the party must seek her remedy in a court of equity.

At Law. Action by Augusta Kircher against R. G. Murray and others to recover land. On exception to the answer. Exceptions overruled.

West & Cochran and Floyd McGown, for plaintiff.

D. W. Doom, for defendants.

MAXEY, District Judge. Suit at law in the ordinary form of trespass to try title is brought by plaintiff to recover of defendants 433 acres of land. The questions submitted to the court for determination arise upon exceptions interposed by the plaintiff to the following answer of defendants:

"Now come the defendants in the above-styled cause, and, for answer to the plaintiff's petition, say that plaintiff ought not to recover in this behalf, for that the plaintiff has no title to or right of possession of the land described in her petition, in this: that the land in controversy in this suit was located and surveyed under and by virtue of unlocated balance certificate No. 20/160, being a balance of certificate No. 31/201, which issued on the 20th day of February, 1874, in lieu of certificate No. 224, which issued to Gustavus Bunson on March 14, 1860, upon the certificate of Edward Clark,

commissioner of claims for Texas, dated September 11, 1858, and No 4/13, this certificate being given to Gustavus Bunson in accordance with an act of the legislature of the state of Texas, dated February 13, 1858, which act provides that 'the commissioner of claims be, and he is hereby, authorized to issue the following named land certificates, that is to say: * * * Gustavus Bunson, 960 acres, bounty for service in army, 1835-1836,' etc., and said land was patented to 'Gustavus Bunson, his heirs or assigns,' July 14, 1876. That said Bunson died, intestate and without issue, in Texas, in February, 1836, in the service of the Texas army, under the command of Col. Grant or Johnson, and the plaintiff, Augusta Kircher, was his wife at the time of his death, and had been his wife since 1834; and the plaintiff claims that she is heir at law of said Gustavus Bunson, and inherited his said right acquired as aforesaid to 960 acres bounty lands; and that said bounty land warrant became her property on its issuance, as aforesaid; and that the patent issued thereon, as aforesaid, vested title to the land in controversy in her; but the defendants say that if the plaintiff would have been the heir of said intestate had she been a citizen of Texas or Mexico at the time of said Bunson's death, (which is not admitted, but denied,) that the facts are that Gustavus Bunson was not a citizen of Mexico when plaintiff married in the year 1834; that he was then a resident citizen of the county of St. Clair, in the state of Illinois; and that he left there on, to wit, the — day of September, A. D. 1835, to go to Texas, to offer his services as a surgeon to the Texas revolutionary army, nor was she (the plaintiff) then a citizen of Mexico, but was a citizen and resident of St. Clair county, Ill., and an alien to Mexico and Texas; that she never came to Texas or Mexico, and never was naturalized as a citizen of Texas or Mexico,—wherefore defendants say that, at the time of the death of said Bunson, the plaintiff was an alien as to Mexico and Texas, and was incapable of inheriting the right to land which her husband had acquired by reason of his service and death as a soldier, as hereinbefore stated, and the fact that she ceased to be an alien in 1846, by the annexation of the republic of Texas to the United States of America, she being then, and having been since 1834, a citizen of the state of Illinois, could not operate to confer any right on her as an heir unless she had been qualified to become an heir of Bunson at the time of his death, and when descent, of the right in virtue of which the land is titled, was cast.

"(2) And, further answering in this behalf, the defendants say that if those who were aliens at the time of the death of said Gustavus Bunson, but who would have been his heirs if they had then been citizens of Texas, were entitled to said bounty warrant and the lands located and patented thereby, yet the plaintiff has no title, for that prior to the death of said Gustavus Bunson his father had died, but not his mother, and the said Gustavus Bunson, who died without issue, left surviving him at the time of his death his mother, Charlotte Bunson, and only two brothers, Carl and George, and no half-brother or half-sister or descendants of such; that said Charlotte Bunson and Carl Bunson were citizens of the empire of Germany at the death of Gustavus Bunson, and remained such until their respective deaths; that George Bunson was a citizen of the state of Illinois at the time of the death of Gustavus Bunson, and remained such until his death; that Carl Bunson died April 2, 1839, leaving issue who have ever since remained citizens of the empire of Germany; that Charlotte Bunson died December 2, 1847, leaving George Bunson and the issue of Carl Bunson surviving her; that George Bunson died during the year 1872, leaving issue surviving him, and the defendants have a regular chain of title from all the issue of Carl Bunson and George Bunson down to the defendants,—wherefore the defendants say that the legal title to the land in controversy is vested in them under the patent issued for the land in controversy to Gustavus Bunson; that, under the Spanish law in force in Texas when said Gustavus Bunson died, his surviving wife was not the heir of either the separate property of the husband or his interest in the community property, whether there was issue of the marriage or not. And the defendants further say that, if the right to lands acquired by said Gustavus Bunson was community property between him and his said wife, (which is not admitted, but denied,) that the legal title to the

whole of the land in controversy was vested by said patent in the heirs of Gustavus Bunson, and the plaintiff cannot maintain her cause of action at law on an equitable interest in the land in controversy growing out of her community rights, if any she ever had.

"(3) And the defendants, further answering in this behalf, say that plaintiff ought not to have or maintain her said suit against these defendants because of any interest she may have been entitled to by reason of the fact that she was the wife of Gustavus Bunson, for that she never came to Texas, or set up any claim to the rights acquired by her said husband, and never paid any taxes on the land in controversy, or otherwise gave notice of her claim, and the defendants, more than forty years after the death of said Gustavus Bunson, in good faith and without notice of plaintiff's claim now asserted, and without notice that Gustavus Bunson was ever married, purchased the land in controversy from the said issue of Carl Bunson and the said issue of George Bunson, paying full value therefor, and receiving good and sufficient deeds therefor; that said issue of Carl Bunson and George Bunson were vested with the legal title to the land in controversy by virtue of said patent to the heirs of Gustavus Bunson, and neither said patent nor the bounty land warrant on which it was issued contained any fact which should have put defendants on inquiry as to said Gustavus Bunson having ever been a married man; that the commissioner of claims of the state of Texas treated said Bunson as a single man, by issuing to his heirs a land head-right certificate for only one third of a league. Wherefore defendants pray that plaintiff should take nothing by her suit, and that defendants should be adjudged to go hence, and recover of the plaintiff all costs in this behalf expended."

The exceptions are as follows:

"(1) It appears from said answer that in February, 1836, when he was killed, Gustavus Bunson was a resident citizen of the republic of Texas, and left surviving him his widow, Augusta (Bunson) Kircher, plaintiff in this suit, whose residence, in contemplation of law, was with her husband, Gustavus Bunson, in the republic of Texas; and, it further appearing from said answer that said Gustavus Bunson left no relations who could take under the Spanish law, his heirs being aliens, the plaintiff in this suit, under the Spanish law, became his heir, and as such is entitled to recover the land in controversy. Wherefore she says that so much of said answer as sets up heirship of defendants and alienage of this plaintiff is insufficient, and ought to be stricken out.

"(2) So much of defendants' answer as sets up that plaintiff's claim is an equitable title ought to be stricken out, because, as appears from said answer, Gustavus Bunson died leaving plaintiff as his surviving wife; and, under the law in force, plaintiff's community interest vested in her absolutely, as a legal title, as much as though she had been an heir, and taken by descent.

"(3) So much of defendants' answer as sets up the plea of innocent purchaser for value, and without notice of plaintiff's title, in behalf of defendants, is insufficient, and ought to be stricken out, because—First. The legal title to the land in controversy is in plaintiff, as the heir of G. Bunson, deceased. Second. If the title to the entire tract is not in plaintiff, then, she having survived her husband, the legal title to one half the land, her community interest therein, prior to his death, vested in her absolutely, and neither the legal nor apparent title was in these defendants. Third. Said defense is enforceable, and can be determined only by the rules applicable to the rights of a bona fide purchaser, as prescribed in courts of equity, and cannot properly be pleaded as a defense upon the law side of the docket of this honorable court."

1. It is elementary law that the plaintiff cannot, in a suit of this character, rely upon the weakness of the title of her adversary, but she must recover, if at all, upon the strength of her own title.

2. The status of heirship, as the question affects the plaintiff and the mother and two surviving brothers of Gustavus Bunson, is fixed

by the laws in force at the date of Gustavus Bunson's death. Their capacity to take as heirs is measured and governed by the laws of descent and distribution in force at that time. *Lee v. Smith*, 18 Tex. 142; *Goodrich v. O'Connor*, 52 Tex. 375; *Hornsby v. Bacon*, 20 Tex. 556.

3. At the date of Gustavus Bunson's death, February, 1836, he should be regarded as a citizen of Texas, under a liberal interpretation applied to the eighth subdivision of the "Declaration of the People of Texas in General Convention Assembled," adopted November 7, 1835. That subdivision is in the following language: "(8) That she will reward, by donations in land, all who volunteer their services in the present struggle, and receive them as citizens." 4 Sayles' St. Tex. p. 138. The averments of the answer are that Bunson left Illinois for Texas in September, 1835, to offer his services as a surgeon in the Texan army, and that he died in the service, in February, 1836. The meaning of the averment plainly is that Bunson was a volunteer in the service of Texas at his death; and the eighth declaration of the general convention should be so construed as to confer upon him the rights of citizenship. Gustavus Bunson being at the date of his death a citizen of Texas, the plaintiff, who was then his wife, was also, in contemplation of law, a citizen of the republic, notwithstanding she resided in Illinois. *Republic v. Young*, Dall. Dig. 466; *Russell v. Randolph*, 11 Tex. 460; *Clements v. Lacey*, 51 Tex. 150.

It is insisted by counsel for the plaintiff that the mother and brothers of Gustavus Bunson, who were aliens at the time of descent cast, and who never in fact became citizens of Texas, were not capable of acquiring by inheritance the estate of Gustavus, because of their alienage; and this contention is supported by *Holliman v. Peebles*, 1 Tex. 673; *Yates v. Iams*, 10 Tex. 168; *Blythe v. Easterling*, 20 Tex. 565; *Hornsby v. Bacon*, Id. 556; *Warnell v. Finch*, 15 Tex. 164; *McGahan v. Baylor*, 32 Tex. 790; *McKinney v. Saviego*, 18 How. 235; *Middleton v. McGrew*, 23 How. 45. Contra: *Sabriego v. White*, 30 Tex. 576, dissenting from *McKinney v. Saviego*, supra; *Hanrick v. Patrick*, 119 U. S. 156, 7 Sup. Ct. Rep. 147; *Settegast v. Schrimpf*, 35 Tex. 323; *Andrews v. Spear*, 48 Tex. 567; *Hanrick v. Hanrick*, 54 Tex. 101, 61 Tex. 596, and 63 Tex. 618. See, also, *Hammekin v. Clayton*, 2 Woods, 336; *Williams v. Bennett*, (Tex. Civ. App.) 20 S. W. Rep. 856; *Phillips v. Moore*, 100 U. S. 208; *Airhart v. Massieu*, 98 U. S. 491. Whether the disposition of a particular case should be controlled by *Yates v. Iams* and others of that class, or by the later cases cited, as in conflict therewith, involves a problem of difficult solution, when, as in the present case, aliens, who never become citizens of Texas, claim under a volunteer soldier, who died in the service prior to the adoption of the constitution of the republic, March 17, 1836, and previous to the Declaration of Independence, March 2, of that year: The conclusion reached by the court, however, on other vital issues of the present controversy, combined with the admitted principle that the plaintiff must maintain her cause on the inherent strength of her own title, whether that of defendants be valid or void, renders it unnecessary to pass definitely upon the question in this suit; but my inclination is in the direction of holding that the mother

and brothers of Bunson should not be debarred from the inheritance simply because they were aliens.

4. As a citizen of Texas and the wife of Gustavus Bunson, what interest did plaintiff acquire in the land in controversy? Before giving a direct answer to this question, the true character of the property itself must be determined. Was it the community property of Bunson and wife, or did it form part of Bunson's separate estate? The certificate which issued to Bunson is known as and termed a "bounty warrant," and the land surveyed and patented by virtue thereof as "bounty land." *Todd v. Masterson*, 61 Tex. 622. The act of 1858, in terms, authorized, as before observed, a certificate to issue to Bunson for "960 acres bounty, for service in 1836." The passage of the act of 1858 was in fulfillment and discharge of a pre-existing obligation resting upon the state in virtue of laws enacted prior to the time the volunteers entered the service of the republic, or contemporaneously therewith; and that act was but a reacknowledgment of the prior rights of such volunteers. See *Goldsmith v. Herndon*, 33 Tex. 710. The eighth subdivision of the declaration of the general convention, adopted November 7, 1835, above referred to, first offered a donation in lands to induce persons to volunteer in the service; and, while it is difficult to indicate the precise legislative act under which Bunson was originally entitled to 960 acres of bounty lands, it is thought that his right thereto may have had its origin in sections 5 and 10 of the ordinance of December 8, 1835, which illustrates the good faith of the struggling republic in making the promise of donations of land to volunteers, as embodied in the eighth subdivision of the declaration by the general convention. 1 Pasch. Dig., arts. 4037-4039. See, also, articles 4057, 4058. It is thus seen that Bunson's right to bounty lands did not originate with the act of 1858, but is clearly traceable to pre-existing laws, which, upon familiar principles, should be held to constitute a contract between the government and the volunteer who availed himself of the benefits of their provisions.

This view of the question was doubtless present in the mind of Mr. Justice Gaines when he prepared the opinion in *Nixon v. Cattle Co.*, 84 Tex. 408, 19 S. W. Rep. 560. In that case the question was whether a bounty warrant, and the land thereby patented, formed part of the community estate. The learned justice clearly draws the distinction between a right to land acquired by onerous title and a pure donation, and holds that the bounty land was the common property of husband and wife. In *Nixon's Case* (at pages 410, 411, 84 Tex., and page 561, 19 S. W. Rep.) it is said by the court:

"The face of the certificate indicates that it was granted by virtue of the tenth section of the ordinance of December 5, 1835, passed at San Felipe. That section offered a bounty of 320 acres of land for volunteers in the auxiliary corps for three months' service. Pasch. Dig. art. 4039. The right acquired by virtue of that ordinance was clearly acquired by onerous title, and belonged to the volunteer and his wife as common property, provided he had a wife at the time of the acquisition. The donations granted to those who participated in the battle of San Jacinto and to others by the act of December 31, 1836, were not in discharge of any legal obligation, but were a gratuitous bounty extended by the republic in grateful recognition for services which had already been rendered. The latter are properly held the separate property of the grantees. *Ames v. Hubby*, 49 Tex. 705."

But it is said by counsel for defendants that the decision in *Nixon's Case* is predicated upon a misapprehension of the Spanish law as it existed in 1836, and is in conflict with *Ames v. Hubby*, *supra*, and *Fisk v. Flores*, 43 Tex. 340. When the two cases last named are carefully considered, the conflict is regarded as apparent, rather than real. Thus, Mr. Justice Moore, in *Ames v. Hubby*, seems to imply that a grant made to one of the spouses during marriage, in fulfillment of an antecedent promise, would not be the separate estate of the grantee. After defining community property (49 Tex. 710) to be "that acquired by husband or wife by onerous title, while that which is acquired by either of the spouses by gift, devise, or descent is the separate property of the heir, donee, or devisee," he proceeds:

"Now, the very language of this statute imports a direct gift. It was not a grant in fulfillment of an antecedent promise or undertaking, as was the fact in the case of *Goldsmith v. Herndon*, 33 Tex. 705."

There was no previous obligation on the part of the state to donate lands to those who participated in the battle of San Jacinto, and the grant construed in *Ames v. Hubby* was therefore a mere gratuity for meritorious services rendered, and properly held to be the separate estate of the donee. In *Ames v. Hubby*, Mr. Justice Moore has this reference to *Fisk v. Flores*:

"But even had the grant of these certificates been made to remunerate those to whom they were issued for services rendered, they would still be separate property of the donee. In the case of *Fisk v. Flores*, 43 Tex. 340, we had occasion to examine this subject somewhat at length, and we found it laid down by the highest authority that a donation in remuneration or compensation for services by one of the spouses is not a part of the community property. Says Eschriche, [*Diccionario de Legislacion*, p. 367:] 'Remunerative or compensatory donations which are made to one of the consorts for his or her individual merits form no part of the community estate;' and that which the husband acquires by military service, and the rewards bestowed upon him by the government for such services, is his separate property."

It may be easily understood how a donation in remuneration or compensation for services rendered by one of the spouses, and how property acquired by the husband as a reward for military service, are the separate estate of the donee, when there was no prior contract between the parties for remuneration, and no previous obligation resting upon the donor to make the donation or reward the soldier; and it is believed that, when this distinction is observed, there will be found to exist no real conflict between the authorities. It is upon this principle, it is thought by the court, that grants made by the king of Spain to one of the spouses were held to be separate property, (*Frique v. Hopkins*, 4 Mart. [N. S.] 212;) and that certain Mexican grants made to the husband in California, prior to her admission as a state of the Union, were construed to be simple donations, and therefore no part of the community estate, (*Scott v. Ward*, 13 Cal. 459.) In this connection it may be noted that the courts of this state have uniformly regarded lands patented by virtue of head-right certificates, (*Parker v. Chance*, 11 Tex. 513,) lands acquired by the husband through the grant of pre-emption, (*Allen v. Harper*, 19 Tex. 501,) and grants of land to married men under the colonization laws (*Yates v. Houston*, 3 Tex. 433; *Wilkinson v. Wilkinson*, 20 Tex. 237)

as community property. It is a fundamental proposition, says Mr. Justice Moore, in *Ames v. Hubby*, supra, "that community property is that acquired by husband or wife by onerous title." See, also, *Scott v. Ward*, supra; *Johns. Civil Law*, marg. p. 57; *Schm. Civil Law*, p. 13, c. 14, § 1; *Yates v. Houston*, supra; 5 Nov. Rec. tit. 4, law 11, bk. 10; 2 *Alvarez*, 109; 1 *White*, Recop. p. 61; *Wilkinson v. Wilkinson*, supra. "By 'onerous title' was meant," says the court in *Scott v. Ward* and *Yates v. Houston*, "that which was created by valuable consideration,—as, the payment of money, the rendition of services, and the like,—or by the performance of conditions, or payment of charges to which the property was subject."

Referring to bounty warrants and bounty lands, Mr. Justice Stayton, in *Todd v. Masterson*, supra, says they were properly so termed, "for the lands were 'a premium offered or given to induce men to enlist into the public service,' an extra compensation offered by the government to those persons who should enlist and faithfully discharge the duties of a soldier in the war then pending." By Mr. Bouvier, "bounty" is defined to be "an additional benefit conferred upon, or compensation paid to, a class of persons. It differs from a 'reward,' which is usually applied to a sum paid for the performance of some specific act to some person or persons. It may or may not be a part of a contract. Thus, the bounty offered a soldier would seem to be a part of the consideration for his services." The bounty offered by the ordinances mentioned to induce persons to serve in the army of Texas formed part of the consideration to be paid for their service, and the republic was in honor and duty bound to fulfill her part of the contract when the volunteer had discharged the duty devolving upon him. The bounty warrant, therefore, and the bounty lands granted to Bunson by the state, were not a mere donation for meritorious services performed. They were issued and granted in the discharge of a solemn obligation imposed by laws antedating by the period of 23 years the act of 1858, and constitute a part of the common property of Bunson and his wife, the plaintiff herein.

The land forming part of the community estate, the question recurs, what interest did the plaintiff acquire therein upon the death of her husband? It is unnecessary to refer to Spanish authorities or the decisions of our own courts in support of the well-accepted proposition that, in the absence of debts and all other proper charges against the community estate, upon the death of one of the spouses, a one-half interest in the community property vests absolutely in the survivor, and the remaining half passes to the heirs of the deceased. The plaintiff, therefore, was entitled, at Bunson's death, to one half of the land in controversy, by virtue of her community right. Did she, or could she under any circumstances, assuming that her husband left neither descendants, ascendants, nor collateral relations capable of taking as heirs, inherit, under the Spanish law then of force, the remaining half of the community, which at his death formed part of Bunson's separate estate? After giving this question attentive consideration, the conclusion reached by me is that the adjudications of the Texas courts resolve it against the right of the wife to inherit her

husband's estate. Under some circumstances she succeeded to the marital fourth. But that feature of the present case may be eliminated, as the claim of plaintiff is not asserted to the fourth "as a relief against poverty." She claims the right to take the separate estate of Bunson (the other one half of the community remaining at his death) as his heir. In *Babb v. Carroll*, 21 Tex. 771, the supreme court, speaking through Mr. Justice Hemphill, says:

"L. X. The law (Nov. Rec. 1, tit. 22, lib. 10) declared that, where there were no heirs, ascendants or descendants, the property of the deceased should go to the treasury. There were previous laws which secured the surviving husband or wife in the succession of the deceased, under certain contingencies. The law (Nov. Rec. 11, tit. 2, lib. 4) of the *Fuero Jurgó*, which gave the inheritance to the surviving husband or wife when there were no other relations of the deceased to the seventh degree, and the law (6 Nov. Rec. tit. 13, pt. 6) by which the surviving husband or wife succeeded to the estate, when there were no relations within the tenth degree. But these laws were, by commentators generally, supposed to be impliedly repealed by the law above recited from the *Recopilación*, although some were of a different opinion, on the ground that the terms of the law in the *Recopilación* were general, and did not refer specifically to the former laws on the rights of surviving husband or wife under those laws. The received opinion of commentators has been held as the rule in Texas, namely, that under the Spanish law the surviving husband or wife, under no circumstances, succeeded to the whole estate of deceased, as his heir, and only to the marital fourth when necessary as a relief against poverty."

In *Van Sickle v. Catlett*, 75 Tex., at page 409, 13 S. W. Rep. 31, the rule announced in *Babb v. Carroll* is approved in these words: "At the time William G. Logan died, his wife did not inherit his estate." Referring to the facts of that case, it will be seen that Logan died in the year 1835.

But the plaintiff's counsel insist that the rule is otherwise declared by the supreme court of this state in *Hill v. McDermot*, Dall. Dig. 419, and by the supreme court of Louisiana. A reference to *Hill v. McDermot* will conclusively demonstrate that a decision of the question was wholly unnecessary in that case, and that the judgment of the court was based altogether on other grounds. Furthermore, the court did not decide it, nor intend to decide it. What is said by the court in that case upon the point is in the nature of a query, with a brief citation from *Partidas* subjoined, and is embodied in the following extract from the opinion, (page 423:)

"Whether he [referring to the husband] died testate or intestate, or with or without a devisee or heir, was not shown; and whether the witness was or was not mistaken as to knowledge of ownership can alone rest on supposition and conjecture. If Sledge died without an heir of any class, under the Spanish law,—if, too, no one had obtained administration of the succession,—in the absence of any proof showing that the husband had had the sole right, was not his widow the sole heir and owner, and entitled to sue for restoration? 'If no relation exist, [such as might inherit,] and the deceased leave a legitimate wife, she will inherit the whole of his estate; and we say that the husband will inherit from his wife in like circumstances.' 2 *Partidas*, 1101, 1102."

A number of decisions of the Louisiana supreme court have been examined; but they appear to be founded upon the Code of that state, and not upon the Spanish law, and hence they can scarcely be said to have application to the present subject of discussion. The opinion

of the distinguished jurist, Chief Justice Hemphill, in *Babb v. Carroll*, with its subsequent approval by the supreme court in 75 Tex. and 13 S. W. Rep., should be regarded as decisive of the question by courts sitting in this state. In support of it, however, reference will be made to two additional authorities. In Schmidt's Civil Law of Spain and Mexico (page 259, c. 1, art. 1212) it is said:

"The intestate heirs are (1) descendants; (2) ascendants; (3) collateral; and, wanting all these, (4) the public treasury."

"When there are no descendants nor ascendants, either legitimate or natural, and no collaterals within the tenth degree, inclusive, the treasury inherits ab intestato." *Id.* p. 270, art. 1266.

Upon the same point Judge Johnston says:

"In default of descendants, ascendants, and collaterals, the crown or exchequer (la real camara) succeeds to the property of an intestate." *Johns. Civil Law*, marg. p. 121.

The plaintiff, therefore, was not an heir of her husband, and did not inherit his estate.

5. The plaintiff acquired a real, beneficial interest in and to one half of the land in controversy by virtue of her community rights; but the interest and title thus acquired were equitable. The legal title to the land passed by the patent to Gustavus Bunson. This principle is so well established by the more recent decisions of the supreme court of this state that the court will content itself with a mere reference to the authorities. *Hill v. Moore*, 62 Tex. 610; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. Rep. 380, and 5 S. W. Rep. 87; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. Rep. 909. See *Gould v. West*, 32 Tex. 349; *Rev. St. Tex. art. 3961*; 1 *Pasch. Dig. art. 4288*.

6. In this court, "where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued," the action of trespass to try title "can only be sustained upon the possession by the plaintiff of the legal title." *Gibson v. Chouteau*, 13 Wall. 92; *Langdon v. Sherwood*, 124 U. S. 74, 8 Sup. Ct. Rep. 429; *Redfield v. Parks*, 132 U. S. 239, 10 Sup. Ct. Rep. 83; *Shierburn v. De Cordova*, 24 How. 423; *Johnson v. Christian*, 128 U. S. 374, 9 Sup. Ct. Rep. 87; *Bennett v. Butterworth*, 11 How. 669; *Bagnell v. Broderick*, 13 Pet. 436; *Hooper v. Scheimer*, 23 How. 235. The plaintiff, having only an equitable title to one half the land in controversy, and no claim whatever to the remaining half, cannot maintain this suit. Her proper forum is a court of equity.

For the reasons assigned, the first and second exceptions to the answer will be overruled; and, as a decision of the questions discussed disposes of every material and practical issue in the case, the third exception will be formally overruled, without passing upon the points therein raised. Ordered accordingly.

McELWEE v. BRIDGEPORT LAND & IMPROVEMENT CO.

(Circuit Court of Appeals, Fifth Circuit. March 6, 1893.)

No. 98.

1. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

If a charge directing a verdict for the defendant is justified, the refusal of the court to give certain special charges is of no consequence, and need not be considered by a reviewing court.

2. CONTRACTS—BREACH—REMEDIES.

A party to a contract, who is prevented or excused from fully performing it by the conduct of the other party, may treat the contract as broken, and sue, at his election, either for damages and loss of profits, or for the value of services already performed, as upon a quantum meruit.

3. SAME—DAMAGES—LAND COMPANIES—BONUS FOR LOCATION OF FACTORY.

A land company, in order to procure the erection of a mill near its land, contracted to pay a bonus to the manufacturer, a fixed sum to be paid when the latter was ready to begin work thereon, and the rest in installments as the work progressed. The first installment was promptly paid, but two others were earned and not paid, whereupon the manufacturer ceased work, and sued for damages for breach of contract. It appeared that his entire outlay and expenses were less than the first installment received, and there was no proof of loss of profits. *Held*, that he could recover nothing.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

Action by Frank B. McElwee against the Bridgeport Land & Improvement Company to recover damages for breach of a contract. The circuit court directed a verdict and gave judgment for defendant. Plaintiff brings error. Affirmed.

R. C. Brickell, F. L. Mansfield, and W. A. Gunter, (Burkett & Mansfield and Brickell, Semple & Gunter, on the brief,) for plaintiff in error.

George N. Messiter and David D. Shelby, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge. The plaintiff in error, who was the plaintiff below, entered into a contract with the defendant in error, a land company, to build and equip a cotton mill or factory, of a given capacity, on certain lots of land in Bridgeport, Ala., to be conveyed to him by the defendant, in consideration of \$60,000, to be paid him by the defendant, as stipulated in the contract. The contract was made on the 3d day of May, 1890. It provided that the entire plant was to be completed as soon as practicable, and as rapidly as the defendant should perform its part of the contract by the payment of the respective sums of money, therein agreed to be paid by it. The stipulation in the contract as to the payment of the money by the defendant is in the following words and figures:

"The party of the second part further agrees and binds itself to the party of the first part that it will, in consideration of the foregoing agreement made by the party of the first part, and the benefits that will accrue to it from the building of said factory or mill, pay to the party of the first part

the sum of sixty thousand dollars (\$60,000) in money, as follows, to wit: Five thousand dollars (\$5,000) when ready to go to work, five thousand dollars (\$5,000) in thirty days thereafter, ten thousand dollars (\$10,000) when the foundations of the buildings are completed, ten thousand dollars (\$10,000) when main building is completed, fifteen thousand dollars (\$15,000) on receipt of bill of lading for machinery, five thousand dollars (\$5,000) on arrival of machinery, five thousand dollars (\$5,000) when machinery is placed in the mill, and five thousand dollars (\$5,000) when the machinery is ready to start and mill completed; but the party of the second part is to incur no further expense or liability in the matter of the erection of said cotton factory or plant except said sum; making in the aggregate sixty thousand dollars (\$60,000) to be paid by the party of the second part."

There are other provisions in the contract, which, in our view of the case, are not necessary to be noticed.

The further undisputed facts are that the plaintiff was ready to go to work, and did begin work under the contract, on the 12th day of May, 1890, and that on that day the defendant made the first payment of \$5,000, stipulated for; that the defendant did not in 30 days thereafter pay the second installment of \$5,000, and did not pay the third installment of \$10,000, stipulated and agreed to be paid when the foundations of the buildings were completed; that said foundations were completed by the 1st day of October, 1890, of which the defendant was fully informed; that on the 11th day of May, 1890, the defendant conveyed to the plaintiff the land mentioned in the contract, which land the plaintiff still owns; that the plaintiff received from the defendant more money than he expended in the work done under the contract, the total cost of the foundations of the buildings being about \$3,200, and the amount paid by defendant to plaintiff being \$5,000. On the 20th day of October, 1890, the defendant, in a letter to the plaintiff, stated that it was ready to go on with its part of the contract, and put up the money as fast as it could do so. On the 23d day of October, 1890, the plaintiff, replying to that letter, said:

"When you refused to make the payment of \$5,000 at 30 days after the beginning of my work I slacked up. When you made your second default, and some of your people began to look for excuses to avoid their contract, I quit work. * * * If your people promptly pay me the \$15,000 now overdue, and desire the house built this winter, I will proceed promptly with the work; but the payment of the \$15,000 is a condition precedent to any work further on or conference touching the future of the mills."

To this letter the plaintiff received no reply, and no further work was done by him. On the 25th day of February, 1891, this suit was brought to recover for the breach of the contract, in that the defendant failed to pay to the plaintiff the second and third installments of \$5,000 and \$10,000, respectively, as by the contract the defendant stipulated and agreed to do.

There are many assignments of error, most of which are on rulings upon demurrers to defendant's pleas. The other assignments are exceptions to the charge given by the court to the jury, and to the refusal to charge as requested by the plaintiff. When a demurrer to a plea is improperly overruled, the presumption of injury arises, and will operate a reversal, unless it appears by the record that injury did not result to the party against whom the error is committed.

Mitcham v. Moore, 73 Ala. 542; Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. Rep. 471. Where the plaintiff has been deprived of no substantial right in introducing his claim, an error in overruling a demurrer to the pleas must be regarded as error without injury, and is not a cause of reversal. Owings v. Binford, 80 Ala. 421. But in our view of this case the determination of the question whether the demurrers to the pleas were properly or improperly overruled is unnecessary. The only assignment of error which we think is material in the case is the exception taken to the charge of the court directing a verdict for the defendant. If that charge was justified, the refusal to give the special charges requested by the plaintiff can be of no consequence, and need not be considered.

The plaintiff contracted to build the cotton mill or factory at the stipulated price of \$60,000, to be paid by defendant in installments, at designated times of payment, on the happening of certain events, or the completion of certain parts of the work. No portion of the contract price was to be paid for any particular part of the work. Both of the parties entered into the performance of the contract, and both in part performed it. The plaintiff begun work, and completed the foundations of the buildings. The defendant paid the first installment on the contract price, but failed to pay the second and third installments as stipulated for in the contract. On defendant's default in making these payments the plaintiff quit work, claimed and treated the contract as broken, and declared his unwillingness to proceed further with the work except on condition that the money due on said two installments was first paid to him. This condition was not complied with, and no more work was done by the plaintiff. If he was, without fault on his part, prevented by the defendant from performing the contract, or if the conduct of the defendant excused him for his nonperformance, he had the right to regard the contract as broken, and to immediately sue to recover all the damages resulting from its breach, which would be the actual loss he sustained thereby. The measure of damages is the amount of expenses and outlay fairly incurred by the plaintiff towards performance, and the profits he might have realized by performing the whole contract. Strauss v. Meertief, 64 Ala. 299; U. S. v. Behan, 110 U. S. 338, 4 Sup. Ct. Rep. 81; Add. Cont. § 881; Chamberlin v. McAlister, 6 Dana, 352.

The contention of the plaintiff is that he sues to enforce the contract which is still subsisting; that the defendant has broken it, but that he has faithfully kept it; and that he sues to recover payments which are, under and according to its terms, due and payable by the defendant. But the proof shows that the plaintiff claimed that the defendant had wrongfully put an end to the contract, and that he, the plaintiff, treated it as broken, and elected to abandon and terminate it. In such a case he could sue to recover the value of the services actually performed under the contract, as upon a quantum meruit, or he could sue for a breach of the contract, to recover, as we have said, his actual damage. We think he pursued the latter course. Is he then entitled to recover anything in this suit? It appears that the outlay and expenses incurred by him in

and about the work done amounted to \$3,200, and that he received from the defendant \$5,000, being an excess of \$1,800 over the amount of his expenditures. While he was entitled to recover any profits he might have realized as the direct fruits of the contract, in order to furnish a ground of recovery they must be proved. None were proved. Inasmuch, then, as the plaintiff failed to prove any damage in the loss of profits, and admitted that he had been more than paid for his outlay and expenses, he was entitled to recover nothing, and there was no error in the charge of the court directing a verdict for the defendant. The judgment is affirmed.

ST. LOUIS & S. F. RY. CO. v. BRADLEY.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1893.)
No. 79.

1. **EXPERT WITNESS—COMPETENCY—DISCRETION OF COURT.**

The qualification of a witness who is not a scientific expert, but who has had special opportunities for observation in the particular case, to give his opinion as to the effect of a railway bridge and embankment in causing overflows of a river is a matter within the discretion of the trial judge, and his ruling thereon will not be disturbed unless plainly erroneous.

2. **SAME—COMPETENCY.**

There is no error in holding such a witness qualified as a practical expert as to the effect of the bridge and embankment in causing overflows upon his farm, when he has long resided there, and has experienced and observed several overflows before and after their erection.

Error to the Circuit Court of the United States for the Eastern District of Texas.

Action by William H. Bradley against the St. Louis & San Francisco Railway Company for damages caused by the erection and maintenance of a bridge and embankment. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

Statement by LOCKE, District Judge:

The suit in the court below was brought to recover damages for injury to the farm of the plaintiff, caused by an overflow of the Red river, which was alleged to have been diverted from its natural and original course by a bridge and embankment constructed by defendant company. The testimony of plaintiff below, defendant in error here, which sets out fully the history of the case and the questions for review, is as follows:

"I am the owner of the land described in plaintiff's petition, and was at the date of the institution of this suit. My farm is on the Texas or south bank of Red river, in Lamar county, Texas, and about one and one fourth miles down the river from defendant's bridge across the river at Arthur; that is, my farm lies east of and down the river from defendant's railroad embankment. I have lived on the farm since March, 1876. There has been five overflows of Red river since I have lived on the land, to wit, in 1876, 1885, 1889, 1890, and 1892. There was very little difference in the height of the water at each overflow. In the latter part of 1887 the defendant built a bridge across Red river at Arthur, about a mile and a quarter above my farm. The bridge, as originally built, was something over 600 feet long. The defendant at the same time threw up and constructed an embankment from the north end of its bridge extending across the bottom to the foothills, about one and one fourth miles. The embankment was from five to fifteen feet high. Only three water ways were left in this embankment. The embankment was highest over near the center and towards the hills. There was not half as

much water ways as embankment. I do not remember the actual measurement of the water ways and embankment. I helped to carry the chain to take the measurements. Mr. J. H. Wright set the measurements down, and has them now. I did not keep them myself. The bottom on the north side of the river to the foothills is a low, flat bottom. When Red river overflowed its banks, the water first left its banks about one and one fourth miles above where defendant built its bridge, on the north side of the river. Before the embankment was built the overflowed water would scatter all over this bottom from the main channel of the river to the foothills on the north, and would continue to flow in one wide expanse of the bottom until Horse creek, below my place, was reached, where the flood waters were again confined to the banks of the river. My farm overflowed before the embankment was built, but not from headwater. The water would back up Fishing creek to a ditch I had to drain my farm, and then come up the ditch and spread over my farm. The effect of this character of overflow was to enrich the land. The backwater, when it receded, left deposits of rich alluvial soil on the land, which greatly enriched it. In the overflow of 1888, after the defendant had built its embankment, the water from Red river broke over its banks about 300 yards from my farm, and run over my farm in a small place that you could jump across. This is the first time since I had owned the farm that the headwaters passed over any part of my farm. About the time this water came down on my farm the defendant's embankment gave way on the north side of the river, and washed out in some places, and immediately the water receded from my farm. There was some 900 feet of the embankment washed away, including some 200 feet of that immediately north of the north end of the bridge. After the overflow of 1888 went down, defendant repaired and rebuilt its embankment, and put in another span of the bridge at the north end, of 200 feet, where the embankment had washed away, and putting in open trestleway the entire washout, building the remaining embankment two feet higher, setting Bermuda grass on top, and ripped the ends of the embankment with rock, by piling in carload after carload of rock, and at the south end of the embankment put in 60 feet of solid rock. In May, 1890, Red river again overflowed, but defendant's embankment did not give way. The water was from 18 inches to 2 feet higher on the upper or west side of the embankment than it was on the east or lower side, as was apparent from the water marks on the trees. We did not measure them. The current of the river and the great volume of the water seemed to be concentrated at the north span of the bridge,—the span that had been put in after the overflow of 1888. There is a bend in the river just below the bridge. The current and great volume of water struck the Texas bank of the river just above my farm, and about 200 yards below the bridge broke the bank, and run through my farm. Piles of drift and a sand bar from 1 to 3 feet high covered about 235 acres of my farm. (The map is here shown witness, and he states the map properly shows Red river and plaintiff's farm where the river went through the same; also defendant's bridge, water ways, and embankment, with the length of each.) The map was made by Mr. Jno. C. Oates, a surveyor, who is now dead. The measurements as shown thereon are correct. I carried the chain in taking the same."

On cross-examination he testified: "I am a farmer, and have been one all my life. I am no engineer. Red river is a stream that is frequently changing its course." Before cross-examination the witness was asked the following question by plaintiff's counsel: "Question. Based upon the facts stated by you as to how defendant's embankment was constructed where the water in time of overflow left the banks and flowed before the embankment was built, and where it flowed after the embankment was built, what, in your opinion, was the effect of defendant's embankment during the overflow of 1890 on the flow or passage of water in its usual course?" To which question defendant objected, on the ground that plaintiff, the witness, was not an expert, and his opinion, as called for, was inadmissible, and he was not qualified to answer the question; which objection was overruled by the court, and the witness answered as follows: "The effect of defendant's embankment was to dam up the water which overflowed the bottom on the north side of Red river, the water ways being insufficient for the passage of water

down the bottom on the north side of the river, and to divert it from its course as it usually flowed before the embankment was built; and to concentrate and increase the water in the river near the north end of the bridge, and cause it to break over its bank on the Texas side, about 200 yards below the bridge, and be discharged and flow over my farm." To which ruling of the court defendant, by counsel, excepted, and assigned as error that the court erred in admitting the opinion of plaintiff, testifying in the cause, that the effect of defendant's embankment during the overflow of 1890 on the flow or passage of water in its usual course down Red river was to change the course of the water as it usually flowed before the embankment was built, and to concentrate and increase the water in the river near the north end of the bridge, and to cause it to break over its bank on the Texas side, about 2,000 yards below the bridge, and be discharged and flow over his farm.

J. L. Harris and W. H. Clark, (W. M. Alexander and E. D. Kenna, on the brief,) for plaintiff in error.

E. B. Kruttschnitt and James G. Dudley, (W. S. Moore, on the brief,) for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, (after stating the facts.) The only question to be considered in this case is whether the answer to the question objected to should have been admitted in evidence. In the view we take of the case, it will be unnecessary to determine whether the exception taken to the ruling upon the objection to such admission was taken at the time and on trial, or whether the assignment of error was technically correct or not. The inquiry in this court must be limited to matters presented to and considered by the court below, and in this case must, therefore, be confined to the objection made at the time, namely, that "the witness was not an expert, and his opinion, as called for, was inadmissible, and he was not qualified to answer the question." The ground of the objection was that the witness was not an expert, and was not qualified to express an opinion. The contention that no one not shown to be an expert by scientific research is qualified to express an opinion in evidence cannot be accepted to the extent it is urged. In *Insurance Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. Rep. 533, the supreme court, speaking by Justice Harlan, says:

"There are matters of which all men have more or less knowledge, according to their mental capacity and habits of observation,—matters about which they may and do form opinions sufficiently satisfactory to constitute the basis of action. While the mere opinion of a nonprofessional witness, predicated upon facts detailed by others, is incompetent upon an issue of insanity, his judgment, based upon personal knowledge of the circumstances involved in such an inquiry, certainly is of value."

The question in that case was one of insanity, and the opinion of nonexperts, who testified from facts within their own knowledge, was held admissible. In *Railway Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. Rep. 96, the question was the same, but the testimony introduced was in a determination of values, and the same conclusion was reached. It is true the subjects in those cases were different, but the arguments and reasons for the admission of the testimony apply with equal force to this case. In *Porter v. Manufacturing Co.*,

17 Conn. 249, the opinion of a nonexpert was admitted upon the ground that the witness had enjoyed special opportunities for acquiring a knowledge of the facts upon which his opinion was based, and we consider the principle there declared well established; that such a witness—one who has had special opportunities for acquiring a knowledge of facts necessary to reach a correct conclusion upon a question of fact—may, after stating such facts, and satisfying the trial court of his qualification in that respect, express his opinion so based; such opinion to be weighed and considered by the jury. *Railway Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. Rep. 96; *Insurance Co. v. Lathrop*, 111 U. S. 612, 4 Sup. Ct. Rep. 533; *Railway Co. v. Locker*, 78 Tex. 280, 14 S. W. Rep. 611; *Spring Co. v. Edgar*, 99 U. S. 645; *Railway Co. v. Klaus*, 64 Tex. 293.

Whether such witness has shown himself sufficiently well informed by special observation and knowledge to be permitted to express his opinion is a question for the trial court, which will not be reversed unless unquestionably error. *Manufacturing Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. Rep. 601; *Spring Co. v. Edgar*, 99 U. S. 645; *Railway Co. v. Warren*, 137 U. S. 348, 11 Sup. Ct. Rep. 96. In this case the witness had testified of his long residence upon his farm in the immediate vicinity of the bridge and embankment complained of, his observation and experience in five overflows at that place, of the manner and effect of the different overflows before the building of the bridge, at the time the bridge was carried away, and when it was subsequently re-established; and we see no error in the court in finding him qualified to express an opinion in the case. The exception to the ruling cannot be sustained, and we find no error in the record.

The judgment will therefore be affirmed.

On Rehearing.

(February 20, 1893.)

PARDEE, Circuit Judge. In this case an application for a rehearing has been made on the ground that we erred in sustaining the ruling of the trial court as to the admission of expert evidence. On the trial a question to the jury was as to the effect of defendant's embankment during the overflow of 1890 on the flow or passage of water in its usual course. It could only be proved from personal observation or experience. Those who had observed the flow of the river before and after the embankment were, in the nature of things, the best witnesses. The witness whose evidence was admitted on this subject over the defendant's objections testified from both observation and experience. He was an expert for the case; not a scientific one, but a practical one. His opportunities for observation and the character and sufficiency of his experience were fully shown. It was for the jury to determine the weight to which his opinion was entitled. As a matter of law, the qualification of a witness to testify as to cause and effect in a given case is a question for the trial judge, and his ruling will not be disturbed unless clearly erroneous. "Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial, and

his decision of it is conclusive, unless clearly shown to be erroneous in a matter of law." *Manufacturing Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. Rep. 601, citing *Perkins v. Stickney*, 132 Mass. 217; *Sorg v. German Congregation*, 63 Pa. St. 156. The Massachusetts case holds that the decision of the trial judge is conclusive, unless it appears upon the evidence to have been erroneous, or to have been founded upon some error in law; citing *Nunes v. Perry*, 113 Mass. 274, and *Com. v. Sturtivant*, 117 Mass. 122. In *Sorg v. German Congregation*, supra, it is said:

"This preliminary question of fact as to whether a witness is an expert qualified to pronounce an opinion, as we have held in *Oil Co. v. Gilson*, (decided in this term,) must, in a great measure, be confided in the discretion of the court below trying the cause, and we will not reverse either on account of admission or rejection of such evidence unless in a clear and strong case."

In *Oil Co. v. Gilson*, 63 Pa. St. 146, referred to, it is said:

"An expert, as the word imports, is one having had experience. No clearly defined rule is to be found in the books as to what constitutes an expert. Much depends upon the nature of the question in regard to which an opinion is asked. There are some matters of which every man with ordinary opportunities of observation is able to form a reliable opinion. *Wilkinson v. Moseley*, 30 Ala. 562; *De Witt v. Barly*, 17 N. Y. 340. It is not necessary, as it is said in one case, to call a drover or butcher to prove the value of a cow, (*Railroad Co. v. Irvin*, 27 Ill. 178;) nor is it imperatively required that the business or profession of the witness should be that which would enable him to form an opinion, (*Van Deusen v. Young*, 29 Barb. 9; *Smith v. Hill*, 22 Barb. 656; *Price v. Powell*, 3 N. Y. 322; *Fowler v. Middlesex*, 6 Allen, 92.) * * * While undoubtedly it must appear that the witness has enjoyed some means of special knowledge or experience, no rule can be laid down in the nature of things as to the extent of it. It must be for the jury to judge of the weight to which his opinion is entitled."

Our decision in this case seems not only to be based upon reason and the common sense of the case, but upon approved authority.

A rehearing is refused.

TYLER v. WESTERN UNION TEL. CO.

(Circuit Court, W. D. Virginia. March 18, 1893.)

1. TELEGRAPH COMPANIES—DELAY IN DELIVERY OF MESSAGE—INJURY—MENTAL SUFFERING.

Mental suffering, and consequent injury to health and unfitness for business, which result from the negligent delay of a telegraph company to deliver to a father a message announcing a fatal injury to his son, whereby the father is prevented from securing medical attendance, and from reaching his son before the latter's death, do not constitute a cause of action by the common law of Virginia. *Wilcox v. Railroad Co.*, 52 Fed. Rep. 264, 3 C. C. A. 73, followed.

2. SAME—VIRGINIA CODE.

Code Va. § 2900, providing that any person injured by the violation of any statute may recover damages, although a penalty be fixed for such violation, merely preserves any right of action the injured person may have, and does not give him any new right of action.

At Law. Action of trespass on the case, brought in the circuit court of Virginia for Alleghany county by J. O. Tyler against the Western Union Telegraph Company, for injuries resulting from neg-

ligent delay in the delivery of a message. The defendant removed the cause to this court. On demurrer to the declaration. Sustained.

Statement by PAUL, District Judge:

The plaintiff in this case brought his action in the circuit court of the state of Virginia for the county of Alleghany on the 18th of January, 1892, and it was thereafter, to wit, on the 7th of June, 1892, removed into this court upon the petition of the defendant company, under the provisions of the act of congress approved March 3, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes," as amended by the act of congress approved March 3, 1887. The plaintiff alleges that on the 25th day of September, 1891, the defendant company, for and in consideration of the charges then and there paid to said defendant company at Asheville, N. C., by one J. W. Morgan, undertook and faithfully promised that it would carry, transmit, and convey from Asheville, N. C., to the plaintiff, at Clifton Forge, Va., the following message, to wit:

"Asheville, N. C. 25.

"To J. O. Tyler, City: Fred is badly hurt. Come at once.

"J. W. Morgan."

—That said message was sent to plaintiff at Clifton Forge, Va. That it was afterwards, to wit, on September 25th, at 5:30 P. M., 1891, received duly by said defendant company at Clifton Forge, Va. That plaintiff was then and there and afterwards a citizen and resident of Clifton Forge, Va., and that he was in that place on the said 25th of September, 1891. That said message showed on its face the importance of its being promptly delivered by said defendant company to the plaintiff, but that the defendant company did not convey, transmit, and deliver the said message to the plaintiff promptly, as it was the duty of the defendant company to have done, but wrongfully held, kept, and retained possession of the same until late in the following day, to wit, September 26, 1891; whereby plaintiff was prevented from seeing his sick son, waiting upon him, and from furnishing him special medical attention, and employing learned surgeons and physicians, by whose attentions the life of his son might have been saved, and that he was prevented from seeing his son alive, whereby, the plaintiff alleges, he has suffered great agony of mind, and has been unfitted for attending to his business as he was theretofore able to do, has been impaired in his health and strength, and has suffered in mind and body, to the damage of plaintiff \$4,900. The defendant in this case demurs to the declaration on the ground that an action for damages cannot be maintained where it is based on mental suffering alone.

Benjamin Haden, for plaintiff.

Robert Stiles, for defendant.

PAUL, District Judge, (after stating the case as above.) The contention of the defendant is that damages for mental suffering can only be allowed where it is the result of and connected with a physical injury. This is clearly the doctrine of the common law, and, so far as the court is informed, there has been no departure from it in Virginia. The court has been cited to a number of decisions in other states which are an innovation on this well-established principle, but a careful reading of these cases will show that the courts rendering the decisions were compelled, in most of the cases, to seek other grounds for their justification than the naked fact of mental suffering from the negligence of the defendant. All of the cases cited were actions against the defendant in this case. The result of this class of decisions is that, if the message was such as to put the telegraph company on its guard as to its great importance, and thus bring home to its notice that its failure to promptly deliver the mes-

sage would probably result in great grief and mental suffering to the sender or sendee of the message, then the action can be maintained for the mental suffering occasioned by the negligent failure of the company to deliver the message promptly. The court deems it unnecessary to enter into a critical examination of these cases and the reasoning on which their conclusions rest. The doctrine has not the sanction of the highest state court in Virginia. The question has never been directly presented to the supreme court of the United States, but the question as to when mental suffering can be considered as an element in ascertaining the damages to which a plaintiff is entitled was considered in *Gilmer v. Kennon*, 131 U. S. 22, 9 Sup. Ct. Rep. 696, and in *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. Rep. 577. In these cases it was held that damages may be allowed for mental suffering when it is the result of and flows from physical injury. But this question has recently been passed upon and settled, so far as this court is concerned, by a decision of the circuit court of appeals of the United States for the fourth judicial circuit in *Wilcox v. Railroad Co.*, 52 Fed. Rep. 264, 3 C. C. A. 73. This was an action brought by the plaintiff to recover damages to the amount of \$5,000 for "great distress of mind, anxiety, mortification, and suspense" suffered by him in consequence of the failure of the defendant company to furnish a special train which he had contracted for, to enable him to go to his father, who was lying in a dangerous illness. There was also a second cause of action, which does not concern the case before the court. The appellate court took up the question "whether an action can be maintained which claims damages for an alleged 'distress of mind, anxiety, mortification, and suspense' resulting from the nonperformance of a contract, no personal injury and no pecuniary loss having been sustained or pretended," and say:

"The authorities are substantially agreed on the proposition that pain of mind, as distinct from bodily suffering, can be considered in actions for damages from injuries to the person, and for pecuniary loss and expense, or like causes, incident to such injuries. But we know of no decided case which holds that mental pain alone, unattended by injury to the person, caused by simple negligence, can sustain an action. It was said in *Lynch v. Knight*, 9 H. L. Cas. 598, that 'mental pain and anxiety the law cannot value, and does not pretend to redress where the unlawful act complained of caused that alone.' We think there was no error in the court below in sustaining the demurrer in this case, and in holding that 'in an action for the breach of a contract damages cannot be recovered for disappointment and mental suffering alone, there being no allegation of any other damage.'"

Counsel for plaintiff, however, contends that the negligence of the defendant company complained of was a violation of a penal statute of the state of Virginia, to wit, section 1292 of the Code of Virginia, and that, under the provisions of section 2900 of the Code of Virginia, his action can be maintained. Section 1292 prescribes the duties of telegraph and telephone companies, and fixes a penalty for their failure to perform said duties, and section 2900 is as follows:

"Sec. 2900. Any person injured by the violation of any statute may recover from the offender such damages as he may have sustained by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages."

It is very evident that the purpose of section 2900 was merely to preserve to an injured person the right to maintain his action for the injury he may have received by reason of the wrongdoing of another, and to prevent the wrongdoer from setting up the defense that he had paid the penalty of his wrongdoing under a penal statute. It cannot be supposed that in enacting section 2900 the legislature had the remotest idea of creating any new ground for bringing an action for damages. It was only intended to keep the subject just where it was under the common law before the enactment of section 1292, prescribing the duties of telegraph and telephone companies, and fixing a penalty for their failure to perform said duties. The language of the statute is, "Any person injured by the violation of any statute," etc., and we are brought back face to face with the question, what constitutes in law the injury referred to by the statute? Certainly, as we have already shown above, it cannot be "disappointment and mental suffering only, there being no allegation of any other damage." And counsel for plaintiff, as if anticipating this, has alleged in his declaration and argued that there has been physical suffering and injury resulting from the mental anxiety of the plaintiff, and undertakes in his argument so to weave the two together as to give the injuries the nature necessary for the maintaining of this action. But the court thinks the sickening of the body in consequence of anxiety of mind is too remote a result of the negligence complained of to give the case the elements which it should possess in order to maintain the action. As has been said by Lord Campbell, quoted by Wharton on Negligence, (section 78:)

"If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

The demurrer is sustained.

MARKER v. MITCHELL.

(Circuit Court, S. D. Ohio, W. D. March 24, 1893.)

1. CARRIERS OF PASSENGERS—LIABILITY—ELEVATORS.

A landlord who runs an elevator for the use of his tenants and their visitors thereby becomes a common carrier, and is charged with the highest degree of care which human foresight can suggest, both as to the machinery and the conduct of his servants; and an instruction that he owes to persons thus put completely under his control "the highest degree of care consistent with the possibility of injury," while unfortunate in the choice of words, does not misstate the law, and, being explained by the context, is no ground for reversal.

2. SAME—SKILLFUL EMPLOYEES.

A person who undertakes to run an elevator to carry passengers who intrust themselves entirely to his care and control is charged with the duty of providing experienced and skillful servants for that work; and the standard of due care for an elevator man is that care which may be reasonably expected of an elevator man of skill and experience.

3. NEW TRIAL—EXCESSIVE DAMAGES.

Where the verdict awards excessive damages, a new trial should be granted, unless plaintiff consents to a remittitur reducing the amount to a reasonable sum.

At Law. Action by Marker against Mitchell for personal injuries received in an elevator operated by defendant. Verdict for plaintiff. Motion for a new trial. Granted, unless plaintiff consent to a remittitur.

W. H. Jackson, for plaintiff.

C. D. Robertson and Chas. T. Greve, for defendant.

Taft, Circuit Judge. This case has been twice tried. The first trial resulted in a verdict for the defendant, and was set aside by the court on the ground that it was against the weight of the evidence. A second trial has resulted in a verdict for \$2,250. A motion is now made for a new trial on three grounds: First. That the court charged the jury, with reference to Mitchell's obligation in running an elevator for the use of his tenants and their visitors, that it was his duty to use reasonable care, under the circumstances, to preserve their lives and limbs, and that reasonable care, in view of the fact that passengers put themselves completely within the control of Mitchell and his employes while on the elevator, required a very high degree of care; "the highest degree of care consistent with the possibility of injury." Second. A new trial is asked on the ground that the court charged the jury that Mitchell was obliged to employ a careful and skilled elevator man, and that the standard fixed for the due care of an elevator man was that care which the jury would expect as reasonable from a careful and skilled elevator man. Third. It is said that the damages are excessive.

On the first point I am of opinion that the language used by the court was not fortunate. The highest degree of care consistent with the possibility of injury is rather a blind expression, but it seems to me that it was sufficiently explained by the context in the charge, and that it did not, therefore, mislead the jury. "Consistent with the possibility of injury," as thus explained, meant "commensurate with or proportionate to the possibility of injury in the use of the elevator." The theory of the court was that the liability of Mitchell in the running of a passenger elevator was the same as that of a common carrier, and the standard for a common carrier is the highest degree of care which human foresight can suggest. This view is sustained by the case of *Goodsell v. Taylor*, a decision of the supreme court of Minnesota, reported in 42 N. W. Rep. 873, and by the case of *Treadwell v. Whittier*, a decision of the supreme court of California, reported in 22 Pac. Rep. 266. It is contended that such a rule applies to the machinery used, but does not apply to the conduct of the employes of a common carrier. No case has been cited which makes this distinction. On the contrary, the opinion of the supreme court of the United States in *Stokes v. Saltonstall*, 13 Pet. 181, considered in connection with the facts of that case, seems to refute the contention.

Secondly. I think it should be, and is, the rule of law that, where a person undertakes to run an elevator which is to carry passengers who intrust their bodies entirely to his care and control, he shall provide careful and skilled operatives to discharge the obligation

thus assumed. I therefore think that the court properly defined the standard of due care for the elevator man.

Finally, as to the question of damages. I believe that the damages are too great. It seems clear to me from the evidence that the injury does not justify the amount of the verdict. For that reason I shall grant a new trial, unless the plaintiff will consent to a remittitur of enough to reduce the verdict to \$1,500; otherwise the motion for a new trial will be granted.

W. & H. M. GOULDING, Limited, v. HAMMOND et al.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1893.)

No. 52.

1. WRIT OF ERROR—REVIEW—DECISIONS OF LAW AND FACT.

Where all evidence as to a contract is in the shape of letters and telegrams, and by agreement of counsel all questions as to the construction thereof are submitted to the court, which instructs the jury to return a verdict, such instruction must be considered as based entirely upon the construction of the contract as a question of law, and is subject to review like any ruling upon questions of law; and the proceeding is not the same as a trial by the court under Rev. St. § 700.

2. CONTRACT—CONSTRUCTION—TELEGRAMS.

Plaintiffs, having the option to require delivery any time from June 1st to September 30th of a cargo of phosphate rock sold by defendants, on August 21st wired defendants to "please extend time for delivery of rock until November 1st. Telegraph reply." Held, that this was only a request to allow plaintiffs the option of taking the cargo in October, and did not give defendants reasonable grounds to believe that plaintiffs intended to abandon their rights under the original contract to require delivery before the end of September. 49 Fed. Rep. 443, reversed.

3. SAME—DEFINITIONS.

The word "extend" means "to enlarge, prolong, expand, stretch out," and is not synonymous with "postpone," which means "to defer, to put off, to place after or beyond something else."

4. SAME—PROPOSAL BY TELEGRAM—ACCEPTANCE.

Where the plaintiff makes a proposal by telegram, with request to reply by telegram, and the defendant replies by a telegram which contains no acceptance of the proposal, but a new proposal, and no notice that a letter is to be written, the plaintiff may treat his proposal as rejected, although a letter subsequently arrives accepting plaintiff's proposal.

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

Action by W. & H. M. Goulding, Limited, against Hammond, Hull & Co. for breach of contract. The circuit court gave judgment for defendants. 49 Fed. Rep. 443. Plaintiffs bring error. Reversed.

Statement by LOCKE, District Judge:

The plaintiffs, residing and doing business in the city of Dublin, Ireland, through T. V. Kessler, their agent at Baltimore, made a contract with the defendants, Hammond, Hull & Co., of Savannah, Ga., as follows:

"Savannah, Ga., 28th of May, 1889.

"Sold to Messrs. W. & H. M. Goulding, (T. V. Kessler, Agt.), of Dublin, Ireland, for account of Messrs. Hammond, Hull & Co., a steamer cargo kiln-dried river phosphate rock, as follows:

"Quantity. About twenty to twenty-five hundred (2,000-2,500) tons of 2,240 lbs. each, more or less.

"Price. Six dollars (\$6.00) per ton of 2,240 lbs., delivered alongside buyer's steamer at seller's wharf, Battery Creek, near Port Royal, S. C.

"Analysis. Guaranteed fifty-five (55) per cent. of bone phosphate of lime by analysis of Prof. C. U. Shepard, Charleston, S. C.

"Delivery. Any time during June, July, August, and or September, 1889, at buyer's option.

"Terms of payment. Cash against documents on presentation at Baltimore, Md., or London, England, buyer's option.

"Conditions. Sworn weigher's weights and sampling at point of shipment. Due notice of charter to be given sellers soon as charter is made. Sellers to have privilege of stevedoring cargo at usual rate for such work.

"Brokerage. Payable by sellers on completion of contract at usual rate per ton.

[Signed]

"J. M. Lang & Co., Brokers."

To which the following was added on May 31st, at the instance of Hammond, Hull & Co.:

"Steamers always afloat. Accepted.

[Signed]

"Hammond, Hull & Co.,

"Per H. P. Richmond, Atty."

On the 21st of August plaintiffs telegraphed defendants as follows:

"Baltimore, Md., August 21, 1889.

"Hammond, Hull & Co., Savannah, Ga.: Please extend time for delivery of rock until November first. Telegraph reply.

[Signed]

"W. & H. M. Goulding."

The defendants the same day telegraphed in reply:

"Savannah, Ga., August 21, 1889.

"W. & H. M. Goulding, Baltimore, Md.: Can't you make it December delivery? This preferred to November.

"Hammond, Hull & Co."

The same day defendants wrote by mail as follows:

"Savannah, Ga., August 21, 1889.

"Messrs. W. & H. M. Goulding, Baltimore, Md.—Gentlemen: Replying to your telegram of even date, viz. 'Please extend time for delivery of rock until November 1st,' duly received, and to which we immediately replied, 'Can't you make it December delivery? This preferred to November,'—which we now confirm, we prefer December to November, and trust it may be your pleasure to make it December, thereby making the transaction agreeable to all interested. Of course, it is understood that we will make the delivery in November; yet we trust, as stated, you will have it December. Awaiting your reply, we remain your friends, truly,

"Hammond, Hull & Co."

Upon the receipt of defendants' telegram of the 21st August, and before the receipt of their letter, plaintiffs, by their agent in Baltimore, wrote defendants this:

"Baltimore, Md., August 21, 1889.

"Messrs. Hammond, Hull & Co., Savannah, Ga.—Gentlemen: We wired you this A. M. as follows, which we now confirm: 'Please extend time for delivery of rock until November first. Telegraph reply,'—and we are now in receipt of your reply, for which accept our thanks: 'Can't you make it December delivery? This preferred to November.' This I have cabled to our Dublin office, and as soon as I receive their reply will advise you. Will you kindly inform us if we can load at quarantine, and what would be the additional expense. If your Mr. Hull, with whom the writer is acquainted, should come north, we would be pleased to see him, as we think an arrangement could be made to take your surplus rock, if you have any, or if likely to

mine extensively. Thanking you for promptly replying to our telegram, we are, very truly, yours,

W. & H. M. Goulding, Ltd.

"Per T. V. Kessler."

On the 23d defendants wrote plaintiffs, their letter containing, among other things immaterial to any question herein, the following: "As our trade now stands, we understand that this rock is to be delivered in November, and that you may be able to extend the time to December, as intimated in our letter." On the 24th, and apparently before that letter was received, plaintiffs wrote defendants, acknowledging the receipt of their letter of the 21st, and notifying them that they had that day received cablegram from the Dublin office, informing them that they had chartered for September. On the 26th defendants wrote plaintiffs, complaining of their having chartered for September, and using this language: "Your telegram to us asked for a direct extension to November, which we were willing to do, and merely begged that you would make it December, instead of November, if possible, to which we got your reply, stating that you had communicated with your people, and would let us know in a few days whether or not you could make it December. We, of course, understood, and so wrote you, that you accepted the terms for November delivery, hoping that a December delivery would suit you as well. Now you come back, and say that your people have made a September charter, which throws us entirely out of gear. We have notified our dredging people of this change, and will, if necessary, send you their certificate to this effect. As the matter now stands, we cannot make a delivery before November, and you must govern yourselves accordingly. We wired you as follows this A. M.: 'Letter 24th received. We notified our dredging people that rock would not be wanted till November, and we cannot now make earlier delivery,'—which we now confirm." And the same day telegraphed plaintiffs' office in Baltimore that they had notified their dredging people that rock would not be wanted till November, and that they could not make the delivery. On the same day, before receiving either telegram or letter of that date, plaintiffs wrote: "From our letter of 24th instance you will see that we have chartered to take the rock during Septbr. If you will kindly refer to our telegram of the 21st inst., you will see that we wanted time extended until Nov. 1 (not November delivery) for rock delivery, but, as we have made charter for Sept. delivery, we will not require the time extended." On the same day, upon the receipt of defendants' telegram of the same date, they again wrote, reviewing the correspondence had, and using this language: "We are at a loss to understand upon what grounds you could construe an inquiry to mean November delivery." The telegram to which this was a reply was: "Based upon your request for extension to November, which we accepted on the 21st instant, we cannot make delivery sooner." On the 27th plaintiffs telegraph: "Steamer Tormore will be due about September 5th. Have cargo ready as per contract May 28th." The further correspondence is of no importance in determining the questions at issue, and was only expressive of the views of the parties of their rights under the circumstances. The steamer Tormore arrived, and reported ready for cargo, which was not furnished. Efforts were made to procure another cargo, but failed, and plaintiffs were compelled to cancel the charter at a cost of \$2,311.59, for which, together with difference in price of phosphate rock they were compelled to purchase, and expenses, amounting in all to \$4,644.63, this suit was brought.

Upon the trial, after the introduction of the original contract and telegrams and letters of the correspondence, the principal defendant was sworn as a witness, and was about to testify how the transaction was changed on August 21st, when counsel for the plaintiffs objected, claiming that the construction of the contract was for the determination of the court upon the letters and telegrams which had been submitted; whereupon counsel for both plaintiffs and defendants agreed that the question as to the construction of the contract and of the letters and telegrams with reference thereto be argued and submitted to the court, whereupon argument was had, and upon motion of defendants, and over the objections of plaintiffs, the court instructed the jury to return a verdict for the defendants, which was done, to which plaintiffs

excepted, filed a bill of exceptions, and brought the case here for review. The assignment of error consists of eleven specifications, the substance of all of which are embodied in the eighth, that "the court erred in directing a verdict for the defendants in said case."

Walter G. Charlton, for plaintiffs in error.

S. B. Adams, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, (after stating the facts.) The first question presented for consideration is how far the decision of the court below must control in the determination of the questions presented here. It is claimed by defendants in error that, the questions having been submitted to the court by the consent and upon the application of the plaintiffs' counsel, it was not within their right to now question the result of that submission; that the case stands upon the same ground as would one tried by a court without a jury, where no finding of fact can be questioned, and that the judgment below should not be reversed if it can be seen how the court below could reasonably have arrived at the conclusion reached. We cannot accept this view of the case. The question submitted to the court below was submitted as a question of law, and not as one of fact. It was submitted upon the joint agreement of counsel for plaintiffs and defendants, and so determined. It is not considered that it was the intention of either party to withdraw the consideration of any question of fact from the jury, or for the court in any way to take the place of a jury, as in a trial under section 700 of the Revised Statutes. The instructions to the jury to find a verdict for the defendants must be considered as based entirely upon the construction of the contract as a question of law, and subject to re-examination and review, the same as any ruling upon questions of law when excepted to.

The determination of the case rests entirely upon what construction is to be placed upon plaintiffs' telegram of the 21st of August, and the reply thereto. Before that there was nothing in doubt or uncertainty, the contract was complete, and the terms so positive and certain that no question could be raised as to its construction and meaning. Plaintiffs had the right to call for and demand the delivery of the rock at any time during June, July, August, or September. Did the request, or inquiry, if it may be so termed, contained in this telegram of the 21st, suggest or give the defendants any justifiable grounds to believe or claim that plaintiffs, by such a request, intended to abandon any of the rights that they had under the original contract to take the delivery of the cargo, at their option, at any time previous to the end of September? Upon the answer to this question the determination of the case rests. The original contract would stand in force until a new one was entered into by the mutual consent and understanding of both parties, and the question is, was there a new one made? We do not consider that the language of the telegram could be so construed, but only as a request to enlarge their privilege. The word "extend," used in the

sense in which it was here used, could not, in our opinion, in any way be construed to mean postpone or arbitrarily put off to later day. Neither the etymology of the word nor its ordinary use would permit such an understanding. The word "extend," used by plaintiffs, in derivation, construction, and the definition of every authority, means "to enlarge, prolong, expand, stretch out;" while the sense and meaning which defendants desire to apply to the telegram, are "to postpone, to defer, to put off, to place after or beyond something else." Webst. Dict.; Cent. Dict.; Amer. & Eng. Enc. Law, 583. We do not consider that any reasonable interpretation can be had of the language used which would express any idea different from that which would add the month of October to the time which plaintiffs had to claim the cargo.

The defendants' telegram of the same date in response was not an acceptance of the request made. It neither granted the application nor refused it, but made a request of their own, entirely different from that of plaintiffs. They had been requested to telegraph reply, and, after their response had been forwarded, and received by plaintiffs, the proposed transaction was closed, and any letter which had been written and mailed by defendants that day could have no weight in the correspondence. The plaintiffs had received a reply by telegraph, as asked, and, their request not having been accepted, nor any notice of a further reply by mail given, they could no longer be bound by their proposal. The Code of Georgia (section 2728) can only refer to a case where the proposition is made by letter, and the reply is communicated in the same way. Here one reply was made, in the manner requested, and no law would compel an awaiting another, or hold the party proposing to the effect of such second response. Defendants' new proposition was immediately telegraphed to plaintiffs' home office, but it was not accepted by them, and they immediately informed defendants of a charter's having been made for September, which information was at once forwarded to defendants, and was, in effect, a refusal to accept their application for a December delivery, and a withdrawal of plaintiffs' request for an extension.

There is another point which has been urged in behalf of defendants, and that is that when plaintiffs learned of the understanding that defendants had received of their proposed request, they did not at once disabuse their minds of this mistaken idea. Before the defendants' letter of the 21st had been received, their first proposal for making a December delivery, by telegraph, had been telegraphed to Dublin, and the answer appears to have been forwarded to them at once upon its receipt. This was a sufficient reply to their proposal. They had resorted to the mail, and could not, in justice, complain that plaintiffs did the same; nor does it appear that any such slight delay was in the least injurious to defendants' interest. The first direct declaration of defendants that they understood the time of delivery had been postponed to November was their letter of the 23d, which was replied to on the 26th, in which letter plaintiffs referred to their telegram of the 21st, and made the explanation that they had requested an extension of time un-

til November 1st, and not a November delivery. Again, on the same day, they say, "We are at a loss to understand upon what grounds you could construe an inquiry to mean November delivery." It appears that plaintiffs gave as early notice of the chartering of a vessel as could be demanded, and we find no unreasonable or injurious delay on the part of the plaintiffs in endeavoring to correct any misunderstanding of their intent in the minds of the defendants, and consider the court below erred in finding plaintiffs had no cause of action, and directing a verdict for defendants; and it is ordered that the judgment be reversed, and the cause remanded for a new trial.

COYLE v. FRANKLIN et al.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1893.)

No. 31.

ADVERSE POSSESSION—WHAT CONSTITUTES—POSSESSION BY TENANT.

Possession by a lessee is continuous, peaceable, adverse possession, in favor of the lessor, as against third persons, within Rev. St. Tex. art. 3193, making such possession for five years a bar to recovery of real estate, although the lessee repudiates the tenancy, and attorns to a third party, where the lessor institutes suit against the lessee, and recovers possession therein.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Action of trespass to try title by W. M. Coyle against Joseph Franklin and others. Judgment for defendant Franklin. Plaintiff brings error. Affirmed.

E. B. Kruttschnitt, (Francis B. Lee, on the brief,) for plaintiff in error.

S. W. Jones, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The plaintiff in error brought an action of trespass to try title in the circuit court for the eastern district of Texas, against Joseph Franklin, the defendant in error, Joseph Courant, and Albert P. Bush, assignee of the Alabama Gold Life Insurance Company, to recover a certain tract or parcel of land situated on Galveston island, state of Texas. Albert P. Bush entered a formal disclaimer. The suit was dismissed as to Joseph Courant. Franklin, defendant in error, pleaded (1) not guilty; (2) the statute of limitations of three years; (3) the statute of limitations of five years. The parties, by written stipulation, waived trial by jury, and the case was submitted to the court. The court found the following conclusions of fact and law:

"The court finds that by and through regular and legal chain of transfer, from and under the sovereignty of the soil, the plaintiff, W. M. Coyle, was at the date of the institution of this suit, September 1, 1890, the owner of the land in controversy, to wit, lot number seventy-five, in section number one, of

Galveston island, according to the map and plan and survey of said island, and containing about 14½ acres of land, unless the defendant Joseph Franklin is entitled to judgment under his plea of five years' limitation, concerning which the court finds as follows: The said defendant Joseph Franklin claimed title to said property under said plea of five years' limitation, under a tax collector's deed to said Joseph Franklin, fully described in the bill of exceptions taken by plaintiff, said deed being dated July 11, 1878, and filed for record and duly recorded in Book 27, page 514, of the Records of Deeds for Galveston County, which deed the court finds to be a deed duly recorded, within the meaning of the statutes of Texas, for the purpose of said plea of limitation, but not as vesting title by its own force and effect. In May, 1884, said Joseph Franklin engaged one Juneman to fence said property, and Juneman accordingly fenced it, completing the fence in June, 1884. Franklin leased the property to Juneman by written lease, described also in said bill of exceptions, and Juneman occupied the premises under the lease until July 1, 1885, when, failing to make arrangements with Franklin for a continuation of the lease, and having heard that Waul & Walker claimed to own or represent the owner of the lot, Juneman took a lease from them, (Waul & Walker,) and notified Franklin that he (Juneman) declined to recognize him as landlord any longer, but never vacated the premises until after termination of suit in supreme court of Texas, as hereinafter stated. On August 19, 1885, Franklin sued Juneman to recover possession of the lot, the suit being in the district court of Galveston county, and the proceedings being as shown in said bill of exceptions. In said suit a writ of sequestration was sued out by Franklin, and was levied by the sheriff of Galveston county, who allowed Juneman to remain in possession as keeper under the sheriff, until the termination of the suit. After the suit was determined, Juneman remained in possession until September or August, 1887. The suit in the district court of Galveston county, after judgment by that court, was carried by appeal to the supreme court of Texas, where the judgment was affirmed February 18, 1887. 67 Tex. 415, 3 S. W. Rep. 562. After Juneman quit the premises, September or August, 1887, Franklin took and held continuous possession by other tenants until the institution of this suit. When Juneman left premises, he left in charge of the premises one Peterson, who also had charge of Juneman's horses and cattle. Peterson turned over possession to Appell, a tenant of Franklin, who remained in possession to the time of filing suit. Franklin paid all taxes on the property in controversy for the years 1884, 1885, 1886, 1887, 1888, 1889, 1890, and all other taxes thereon. Juneman was a dairyman, and used the lot, while in possession of it, for grazing his cows and horses. Franklin's other tenants used it for the same purpose.

"Conclusions of law by the court on the foregoing findings of fact: The court holds that the defendant Franklin had continuous adverse possession of the property, by and through Juneman, and the other tenants after Juneman, from July 1, 1884, to September 1, 1890, notwithstanding the repudiation by Juneman of his tenancy under Franklin in June, 1885, and the suit by Franklin to recover possession, pending from August, 1886, to February 18, 1887, because Juneman, having gone into possession under Franklin, could not lawfully hold against Franklin, and the possession of Juneman was in law that of Franklin, after, as well as before, the expiration of the lease from Franklin to Juneman, notwithstanding the repudiation by Juneman of his tenancy under Franklin. And the possession and claim of Franklin under the tax collector's deed, and his paying the taxes on said property, complied fully with the condition of the statutes of limitation of five years, as pleaded by Franklin; and he is entitled to judgment accordingly against the plaintiff, which will be so entered."

Judgment being entered in favor of the defendant Franklin, Coyle, the plaintiff, brought the case to this court for review.

The errors assigned present but two questions: (1) Is the tax collector's deed to Joseph Franklin, the defendant in error, for the property in controversy, such a deed as will, under article 3193 of the Revised Statutes of Texas, support the plea of five years' limitation?

(2) Was the attempted attornment by Franklin's tenant to another after the expiration of his lease, July 1885, and the litigation between Franklin and his tenant for the possession of the property, which shortly followed, and which resulted in favor of Franklin, an interruption of the continuity of Franklin's possession, begun in June, 1884, so as to defeat his plea of five years' limitation under the statute in this action, brought by a third party against him for the recovery of the land?

The sufficiency of Franklin's deed to support the plea of five years' limitation is admitted by counsel for plaintiff in error in his oral argument, and it is fully shown by the principles declared in the following adjudged cases: *Wofford v. McKinna*, 23 Tex. 43; *Flanagan v. Boggess*, 46 Tex. 335; *Fry v. Baker*, 59 Tex. 405; *House v. Stone*, 64 Tex. 678; *Seemuller v. Thornton*, 77 Tex. 156, 13 S. W. Rep. 846.

On the second question we agree with the learned judge of the circuit court, that the defendant Franklin had continuous adverse possession of the property by and through his tenant Juneman, and the other tenants after Juneman, from July 1, 1884, to September, 1890, notwithstanding the repudiation by Juneman of his tenancy in June, 1885. As Juneman went into the possession of the premises as a tenant of Franklin, and neither vacated them nor surrendered them to Franklin, the possession, notwithstanding Juneman's attornment to another, and the litigation which followed between Juneman and Franklin, continued to be Franklin's possession. The controversy between Franklin and Juneman was merely an unsuccessful attempt on the part of the tenant to deny his landlord's title. As the litigation, though lasting some time, was instituted without unnecessary delay after the tenant's denial, and resulted in favor of Franklin, recognizing his possession and ownership from the beginning, his possession was not interrupted thereby, and must be considered as continuous, peaceable, and adverse. The following authorities sustain this position: *Peyton v. Stith*, 5 Pet. 490; *Flanagan v. Pearson*, 61 Tex. 306; *Scott v. Rhea*, 21 Tex. 708; *Whitehead v. Foley*, 28 Tex. 15; *Elliott v. Mitchell*, 47 Tex. 445; *Blue v. Sayre*, 2 Dana, 213; *Pleak v. Chambers*, 5 Dana, 60; *Ferguson v. Bartholomew*, 67 Mo. 212; *Cary v. Edmonds*, 71 Mo. 523. There is no error in the judgment of the circuit court, and the same is affirmed, with costs.

MANN BOUDOIR CAR CO. v. DUPRE.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1893.)

No. 99.

1. SLEEPING CARS—EJECTMENT OF PASSENGER FROM BERTH—DAMAGES.

Where an unlawful expulsion from a berth of a sleeping car is the proximate cause of a married woman's miscarriage, the sleeping-car company is liable for such injury, although its servants were ignorant of the woman's condition when they expelled her.

2. SAME.

Where a sleeping-car company has reserved certain berths for passengers getting on at a certain station, and before the train reaches the sta-

tion its conductor erroneously sells one of the berths so reserved, the conductor may, a reasonable time before reaching such station, notify the passenger of his error, and tender another berth equal in accommodation, and the passenger has no cause of action if she refuses to accept this, and voluntarily leaves the car.

3. SAME—PAROL EVIDENCE TO CONTRADICT "BERTH CHECK."

In an action against a sleeping-car company to recover damages for being unlawfully ejected from a berth, the plaintiff may contradict by parol evidence the recital on his "berth check" as to the berth bought by him.

4. TRIAL—INSTRUCTIONS—REFUSAL TO GIVE.

To save an error in the refusal to give a proper special charge, such special charge must not be asked in the aggregate with other charges in any one of which there is anything objectionable.

5. SAME.

Although a feature of the case may rightfully call for a proper special charge, still if the charge asked for is too broad, the court may rightfully refuse to give such charge.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

Action by Florence C. Dupre against the Mann Boudoir Car Company to recover damages for illegal expulsion from the berth of a sleeping car. The circuit court gave judgment for plaintiff. Defendant brings error. Reversed.

Percy Roberts, (Nugent & McWillie, of counsel, also filed a separate brief,) for plaintiff in error.

Frank Johnston and M. Green, (Calhoon & Green, on the brief,) for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. On the 7th August, 1890, Mrs. Florence C. Dupre, the defendant in error, accompanied by her husband, got on the Meridian train of the Alabama & Vicksburg Railway, a part of the Cincinnati, New Orleans & Texas Pacific Railway Company's system, at Jackson, Miss., to go to Akron, Ala. They first entered the day coach, but as Mrs. Dupre was enceinte, about two months advanced, and had experienced one miscarriage, they concluded to take the sleeper, and went back to it, where they were met by the porter, seated, and told they would have to wait until the conductor came around. This was about 5:30 P. M., and the train on schedule time would arrive at Akron about 1:30 A. M. following.

On May 27, 1891, to the June term of the circuit court for the state of Mississippi, Hinds county, first district of the circuit court, Mrs. Dupre, the defendant in error, brought her action against the plaintiff in error, the Mann Boudoir Car Company, alleging that, on the occasion mentioned, she, accompanied by her husband, went into the sleeping car, and asked for a lower berth in said sleeper. That then and there the conductor sold her a lower berth for two dollars, which her husband paid the conductor, and the conductor assigned her a particular berth as the one designated and selected for her, and shortly after, the berth, by the conductor's direction, was properly arranged so that she could retire, which she accordingly did, it having been explained to the conductor that she was unwell and deli-

cate, as a reason why it was desired that her berth should be made down at an early hour. That when the train reached Meridian, about 11 o'clock that night, the conductor came to her compartment, and informed her and her husband that she must vacate and leave her berth at once, as it, with other berths, were needed for certain commercial travelers who came aboard the train at Meridian. It was protested that the conductor had no right to eject her, but he in a rude and offensive manner ordered her to leave the berth, and insultingly pulled back the curtain that draped her berth, and declared in a loud tone that she must get out. That the conductor insultingly refused to open the forward sleeper that they might walk through it to the day coach. That he curtly refused to permit the porter to carry her hand baggage to the day coach, and declined to assist in removing her hand baggage from the sleeper, or help her to descend from the platform. Thereupon, protesting against this denial of her legal and just rights, she, with her husband's assistance, descended from the platform, and with great pain and discomfort walked, greatly hurried and agitated, to the day coach, about the moment the train was getting into motion, and sat up during the remainder of the night. That she had suffered alarm, agitation, and distress, from the offensive manner, language, and conduct of the conductor, which produced or contributed greatly to produce an illness of a serious and perilous character, from which she suffered great bodily pain and apprehension and distress of mind, for all of which she claims damages in the sum of \$10,000. To which action the sleeping-car company, on June 1, 1891, pleaded not guilty; and the same day, by proper petition and bond, moved the case to the United States circuit court for the southern district of Mississippi. The testimony of the defendant in error and of her husband tended to prove all the material allegations of the declaration, and the testimony of a Dr. Hunter, who attended her as a physician, tended to prove that her fright, agitation, distress, and discomfort that night, if as she and her husband represented it to have been, would tend to produce, and might have caused, the miscarriage which she suffered on the 31st of August, 1890. For the defense there was proof tending to show that by a regulation of the railroad company the whole compartment in which was the berth occupied by Mrs. Dupre was reserved from sale by the conductor until after the train should pass Meridian, when, if the berths in it were not sold at Meridian, or taken by persons getting on there, the conductor could dispose of them, but not before; that this regulation was fully explained to the husband of Mrs. Dupre in her presence, and they were told they could occupy it until the train reached Meridian, but would have to surrender it then if it had been sold at Meridian; that some time before reaching Meridian the conductor learned that the compartment had been sold at Meridian, and told the husband of Mrs. Dupre that she would have to take the upper berth in another compartment, for which the conductor had given said husband a berth check when he sold him a berth; that said husband then became violent, and said they would not leave the berth Mrs. Dupre was in; that the conductor had no lower berth which he could let her have, except the lower

berth in the buffet where he slept, and which immediately adjoined the compartment where Mrs. Dupre was, and was every way as comfortable and sumptuous, which he offered to let her occupy as far as she was going, and to give her the exclusive use of the buffet compartment to Akron, which she indignantly refused, because the negro porter ordinarily sat in the buffet, and slept in the upper berth in it. There was proof also tending to show that the regulation reserving the compartment for passengers taking the train at Meridian was a reasonable one, and that on this day, 7th August, 1890, the lower berths in said compartment were taken at Meridian by parties who took the train at that point. The berth check delivered to Mrs. Dupre's husband was attached by him to his deposition offered on the trial by her, and it shows that it designates an upper berth in another compartment. There was proof tending to show that Mrs. Dupre's husband was a very excitable man, and when he was informed that compartment B, in which his wife then was, had been taken at Meridian, and she would have to vacate it, his temper rose at once to fury, and that the fright, anxiety, and distress of mind suffered by Mrs. Dupre was excited and caused by her husband's violent language and conduct; that his rage was such as rendered him deaf to all explanation, and made him reject with scorn every offer of accommodation or assistance. The proof also tended to show that for 16 or 18 days Mrs. Dupre suffered with uterine pains without calling in medical aid, and that timely, skillful medical aid might have relieved them, and prevented the miscarriage. The plaintiff in error, defendant below, requested the circuit court to give the jury what it calls "Instruction No. 1," "Instruction No. 2," and "Instruction No. 3." Instruction No. 1 has three sections, No. 2 has only one section, No. 3 has six sections, and altogether they fill seven closely printed octavo pages in the printed record, all of which the judge refused to give, and gave the jury a charge in writing, excepted to only "in so far as it failed to include the charges asked by defendant, and refused." There was a verdict and judgment for the plaintiff, motion for new trial refused, and the defendant prosecuted and perfected this writ of error, setting out separately and particularly 13 errors in its assignment of errors.

The distinguished counsel who appeared for the plaintiff in error in this court, and made an oral argument, has in his printed brief urged four propositions:

"(1) It was error in the lower court to admit the testimony of the plaintiff and her husband, contradicting the declarations appearing on the face of the berth check as to the berth bought by the plaintiff, and in refusing our instruction to return a verdict for the defendant.

"(2) The circuit court erred in refusing our request to exclude from the consideration of the jury, as a basis of damages, the uterine pains and miscarriage suffered by the plaintiff after she left the car of the defendant at Meridian.

"(3) The circuit court erred in refusing to give section 4 of instruction No. 3 asked for by the defendant company.

"(4) The circuit court erred in refusing to give the instruction asked by the defendant bearing on the contributive negligence of the plaintiff."

Only the first of these propositions relates to errors which were properly saved under the well-settled rules announced by the supreme

court. The others all relate to errors in refusing parts of instructions asked in the aggregate, which in our opinion should not have been given in the aggregate, on account of objectionable matter therein, and were therefore rightly refused. *Railroad Co. v. Horst*, 93 U. S. 291; *Harvey v. Tyler*, 2 Wall. 339, and many other cases. Sounding only this note of caution, we may waive this informality, and consider the four propositions urged by plaintiff in error in this court. The first of these propositions rests on the theory that the berth check furnished a passenger by the conductor of a sleeping car, so far as it designates a particular berth as the one assigned to the passenger, becomes, as soon as it is furnished to the passenger, and received without immediate objection, a written contract as to that subject-matter, and its terms cannot be varied or contradicted by parol testimony. It is common knowledge that in many cases, possibly in the majority of cases where the carriage begins at a terminal point, or in any large city or considerable town, the passenger receives a "sleeper" ticket at a ticket office, and surrenders this ticket on entering the "sleeper," and receives a berth check from the conductor of the sleeping car. Until only a very few years ago this berth check was taken up by the porter when he first prepared the berth to be occupied as a bed. It was then, manifestly, only a check on the employes of the company,—not the evidence during the trip or afterwards of a contract between the company and the passenger; for after it was surrendered there was nothing on it to identify it as the berth right of any individual passenger. We believe it is safe to assume that the great majority of travelers of middle age or past, who are familiar with the former practice in this respect, have not noted the change, and, of those who have noted it, few, if any, have understood that the company's purpose in discontinuing the practice of having these berth checks taken up by the porter, at the very beginning often of a several days' journey, was to convert them into a written contract, which should show beyond contradiction what berth the passenger had been allowed to select for the customary fare he had paid. An expert railroad officer, employe, or traveler may be familiar enough with the current forms of these berth checks to decipher, on a blue or other colored ground, by the lights in a sleeping car at night, the marks of a lead pencil, made by the average conductor, standing in a car on a moving train on an average track in this circuit, so as safely to accept it, as the only admissible evidence to him and to the courts, as to the berth he was allowed to select and did select, and had delivered to him, but, speaking from an average experience and observation, it is safe to say that if it is, or ever becomes, the sound and settled rule of law that such berth checks as are now commonly issued shall be conclusive evidence as to the berth contracted for, whenever any question arises between the company and the passenger as to that matter, the rule will put one of the parties largely and in many instances wholly in the power of the other. Why should it be the rule? What are the reasons which justify the rule that some contracts shall be proved only by a memorandum in writing? Or the broader rule that requires, when parties do reduce their contracts to writing, the writing

shall be conclusive between them as to all it clearly expresses that is material to the contract? The most accurate thinkers are the first to note, and the most careful to guard against, the liability of the mind to be misled by the use of terms and the application of analogies. Whatever answer may be correctly given to the last question, it can hardly be such as to draw the berth check in question, within the meaning of the rule, and give to it that conclusive force claimed for it by the plaintiff in error. A transportation ticket from Boston to Chicago is issued for use on several different lines of road, or on different divisions or conductors' runs on the same road, to be evidenced to these several numerous conductors, and to be used necessarily more than one day before being regularly exhausted by complete execution of the contract to carry, and yet, in a case arising on such a contract as a ticket for that carriage evidenced, the United States supreme court say:

"While it may be admitted, as a general rule, that the contract between the passenger and the railroad company is made up of the ticket which he purchases, and the rules and regulations of the road, yet it does not follow that parol evidence of what was said between the passenger and the ticket seller from which he purchased his ticket at the time of such purchase is inadmissible, as going to make up the contract of carriage, and forming a part of it. In the first place, passengers on railroad trains are not presumed to know the rules and regulations which are made for the guidance of the conductors and of the employees of railroad companies, as to the internal affairs of the company, nor are they required to know them." *Railroad Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. Rep. 356.

No more are they presumed to know the meaning of the detached words, abbreviations, figures, punches, blanks, and pencil marks, that can only be correctly read or interpreted by the rules and regulations which are made for the guidance of the conductors and of the employees of sleeping-car companies as to the affairs of the company, nor are they required to know them. The conductor of the sleeping car does not need this berth check to evidence to him anything expressed on it, with which the passenger has any concern. The conductor is the initial party to it, and remains constantly present with the other party, until its every function which affects the passenger should be completely discharged. The parties necessarily remain together during the whole period of the life of the berth check, and as, necessarily, not as much as a full legal day can intervene between the furnishing of it and that complete delivery of the berth itself, which surely should be as conclusive as the mystic symbols on the berth check. Each car has its conductor and porter that go with it through its whole trip, and it can receive only that limited number of passengers which an experienced conductor can readily identify and keep distinguished in his mind. In our opinion there is no necessity of the sleeping-car service, or sufficient reason shown or believed by us to exist, for giving the berth check the conclusive force as evidence insisted on by the plaintiff in error. Its first proposition therefore cannot be sustained.

The plaintiff in error's second proposition rests on the theory that, unless it was apparent to a casual observer that Mrs. Dupre was enceinte, or that fact was made known to the servants of the com-

pany, she could not recover damages for her subsequent miscarriage, though the jury might believe from the evidence the miscarriage was proximately caused by the unlawful conduct of the company's servants in expelling her from the train. This theory, and the requested charge embodying it, would require every pregnant woman to refrain from travel; to take all the risks of the negligence of public carriers; or to proclaim her condition to the servants of the carriers. We are not willing to sanction by our authority a rule that would so shock the delicacy, dignity, and sense of justice of our "honorable women not a few." The subject called for careful direction of the jury in order to exclude damages too remote; that is, such as were suffered from the action of some intervening cause, or contributed to by the negligence of the plaintiff below. Where, however, the proof satisfactorily shows that the misconduct of the carrier's servant to her while she was a passenger in the carrier's car was the proximate cause of such an injury to a married woman, the carrier should not be held exempt from liability on account of the fact that her condition was unknown to the servants of the company. We therefore do not sustain the second proposition of the plaintiff in error.

The fourth proposition of plaintiff in error we cannot sustain because the requested charge to which it refers, if we have guessed correctly, (we are left by the proposition to guess,)—section 3 of instruction 3,—is too broad to have been given as requested. It relates to a feature of the case calling for a proper charge,—one not embraced in the court's charge,—and if it had been properly limited and freed from that coloring which the zeal of advocacy often gives to requested charges, should have been given.

The third proposition must be sustained. Section 4 of instruction No. 3, asked by the company, and refused, is as follows:

"If you find from the evidence that, by the standing order of the railroad company, all of the berths in 'Letter B' were reserved for Meridian passengers, and that the conductor of the defendant erroneously sold the lower berth in 'Letter B' to the plaintiff; and you further find that, within a reasonable time before reaching Meridian, he notified the plaintiff of his error, and at the same time informed her that the berth was reserved for, and had been taken by, passengers at Meridian; and you further find that the conductor offered the plaintiff the occupation of another berth in the car, equal to the berth in 'Letter B' in accommodation; and you further find that the plaintiff refused to accept this other berth, and thereupon left the car without being compelled to do so by the conductor,—then I instruct you that the defendant was not guilty of such a breach of the contract with the plaintiff as would entitle the plaintiff to recover damages on that account."

This charge we consider substantially sound, and applicable to the issues of fact and the evidence in the case, and either it should have been given as requested, or the judge of the circuit court should have charged the jury on the point, and substantially to the effect of this request. For the error in refusing this requested charge, and in failing to charge on the point indicated by this request, the judgment of the lower court must be reversed.

It is therefore ordered that the judgment of the circuit court be reversed, and the cause remanded, with directions to that court to award a new trial.

SCHREYER v. KIMBALL LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1893.)

No. 81.

1. SALE—DELIVERY—WHEN TITLE PASSES.

A foreign merchant contracted for several cargoes of lumber to be delivered free on board ship in the Appalachicola river, seasoned when delivered, within seven months from May 1st, certain advances to be made about June 1st. These advances were made, and the first cargo was prepared by August, piled by itself in the seller's yard, and the buyer notified of readiness. The latter had difficulty in chartering ships, and later the seller's mill and all the lumber were burned. *Held*, that there was no delivery, and the title had not passed.

2. SAME—RESCISSON.

Immediately after the fire the seller notified the purchaser thereof by cable, with the request to "cancel all business," to which the buyer agreed, "subject to immediate return of advance." The seller accepted, but was silent as to the return of the advance. *Held*, that from this silence it could fairly be presumed that he thereby contracted to return the money.

In Error to the Circuit Court of the United States for the Northern District of Florida.

Action by Fr. Julius Schreyer against the Kimball Lumber Company to recover moneys advanced on a purchase of lumber. From a judgment dismissing the complaint, plaintiff appeals. Reversed.

John C. Avery, for plaintiff in error.

Fred. T. Myers, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. Fr. Julius Schreyer, plaintiff in error, a lumber dealer of Bremen, Germany, brought his action in the circuit court against the Kimball Lumber Company, a corporation of the state of Florida, engaged in the manufacture of lumber at Appalachicola, to recover the sum of \$2,400, alleging indebtedness of the defendant in error for that sum "for money payable by the defendant to the plaintiff for so much money loaned by the plaintiff to the defendant; and in a like sum of money for money had and received by the defendant for the use of the plaintiff; and in a like sum of money upon accounts stated between the plaintiff and the defendant." To this action the defendant entered a plea that it was never indebted as alleged. On the trial, the judge instructed the jury to return a verdict for the defendant, to which instruction the plaintiff excepted, and upon judgment entered against him, after moving in vain for a new trial, brought the case to this court for review. The evidence adduced upon the trial is all embraced in the bill of exceptions, and the question presented to us is whether it warranted the instruction given. The evidence shows that Schreyer contracted with the lumber company for three cargoes of from 900 M. to 1,500 M. feet of prime boards at \$12.25 per thousand feet, to be seasoned when shipped, and to be delivered free on board

ships in the Appalachicola river, within seven months from May 1, 1890; ships to be chartered by Schreyer, and charters to be made on certain specified forms, the benefits of the whole charter party to the lumber company. It was further agreed that there was to be a rebate of 25 cents per thousand to be allowed if Schreyer's agent inspected the lumber on delivery. As to payment, it was agreed that the lumber company might draw upon Schreyer at 30 days' sight, about June 1st, in the sum of 10,000 marks, to be accepted by Schreyer and received by the lumber company as an advance on the three cargoes contracted for, the same to be deducted from the price of the last cargo; and that, otherwise, the lumber company was to draw on Schreyer for the amount of invoices at three days' sight, payable at Bremen, bills of lading to be attached to the drafts. On June 2d, the draft for 10,000 marks was drawn, and was sold, netting the lumber company the sum of \$2,371.87, which sum was placed to the credit of Schreyer, and which draft was thereafter in due course paid and taken up by Schreyer. The first order under the contract, designated by the parties "Lenity," from 400 to 500 M. feet, according to specifications furnished by Schreyer, was prepared by the lumber company, and was ready for shipment in August, 1890. It was stacked in a pile by itself in the company's yards, and the plaintiff in error was notified of its readiness, and urged to send a ship for it. There was apparent difficulty in obtaining suitable ships for Appalachicola river, and the lumber remained stacked and piled until October 28, 1890, when the lumber company's mill and all the lumber in the company's yards, amounting to about 4,000,000 feet, were destroyed by fire. At the time of the fire the lumber company had insurance on all the lumber in the yard, under policies taken out before the lumber was cut for Schreyer, and taken out for the year, without regard to any particular lumber. The insurance the lumber company received, if proportioned upon the entire quantity in the yard, would have amounted to about \$6.75 per thousand feet. Excluding the "Lenity" lot, still the loss of the lumber company was largely in excess of the insurance. The lumber sawed for Schreyer had not been measured nor inspected, except as it went through the mill. The net proceeds of the draft for 10,000 marks, if applied to pay for the "Lenity" order, were not sufficient to pay the value thereof. All the details of the contract were settled between the parties by correspondence, and after the contract there was considerable correspondence between the parties with reference to other orders and the vessels that Schreyer was to charter; and therein many complaints were made by the lumber company as to the failure of Schreyer to forward ships as promptly as expected. August 20, 1890, the lumber company offered to accept another order for 300 M. feet, saying that, "if necessary, we can use from quantities now cut and piled of your schedule 'Lenity.' We understand it so. But we think we can have the cargo ready in addition to 'Lenity;' that is 'Lenity' and this 300 M. feet also by October 15th, '90." This offer was accepted by Schreyer as follows: "As to above business, I request you to prepare according to my telegram,

* * * heart face floorings, eighty per cent. free of knots, prime planks, using ready quantities for these dimensions which you have already cut for 'Lenity.'" Immediately after the fire the lumber company sent a telegram to Schreyer, as follows: "All lumber and mill burned yesterday; cancel all business,"—to which Schreyer immediately replied: "We agree canceling, subject to immediate return of advance,"—and, in a letter of October 31st, wrote: "And I hope you have already sent off to me the ten thousand marks which you have no right to keep longer, as on account of the fire you cannot furnish the cargoes upon which I have given you the advance."

The evidence of Schreyer was taken under commission, and shows that, under his understanding of the contract, the 10,000 marks was an advance on the contract of three cargoes of lumber to be deducted from the invoice of the third cargo; and the correspondence between the parties prior to the advance shows that the lumber company had the same understanding. Whether the evidence warranted the instruction given to the jury to find for the defendant depends upon the question whether the title and ownership of the lot of lumber called "Lenity" had passed to Schreyer at the time that it was destroyed by fire; for, according to the common law, the risk follows the title. 2 Kent, Comm. (6th Ed.) p. 498. The judge presiding on the trial so held the law to be; for, in giving the instruction complained of, he said to the jury: "It is clear to the court, under the testimony adduced here, that the plaintiff is not entitled to recover, as the lumber at the time of the fire was the property of plaintiff, and it is his loss." Counsel for defendant in error, in a very ingenious brief, has argued his case and supported his positions by the citation of many authorities, as though the transaction between Schreyer and the lumber company was an actual sale, under which delivery had been substantially made and accepted. This view of the case, however, we do not think is sustained by the evidence. The lumber had not been measured, inspected, nor delivered, nor had the lumber company's control over it been so abandoned but what it still had the option to use the same for other purposes without responsibility to Schreyer, provided lumber in accordance with the specifications should be delivered when Schreyer sent his ship. We view the transaction as one more in the nature of an executory agreement than an actual sale. At the time the contract was made, its subject was not in existence, except in a primitive condition, either in logs or still in the trees of the forest. To comply with the contract, the lumber company had to take all the steps and do all the work necessary to produce the manufactured article contracted for. It was to be sawed out and seasoned before it came up to the conditions required, and was thereafter to be measured, inspected, and delivered. The distinction between actual sales and executory agreements to sell in the matter of title passing is well recognized in the text-books and in many adjudged cases. See 2 Kent, Comm. 450; Benj. Sales, § 308 et seq.; Hatch v. Oil Co., 100 U. S. 124, and authorities there collated. Certainly, in this case the title did not pass at the time the contract was entered into, nor, by the terms of the contract,

was it intended to pass until actual delivery free on board such ships as Schreyer might charter and send for it; and it is clear to us that, if the title to the lumber in question ever did pass, it must have been by some contract, express or implied, entered into between the parties subsequent to the making of the original agreement. The only evidence which at all points to any such subsequent contract as having been made, is that relating to the order given by Schreyer for 300 M. feet of flooring, which shows that Schreyer consented, if necessary to fill the new order, to the taking of lumber from the lot prepared to fill the "Lenity" schedule. This falls far short of showing a contract on the part of Schreyer to vary the original agreement as to the time and place of passing title to the "Lenity" cargo, and short of showing an agreement on his part to accept delivery of the "Lenity" cargo in the lumber company's yards at a time long before he would be able to obtain a ship to receive the same. Nor do we think that this evidence shows that the lumber company understood that, in giving his consent, Schreyer was accepting delivery of the "Lenity" lot; for the company expressly said, in making the proposition, "We can have the cargo ready in addition to 'Lenity.'" The whole weight to be given to this negotiation is that Schreyer, by consenting that the "Lenity" lot might be drawn from, waived delivery until the October following if the lumber company had trouble in filling both orders.

In connection with the instruction of the court to find for the defendant, it must also be noticed that, by uncontradicted evidence, when the lumber company's mill burned, the company called on Schreyer to cancel all business. At that time there were outstanding between the parties contracts covering the delivery of at least four cargoes. Schreyer consented to the cancellation of all these orders, subject to immediate return of the advance. The lumber company accepted, but was silent as to the return of the advance. From the silence of the lumber company at this time, and its acceptance of the cancellation of all orders, it is fair to presume that it thereby contracted and agreed to return the said advance, no matter what may have been its previous title or right to retain the same.

We conclude there was error in giving the instruction complained of, and therefore reverse the judgment of the circuit court, and remand the cause, with instructions to award a new trial.

UNITED STATES v. GILLER.

(Circuit Court, W. D. Missouri, St. Joseph Division. April 5, 1892.)

INTOXICATING LIQUORS—ILLEGAL SALES—"RETAIL DEALERS."

An incorporated benevolent association, which sells, as such, to its members, for five cents each, tickets entitling the holder at a picnic of the association to a glass of beer or other refreshment, or to participate in some amusement, at his option, who, upon presentation of the ticket, and any number he may so see fit to purchase, obtains from the association beer therefor, which beer is the property of the corporation, as such, thereby becomes a dealer in malt liquors, within the act of March 1, 1879, § 18, (1 Supp. Rev. St., 2d Ed., 229,) which defines such dealer to be one

who sells or offers for sale in less quantities than five wine gallons at one time, where he does not deal in spirituous liquors. The case would be different where the beer was bought on previous contributions by the members, or as copartners in the purchase, and the assessment was based upon the proportion taken or consumed by each contributor, or like circumstance.

At Law. Trial of an indictment against John Giller for selling malt liquors without the payment of a license tax. Verdict of guilty.

Statement by PHILIPS, District Judge:

This case was submitted to the court, without the intervention of a jury, on the following agreed statement of facts: Defendant, at all times mentioned in the information, was an officer of the Bavarian Benevolent Society, a benevolent association duly incorporated under the laws of the state of Missouri. That among the objects of said society is the cultivation of social intercourse and friendship among Bavarian immigrants, and their descendants, resident in the vicinity of St. Joseph, Mo., and to provide for destitute members of the society. It is a custom of said society, in the warm season of the year, to assemble at picnics in the fields and groves in the neighborhood of St. Joseph, which picnics, to secure good order and harmony, and to promote the enjoyment of said members and their families, are conducted under the management of the officers of said association. That on such occasions refreshments are served, consisting of meats, bread, cake, and beer, which are purchased and taken to the ground by the officers of said association, and distributed to the members and families as demanded. That on entering the grounds the members can obtain as many tickets as they desire from the proper officer of the said society, paying five cents each, and each ticket entitles the holder to any one article of refreshment provided by the society, or to participate in any one exercise or game of amusement, which may also be provided. On one day in July last, said association had a picnic, of the description hereinbefore set forth, at Villa Rosa addition, St. Joseph, at which it furnished refreshments of the kind above stated, including beer, and which was distributed to the members in the manner above described. At said picnic, defendant was present, and participated in doing whatever was done in behalf of said society. Afterwards, on the 22d day of July, 1891, defendant was accused by some officer of the government with violating the law on the occasion described, and was notified to call at the internal revenue office, and take out a license, and warned that if he did not he would be arrested, and, supposing that it was required of him by law, he paid said collector an internal revenue tax for said society for a year beginning July 1, 1891, and shows to the court herewith the receipt given by the collector of the government to said society for said tax.

Hall & Pike, for defendant,

Cited *Seim v. State*, 55 Md. 566; *Com. v. Ewig*, 145 Mass. 119, 13 N. E. Rep. 365; *Barden v. Montana Club*, (Mont.) 25 Pac. Rep. 1042; *Graff v. Evans*, 8 Q. B. Div. 373; *Tennessee Club v. Dwyer*, 11 Lea, 452; *Com. v. Smith*, 102 Mass. 144; *Com. v. Pomphret*, 137 Mass. 564; *Piedmont Club v. Com.*, (Va.) 12 S. E. Rep. 963; *U. S. v. Howell*, 20 Fed. Rep. 718.

G. A. Neal, U. S. Atty.,

Contra: *U. S. v. Wittig*, 2 Low. 466; *People v. Andrews*, 115 N. Y. 427, 22 N. E. Rep. 358; *People v. Soule*, 74 Mich. 250, 41 N. W. Rep. 908; *Martin v. State*, 59 Ala. 34; *Chesapeake Club v. State*, 63 Md. 446; *State v. Essex Club*, (N. J. Sup.) 20 Atl. Rep. 769; *State v. Easton, etc., Club*, (Md.) Id. 783; *State v. Nels*, (N. C.) 13 S. E. Rep. 225; *State v. Bacon Club*, 44 Mo. App. 86; 32 Cent. Law J. 98, 382.

PHILIPS, District Judge, (after stating the facts.) The statute defines a "retail dealer in malt liquors" as follows:

"Every person who sells, or offers for sale, malt liquors, in less quantities than five gallons at one time, but who does not deal in spirituous liquors, shall be regarded as a retail dealer in malt liquors." 1 Supp. Rev. St. (2d Ed.) p. 229, § 18.

The only exceptions, exempting a party making a sale from the license tax, as a retailer, are specified in section 4, same volume, amending section 3244, Rev. St., as follows: Where the liquors have been received by the vendor as security for or in payment of a debt, or as executor, administrator, or other fiduciary, or where they have been levied upon by an officer under order or process of any court or magistrate, and where such spirits are sold by such person in one parcel only, or at public auction in parcels not less than twenty wine gallons, or in the case of a sale made by a retiring partner, or the representatives of a deceased partner, to the incoming, remaining, or surviving partner or partners of the firm, or, in case of a retail liquor dealer, or a retail dealer in malt liquors selling out his entire stock in one parcel, or in parcels embracing not less than his entire stock of distilled spirits.

While not as specifically stated as it should have been, it is quite inferable from the whole of the agreed statement that the beer in question was bought by the corporation and taken by it onto the ground, through its officers. The property in it, therefore, was in the corporation, and belonged to its assets. The corporation might, as far as the United States is concerned, give this property to whom it pleased. The United States could only interfere for the purpose of exacting a license fee, or visiting with punishment for failure to obtain such license when the corporation, or any one for it, sells the liquor without license. The corporation did not give this beer away, even to its constituency. How, then, did they obtain it? Its officers or agents, after buying the beer, took it upon the picnic grounds. It is true it was taken there for the sole use of its constituent members, but it was not parceled out among them ad libitum, as the common property of all. Such of its members, only, who first bought a ticket from the association, could obtain a glass of beer. The fact that such ticket gave to the purchaser the option of taking a piece of bread or meat, or some other article of food, or participating in some chosen diversion, does not affect the question involved. Under the arrangement made, a member might have bought fifty tickets, and obtained with them as many glasses of beer. Stripped of its *modus operandi*, and reduced to its practical effect, the transaction was the same as if each person had gone to the stand erected on the grounds, and paid the agent in charge five cents for a ticket, and immediately handed back the ticket, and received a glass of beer therefor. In other words, it was the same, in its results, as if the purchaser had gone to the stand, and handed the agent five cents, and received there a glass of beer. As there is no limit to the number of tickets a member might purchase under the arrangement, one member might have "treated" 50 other members of the association to beer. The money thus taken in went into the common fund of the corporation, and became a corporation asset, to be accounted for as such.

We cannot shut our eyes to obvious facts, and say this was but an equitable method of apportioning the cost of the beer among the members of the company, by requiring him who took beer alone to pay the cost thereof. It is not stated what the beer cost the company, nor does it appear that the party who handled it on the grounds received any compensation therefor. In this age of "malt," it perhaps would not be too much to say that beer bought by the keg does not cost at the rate of five cents a glass, nor the fourth of it. The profit arising from the arrangement would go into the exchequer of the corporation. Palpably, the beer, while contributing to the social features of the occasion, could also easily be made a source of revenue to the company. Had it been designed merely as an equitable mode of distributing the beer among those who drank, the natural and simple way would have been for the managing officers of the company, by the direction or common consent of the constituency, to have either made a levy in advance on its members for the purchase of the beer, or required such as wished to indulge in the luxury to contribute sufficient money to buy the same, and pay for the handling thereof. It may be conceded that some such prior arrangement could be conducted on the basis of issuing to each contributor in advance a certificate or ticket showing the sum thus contributed, entitling the member to a number of glasses proportionate to the cost of the whole. Such an arrangement would bring the case within the condition of two or more parties who meet for social pleasure, and make up a common fund for the purchase of a keg of beer or other liquor. When thus bought, the article belongs to the parties in common. They do not become vendors of the liquor, any more than two partners who should buy liquor for their own use, and drink it between them, in such portions as suit their pleasure.

On the theory of the defendant, where is to be the limit as to either time or place or action to such an arrangement? How often may the association have such picnics? At how many places may they thus assemble under the claim of the social gathering, with its privilege? Might they not, in the heat of summer, "picnic" six days out of the week, and in the cold of winter might they not assemble in social conviviality as often in their "banquet hall," and dispense kegs of beer, at five cents a glass *ad libitum*, and cover the revenue arising therefrom into the treasury, to swell the assets of the corporation? And thus the members of the charitable and benevolent corporation would certainly acquire peculiar privileges over the unincorporated citizens. It is said, in answer to this, that the frequency of the occasion, and such transactions, may go to the trier of fact to determine whether or not such arrangement be a mere disguise for conducting a retail business in liquor, or whether it be merely accidental, and without the *animo lucrandi*. But the statute makes the act of selling, and not the good or bad intent of the seller, that which constitutes a retail dealer. Even a physician living in the country, who prescribes whisky for his patients, charging them for the liquor, is liable under this statute unless he has a license as a retail dealer. The test under the statute is, was the act a sale? Where the property belongs to a

corporation, a person, and it parts with it only on condition that he who takes pays therefor, this certainly possesses the elements of a barter and sale. If no purchaser of a ticket had taken beer at that picnic, "the stock" would have been left on the corporation's hands, as a part of its assets, and the loss, if any, would have fallen on the entire constituency.

While this statute, like any other penal statute, ought not to be so administered as to make it unnecessarily harsh and severe, it must nevertheless be kept in mind that this statute is designed to raise a revenue for the support of government. To accomplish this end the law is designedly rigorous and severe, and courts are compelled to so construe and administer it as to effect the legislative intent, which was to require all parties selling, or offering for sale, spirituous or malt liquors to first obtain a license therefor, as it is by means of the license that the revenue comes. No device or subterfuge can substitute mere form or semblance for actual substance.

While the facts of this case are somewhat peculiar, the principle involved has been settled consistent with this opinion by the adjudications in the federal jurisdiction. *U. S. v. Whittig*, 22 Int. Rev. Rec. 98; *U. S. v. Woods*, 24 Int. Rev. Rec. 150; *U. S. v. Rolinger*, 28 Int. Rev. Rec. 314; *U. S. v. Kallstrom*, 33 Int. Rev. Rec. 150. On the agreed statement of facts, the law is that a verdict of guilty should be returned, which is accordingly done.

In re COPENHAVER et al.

(Circuit Court, W. D. Missouri, W. D. March 2, 1893.)

1. FEDERAL COURTS—JURISDICTION—MANDAMUS TO COUNTY OFFICERS.

Since the laws confer upon the federal courts jurisdiction of actions against a county by nonresidents of the state, but there is no provision for the issue of an execution upon such judgment against property of the constituent, such courts have jurisdiction *ex necessitate* to compel by mandamus the proper officers to make a levy to satisfy such judgment, as provided by the state laws for raising revenue to cover the county's liabilities. *Riggs v. Johnson Co.*, 6 Wall. 166, followed.

2. SAME—CONTEMPT—HABEAS CORPUS.

Disobedience of such writ is a contempt which the court may punish by imprisonment, and it is no ground for the release on habeas corpus of county judges so imprisoned that their continued detention might seriously interfere with the collection of the county revenues, and thereby endanger the continuance of the state government.

3. FEDERAL COURTS—FOLLOWING STATE DECISIONS—BONDS.

The federal courts, in passing upon the validity of state or county bonds, will follow the constructions of state laws announced by the state courts at the time the bonds were issued, upon reliance on which they found a market, rather than a contrary construction, announced after such bonds are in circulation as commercial securities.

4. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—STATE BONDS.

The rights of investors in state bonds become vested under the laws for raising revenue to pay principal and interest existing at the time the bonds are issued, and the obligation of the contract is impaired by subsequent laws which unduly restrict their rights to compel payment; hence the "Cotton Bill," (Laws Mo. 1879; Rev. St. Mo. 1889, §§ 7654, 7655,) making such changes in the laws providing for the payment of county bonds, is

unconstitutional. *Seibert v. Lewis*, 7 Sup. Ct. Rep. 1190, 122 U. S. 284, followed.

5. SAME—PROSPECTIVE LAWS.

The provision of Const. Mo. 1875, art. 10, § 11, limiting the power of certain county courts to make an assessment for county purposes in any one year in excess of 50 cents on the \$100 valuation, has no application to county debts, contracted before the adoption of the constitution, for the section itself excepts from the restriction "taxes to pay valid indebtedness now existing." *State v. Schooley*, 84 Mo. 447, followed.

Petitions of B. R. F. Copenhaver and Thomas Nevitt for writ of habeas corpus. Denied.

John H. Lucas, for petitioners.

Geo. A. Neal, for the United States.

PHILIPS, District Judge. This is an application for discharge from imprisonment by the writ of habeas corpus. The petitioners are justices of the county court of St. Clair county. They are so imprisoned in the jail of this county on a contempt proceeding for refusal to obey the mandate of this court requiring them to make a levy, under the state law, to satisfy a judgment of this court against said county of long standing. While it greatly interrupts my attention to other pressing matters impatiently awaiting action by the court to stop to consider this case, in view of recent public agitation respecting the imprisonment of these petitioners, the cause of truth and justice well justify the day's attention I have given to it. The right of the citizen to have his cause heard without denial or delay, where his personal liberty is concerned, is paramount under our republican form of government. If their restraint be without "due process of law," they should be discharged. This application involves the authority of this court to imprison judges of the state county courts for refusal to obey the writ of mandamus. It is sufficient to say that this has now been the settled practice, established by decisions of the supreme court of the United States for over 30 years. It is a question which has called forth the best efforts of the ablest lawyers of the republic in its discussion, and on which has been expended a vast wealth of legal and judicial learning. It received its quietus in the cause celebre of *Riggs v. Johnson Co.*, 6 Wall. 166. There was nothing political or revolutionary in the history of the establishment of this rule of practice in the federal courts. It was affirmed in a unanimous opinion by the supreme court, presided over by Chief Justice Taney, in 1860, in *Knox Co. v. Aspinwall*, 24 How. 376; and the final settlement of the question was an able opinion written by Mr. Justice Clifford, and concurred in by Mr. Justice Field, and others; Justice Miller dissenting with characteristic energy and ability. The doctrine sprang from the necessities of the case. As no law authorized the issue of an execution in the instance of a judgment in the United States court against a municipality, directly against the property of a constituent member of the corporation, the writ of mandamus was, ex necessitate, resorted to as the equivalent of an execution, to require the local agency of the state to make the levy as provided by the state statute for raising

revenue to cover liabilities of the municipal government; otherwise the federal judiciary would present the anomaly of being provided for in the organic law of the federal government, with unquestionable power and jurisdiction to proceed to judgment in an action by a non-resident citizen against the county or other municipal organization, and yet without power to execute judgment. As expressed tersely by the supreme court: "No court having proper jurisdiction and process to compel the satisfaction of its own judgments can be justified in turning its suitors over to another tribunal to obtain justice." In other words, it would seem to be a travesty of justice that, after conferring on the United States court jurisdiction to render judgment, (as congress had the unquestioned right to do,) the judgment suitor, as the opposers of the doctrine in question contended, should be turned out to pursue his remedy by another suit on his judgment in the state court. It is not necessary for me to say at this late day in the history of this matter what other remedy congress might have provided to mitigate any supposed evils of the practice in vogue, or what substitute might now be made with justice to both creditor and debtor. But it is proper to say that, unless congress shall wholly strip the courts of the United States of jurisdiction over controversies between citizens of different states whenever a municipality is concerned, it were madness to suppose it, or the federal courts, will ever deny the remedy by mandamus, until some other remedy, equally, if not more, efficacious, is provided.

It is insisted here, as elsewhere, that the federal courts of this jurisdiction, in attempting to enforce the collection of these county bonds, are disregarding and overriding the decisions of the state supreme court in construing the constitutions and statutes of the state. Sometimes a cure for a prevailing public distemper is found in a forgotten or neglected chapter in history, written or unwritten. I will take this occasion to recall one, connected with the county bond litigation in this state, which establishes the fact, however little it may suit the purpose of some people, that the responsibility for the judgments in this court against St. Clair county rests rather upon the rulings of the state supreme court than the federal courts. No state court had decided the subscription of St. Clair county invalid prior to the adjudication in the federal courts. Senator Vest and myself were the attorneys for the counties of Cass, Henry, and St. Clair throughout that litigation. The cases against Henry and St. Clair counties involved precisely the same questions, so that the litigation was conducted, by agreement, in the name of *Henry Co. v. Nicolay*, 95 U. S. 619.

Our first line of defense was that the bonds had been issued in 1870, after the adoption of the state constitution of 1865, and were in contravention of section 14, art. 11, thereof, which prohibited the county from issuing such bonds in aid of any railroad without the consent of two thirds of the qualified voters of the county, expressed at an election held therefor. We were at once confronted with decisions of our own supreme court, holding that this provision of the constitution was prospective, and had no retroactive operation, so as to subject to its interdiction a subscription made under a charter

granted by the legislature anterior to its adoption. The Macon County Case, 41 Mo. 453.

Our next contention was that this subscription in fact was not made under the provisions of the old charter of the Tebo & Neosho Railroad, as claimed, granted in 1859, but under the act of the legislature of March 21, 1868, (Laws Mo. 1868, p. 90,) which provided for building branch railroads; that, this statute having been enacted after the constitutional provision went into effect, no such subscription could be made without the consent of the required two thirds of the qualified voters of the county.

Again we were confronted with decisions of our state supreme court, affirming the validity of the act of 1868, and holding that a like subscription, made under like charter, supplemented by said act, was valid, notwithstanding no election was held. *State v. Sullivan Co.*, 51 Mo. 522, and *State v. Green Co.*, 54 Mo. 540. The first opinion was by Wagner, J., and concurred in by Adams, Ewing, and Sherwood, JJ., Napton, J., not then being on the court; the Green county decision, also by Wagner, J., being concurred in by Adams and Napton, JJ., Vories, J., dissenting, Sherwood, J., not sitting.

The next fortification we fell back behind was the act of 1861, (Laws Mo. 1861, p. 60,) which declared that "it shall not be lawful for the county court of any county to subscribe to the capital stock of any railroad company, unless the same has been voted for by a majority of the resident voters," etc. As this statute was enacted prior to the exercise of any right under the antecedent charter, and contained almost a penal prohibition, we believed it was an express legislative limitation ingrafted upon the exercise of the grant. When it was called to the attention of Judge Dillon on argument, it so staggered him that he announced that he would take the matter under advisement until the next term of court, in November, 1873. But in the interim the case of *Smith v. Clark Co.*, 54 Mo. 58, was brought before the state supreme court, and when Judge Dillon went upon the bench at Jefferson City in November, 1873, the decision of the state court was handed to him, not only reaffirming the validity of the act of 1868, the exemption of anterior charters from the operation from said section of the state constitution of 1865, but entirely sweeping away from us the act of 1861, the last rock on which we planted ourselves with any reasonable hope of success. That opinion was written by so distinguished a jurist as Judge Napton, and was concurred in by Adams, Vories, and Wagner, JJ., Sherwood, J., absent.

Judge Dillon followed the rulings on these statutes and the state constitution by the state court, and we lost. When we reached the United States supreme court on appeal, the case of *County of Scotland v. Thomas*, 94 U. S. 682, from this circuit, had been passed on by the court, following the same rulings of the state supreme court; and when Hon. James O. Broadhead and myself entered upon the argument in the Nicolay Case we were informed at the outset that the questions involved had been decided against the county by our own supreme court. The Scotland County Case was reaffirmed, and we were left dead "in the last ditch." And it is worthy of observa-

tion in this connection that the doctrine of the inviolability of such bonds as commercial securities when in the hands of purchasers for value was as stoutly asserted by our supreme court as it has ever been maintained by the federal courts. See *Flagg v. City of Palmyra*, 33 Mo. 440; *Smith v. Clark Co.*, 54 Mo. 71-74. So let the responsibility, if any is to attach by way of censure, for the deplorable condition of the taxpayers of St. Clair county, rest where absolute history places it.

It is true, after the state court had been accorded a *locus poenitentiae*, after the counties had lost in the federal supreme court by following the state court, and after the bonds in question had entered into circulation as commercial paper on the faith of its prior rulings, the light of a new revelation fell upon it, and it discovered the unconstitutionality of the said act of 1868 and the validity and virtue of the act of 1861. But the mischief done was then incurable. The supreme court of the United States refused to follow these later decisions of the state court on the well-established rule that the contract, as respects commercial paper, should be enforced according to the construction put upon the local statutes by the local court at the time the contract was made or the bonds went upon the market. The history of the federal adjudications utterly contradicts the contention of counsel that the federal courts had hitherto followed as a settled rule of practice the latest rulings of the state courts in the application of state statutes to commercial securities until the later bond litigation arose. The doctrine was established, and then on precedent, by so pronounced a state-rights jurist as Chief Justice Taney in *Insurance Co. v. De Bolt*, 16 How. 416-432, decided in 1853. It was not a municipal bond case, but arose on a state law of Ohio to tax banks, etc., and the question was whether the court should follow that ruling of the state court, made at the time the contract in question was made, or later decisions, overruling the former construction? *Inter alia*, he said contracts had been made with the state authorities under the first rulings of the state courts; "and upon a question as to the validity of such a contract, the court, upon the soundest principles of justice, is bound to adopt the construction it received from the state authorities at the time the contract was made. * * * Indeed," he further says, "the duty imposed upon this court to enforce contracts honestly and legally made would be vain and nugatory if we were bound to follow those changes in judicial decisions which the lapse of time and the changes in judicial officers will often produce; * * * and the sound and true rule is that, if the contract, when made, was valid by the laws of the state as then expounded by all the departments of its government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state or decision of its court, altering the construction of the law." So the court in *Gelpcke v. City of Dubuque*, 1 Wall. 206, says: "It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. We shall never immolate truth, justice, and the law be-

cause a state tribunal has erected the altar and declared the sacrifice." And Judge Napton, in the Clark County Case, *supra*, asserted the same doctrine, and on page 70, after adverting to the fact, according to his construction, that our own courts and legislature had so construed the statutes in question up to a given time, and no doubt acted on by corporations, counties, and municipalities, observed: "The necessary result was the investment of vast amounts of money in securities issued by counties, cities, and towns by virtue of the provisions in the charters of railroad companies. After the acts, etc., the subject was regarded as *res adjudicata*, and upon this view millions of dollars have been invested. Whatever, therefore," he proceeds to say, "might be the opinion of this court or any individual judge, had the question come up for examination as an open one, we are all of the opinion that it is now too late to disturb the received construction." So, if the United States courts declined afterwards to follow the later tergiversations of the state court, it had for its authority the unanimous judgment of the state court. After these judgments were thus fastened immovably upon the taxpayers of the county, the taxpayers have been largely induced to resist settlement by compromise because of the fact that a Pegasus can be reduced to a "hobby horse," on which the local agitator hopes to ride into county office.

It is urged upon me that the attempt by this court to compel by *mandamus* these justices to make a levy is to bring them into direct conflict with the laws of the state, and would, if obeyed, subject them to punishment as for a misdemeanor. The statute thus interposed is what is commonly known as the "Cotty Bill," enacted in 1879, and incorporated in the statutes of 1889, (sections 7654, 7655,) of which enactment it is not too much to say that, had it conformed to the spirit of the state constitution, requiring the title to indicate the purpose of the act, it should have been entitled "An act to prevent the collection of judgments rendered in United States courts against any county or municipality in the state," for this, as is well known to every well-informed person familiar with the history of the county bond litigation, was its inspiration and object. This act undertook to change entirely the law in existence at the time the bonds were issued for raising the revenue necessary to meet the accruing interest thereon. The federal courts have never questioned the right of the state to prescribe its own method for raising a revenue, or the money for meeting such bond debts. They also recognize the right of the state to change the remedy therefor, provided only that in such change it make some suitable or adequate remedy, equally efficacious, so as not to destroy or impair the right. But this legislation sought to so obstruct the right as to render it impracticable of enforcement, by leaving it to the pleasure of the state courts. In effect, it subjects such judgments on contracts made anterior thereto to the supervision of the justices of the county court, as they are only required to act when satisfied that a necessity for such levy exists. Then they are to enter such finding of record, and certify to the county attorney to present the matter, at his own sweet will, and in his own time, to the circuit court, where the judgment of the

United States court must again run the gauntlet of revision of the circuit court judge. "Such circuit court, or the judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy, and collection thereof will not be in conflict with the constitution and laws of this state, shall make an order directed to the county court, commanding said court to have assessed, levied, and collected such other tax," etc.

The judgment of the United States court must receive, first, the approval of the county justices that a levy is necessary to satisfy the same. Then the circuit court is to pass upon the question as to whether such judgment conforms to its conception of constitutionality and lawfulness. If the opinion of the state courts be adverse, it is an end of the judgment of the United States court. This statute was sought to be applied to a judgment of the United States court at St. Louis, rendered on bonds issued for Cape Girardeau township, prior to the passage of the "Cotty Bill." The case went to the supreme court of the United States. *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. Rep. 1190. In a unanimous opinion that court held this act to be in contravention of section 10, art. 1, of the federal constitution, which prohibits any state from passing any law "impairing the obligation of contracts." The opinion quotes the language of Chief Justice Taney in *Bronson v. Kinzie*, 1 How. 317:

"It is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceeding with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

In *Louisiana v. New Orleans*, 102 U. S. 206, Mr. Justice Field says:

"The obligation of the contract, in the constitutional sense, is the means provided by law by which it can be enforced. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

The court held, not that the levy in such case should be made despite any statute law of the state, but simply that it should be made under the law in force at the time the contract was made. The court say:

"When he seeks and obtains the writ of mandamus from the circuit court of the United States for the purpose of levying a tax for the payment of the judgment which it has rendered in his favor, he asks and obtains only the enforcement of the laws of Missouri under which his right became vested, and which are preserved for his benefit by the constitution of the United States. The question, therefore, is not whether a tax shall be levied in Missouri without the authority of its laws, but which of several of its laws are in force and govern the case."

No lawyer or statesman will question the right of the supreme court to construe the federal constitution, and determine when a state law impairs the obligation of a contract, or that its decision is conclusive, and becomes the supreme law of the land. So, when the county justices shall make a levy pursuant to the statute of the state in force at the time these bonds were issued, they will act in obedience to the supreme law of the land. And it is but due

to the state courts to say that they would respect the decision of the court of final resort, and decline to interfere with or to punish the county judges for obeying the paramount law. If, however, the courts should thus attempt to molest such officers for executing the mandate of the federal court, they would be protected by the supreme judicial power, under our form of government. It reaches the very depth of shallowness to imagine that any conflict of duty or obligation exists in the case of these petitioners. The excuse has no foundation in fact or law. What has just been said respecting the prohibition upon the state to "impair the obligation of contracts," applies to the next contention of petitioners, that the state constitution (article 10, § 11) limits the power of the county court of St. Clair county to make an assessment for county purposes in any one year to 50 cents on the \$100 valuation; and the petitioners allege they have made this maximum assessment, and it has not produced more than sufficient revenue to defray the ordinary necessary expenses of county government. It is enough to say that the concluding clause of said section of the state constitution expressly excepts from the operation of said restriction the "taxes to pay valid indebtedness now existing." As this constitutional provision first appeared in the constitution of 1875, it has no application to the debt in question. This has been expressly so held by the state supreme court in *State v. Schooley*, 84 Mo. 447, which arose in St. Clair county, opinion by Judge Black, who was a conspicuous member of the convention which framed the constitution.

The court will furthermore say that where the amount of the judgment is so great as to make its payment unduly burdensome in any one year, its practice, where the county court is willing to comply, is to require only a moderate per cent. of the judgment to be imposed in any one year.

It is finally suggested by counsel for petitioners that the continued imprisonment of these judges might seriously interfere with the collection of the revenues of the county, and thereby endanger the continuance of the state government. With equal logic might it be contended that if the county judges, for contempt committed against a state court, or for a violation of the criminal law of the state, be fined or lodged in a county jail awaiting trial, they should be unconditionally discharged by the state court, lest a session of the county court might not be held for the transaction of some important business. Any failure of administration of the county affairs by these judges is not the fault of this court, but of the county officers who will not obey the mandate of a court of competent jurisdiction, or of the people of the county who will not allow their county judges to perform their duty to this court, and of those who encourage them in their resistance to law.

A word as to the popular view of this controversy may serve to dispel some prejudice connected with this case. It is true no election was held in this county on the question as to whether the subscription should be made; but the truth is that the subscription was not made by the county court under cover, or in the dark. At that time a large and most respectable element of the

taxpayers of St. Clair county was under the ban of disfranchisement, and, as a more just method of reaching the sense of public opinion, petitions were circulated and signed by a very large number of taxpayers asking the court to make the subscription,—so large that it indicated a very strong popular feeling in the county in favor of it. In its isolation from railroad communication, the enterprising men of the county felt the necessity for and desired the building of a railroad into the county. In their zeal and enthusiasm sufficient safeguards were not thrown around the contract to protect the county against the contingency of a misapplication of the proceeds of the bonds; but the county court thereafter made levies and collected taxes to meet the interest on these bonds, and voted their subscription as stockholders in the road, and thereby invited public confidence in the integrity of her bonds. A large amount of work was done on the roadbed between Kansas City and Osceola, in St. Clair county. And while the corporation to whom the bonds were delivered did not complete the road, the roadbed thus constructed has since been turned over by the county to another railroad company, which has built the railroad without further cost to the county, and has long been operating the same into the county. And after the adverse decision of the supreme court of the United States in the Nicolay Case, as late as 1876 or 1877, the county judges proceeded with another levy, and the money they have thus collected from the people is held by the county authorities to-day. These facts are stated merely to show that the conduct of that court and the people of the county has given circulation and value to the bonds in question as commercial paper, and therefore a strong equity exists in favor of those who have since invested their money in these securities.

The county, instead of following the advice of their counsel, when their cause was last in court, to settle on the best terms attainable, has followed an evil genius, until the accumulated interest on the debt has swollen to fearful proportions. Every man of sense must recognize the fact that this debt cannot now be paid in full. It would be a disgrace to the state to repudiate it, and I believe it would be an insult to the intelligence and honor of the people of the county to suggest such attempt. The proper solution of the problem is an adjustment; and he who, with unselfish patriotism, controlled by a sense of justice, shall, on terms of equal equity to creditor and debtor, bring about such compromise, will enjoy, as he will most deserve, the lasting gratitude of the good people of St. Clair county.

As, in committing these petitioning judges to jail as for a contempt, I have followed the law and the practice of the courts, both federal and state, as I understand it, the petitioners are remanded.

I trust petitioners will prosecute an appeal to the higher court, and obtain on the questions involved a more authoritative ruling. No one would be more pleased to see them declared free, under the law, than myself.

In re ENO.

(Circuit Court, S. D. New York. March 27, 1893.)

NATIONAL BANKS—CRIMES—EXCLUSIVE FEDERAL JURISDICTION.

The offense of making false entries in the books of a national bank, for which an officer of the bank is liable to punishment under Rev. St. § 5209, since it is not a crime of which the state courts have concurrent jurisdiction under section 5328, is exclusively cognizable by the federal courts. *Bank v. Dearing*, 91 U. S. 29, followed.

Habeas corpus proceeding by John C. Eno, detained by the warden of the city prisons of New York, under an indictment in a state court, for making false entries in the books of a bank. Petitioner discharged.

Geo. Bliss, (Frank Hiscock, of counsel,) for petitioner.
De Lancey Nicoll, Dist. Atty., for the People.

WALLACE, Circuit Judge. The petitioner, who is in the custody of the warden of the city prisons of New York city under bench warrants issued upon indictments preferred in the court of general sessions of that city, seeks by this proceeding in habeas corpus to procure his discharge upon the ground that the state court is without jurisdiction to entertain the offenses for which he has been indicted, and that jurisdiction thereof is exclusively vested in the courts of the United States. The indictments are five in number, and charge Eno with acts which are made criminal, and defined as forgery,—some in the second degree, and the others in the third degree,—by sections 511 and 515 of the Penal Code of the state of New York, enacted in 1881. These acts were committed while Eno was an officer of a national banking association,—the Second National Bank of the city of New York,—and they consist in the making by him of certain false entries in the books of the banking association with intent to deceive. Such acts are offenses against the laws of the United States, previously enacted, commonly known as the National Banking Act, and embodied in the revision of the statutes of the United States in 1874. Section 5209 of the Revised Statutes of the United States declares that every officer of a national banking association who makes any false entry in any book of the association with intent to injure or defraud the association, or any other company, body politic or corporate, or any individual person, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years or more than ten. It is not disputed that the jurisdiction to punish these acts as crimes against the United States is vested by the laws of congress in the courts of the United States, but it is contended in behalf of the state authorities that the state court has also jurisdiction, because the acts are as well offenses against the people of the state.

National banking associations are the creatures of the legislation of the United States, and it cannot be doubted that the power resides exclusively in congress to prescribe what acts may or may not

be done by their officers in conducting their operations, and what shall be lawful and what unlawful, and, having prescribed what acts shall be unlawful, to declare what penalties and punishments therefor shall be visited upon the offender. The laws of congress over the subjects legitimately within the sphere of their authority by the constitution are the paramount law of the land, and are necessarily exclusive of all state legislation inconsistent with them. Upon this principle it was adjudged in *Bank v. Dearing*, 91 U. S. 29, that, congress having prescribed a forfeiture for the taking of unlawful interest by a national bank, no other penalty created by the usury laws of a state could be enforced.

The question has frequently arisen whether in the case of an offense not exclusively cognizable by the federal courts, but punishable by the laws of congress, which is also an offense at common law, the state courts can exercise a concurrent jurisdiction with the courts of the United States; and it is well settled that they can. On the other hand it is settled by a great preponderance of authority that when the offense is created by the laws of congress, and jurisdiction over it is expressly, or by necessary implication, vested exclusively in the courts of the United States, the state laws and state courts cannot touch it, although it may also be an offense against the state.

No useful purpose will be subserved by a citation and analysis of the numerous adjudications upon these questions in state and federal courts. Some of them, however, may be referred to, in which the offenses under consideration were acts made criminal by the laws of congress relating to national banking associations. In *People v. Fonda*, 62 Mich. 401, 29 N. W. Rep. 26, it was held by the supreme court of Michigan that the state courts had no jurisdiction of the crime of embezzlement or larceny by a clerk of a national bank, for the reason that such offense is covered by section 5209 of the Revised Statutes of the United States, and jurisdiction of it is conferred upon courts of the United States by section 711 of those statutes. In *Com. v. Felton*, 101 Mass. 204, the supreme court of Massachusetts held that a person charged with being an accessory to an embezzlement by an officer of a national bank could not be convicted, because the provisions of the national banking act covered the crime imputed to the principal offender, and the courts of the United States were vested with the exclusive cognizance of that crime. In the case of *Cross v. North Carolina*, 132 U. S. 131, 10 Sup. Ct. Rep. 47, the supreme court affirmed the validity of the conviction in a state court of a person indicted for forging a promissory note made payable at a national bank, placing the decision upon the ground that the forging of such a note was not an offense under the national banking laws. The court said:

"If it were competent for congress to give exclusive jurisdiction to the courts of the United States of the crime of falsely making or forging promissory notes purporting to be executed by individuals, and made payable to or at a national bank, or of the crime of uttering or publishing as true any such falsely made or forged notes, it has not done so. Its legislation does not assume to restrict the authority which the states have always exercised, of punishing in their own tribunals the crime of forging promissory notes and

other commercial securities executed by private persons, and used for purposes of private business."

Not only are the acts for which the petitioner is under indictment in the state court created offenses by the laws of congress, and their punishment defined thereby, but they are offenses exclusively cognizable by the courts of the United States, by force of section 711 of the Revised Statutes of 1874. That section provides that the jurisdiction vested in the courts of the United States, "of all crimes and offenses cognizable under the laws of the United States, shall be exclusive of the courts of the several states." By section 5328 a large class of offenses cognizable by the courts of the United States are withdrawn from the operation of section 711; but offenses arising under the laws relative to national banking associations are not enumerated as within the exception.

The conclusion seems inevitable that the offenses for which the petitioner has been indicted are exclusively cognizable by the courts of the United States. It is proper to say that if any serious doubt were entertained as to the want of jurisdiction of the court of general sessions of the city of New York, and its consequent want of authority to retain the petitioner in custody, such a disposition of the present proceeding would be made as would permit that question to be raised, in the event of a conviction upon the indictment, after a trial. As it is, however, the petitioner is entitled to be discharged from custody.

In re EISNER et al.

(Circuit Court, S. D. New York. March 14, 1893.)

CUSTOMS DUTIES—CLASSIFICATION—MALT EXTRACT—PROPRIETARY MEDICINES.

"Johann Hoff Malt Extract," a medicinal compound of many ingredients, made by a secret formula, and containing 12 per cent. malt extract, and entered for 15 years as a proprietary medicine, is dutiable as a proprietary medicine, under paragraph 75 of the tariff act of October 1, 1890, at 25 per cent. ad valorem, and not under paragraph 338, imposing a duty on "malt extract, fluid, * * * in bottles or jugs, 40 cents per gallon; solid or condensed, 40 per centum ad valorem." *Ferguson v. Arthur*, 6 Sup. Ct. Rep. 861, 117 U. S. 482, followed.

Appeal by the Importer from a Decision of the United States Board of General Appraisers affirming a decision of the collector of the port of New York. Reversed.

Dudley, Michener & Ray, for importer.

Thomas Greenwood, Asst. U. S. Atty., for collector.

COXE, District Judge. The appraisers found that the merchandise imported was a fluid malt extract dutiable at 40 cents per gallon, under paragraph 338 of the tariff of 1890, which is as follows:

"Malt extract, fluid, * * * in bottles or jugs, forty cents per gallon; solid or condensed, forty per centum ad valorem."

"It is said that this is the first time the term "malt extract" ever appeared in a tariff act. The importer insists that it should have been classified under paragraph 75, which reads as follows:

"All medicinal preparations, including medicinal proprietary preparations, of which alcohol is not a component part, and not specially provided for in this act, twenty-five per centum ad valorem."

In approaching the question whether or not the importation is a fluid malt extract, care should be taken to guard against the impression, unfavorable to the appellant's contention, which is produced by the undisputed fact that the merchandise is imported as "Johann Hoff's Malt Extract," and that it is advertised, sold, labeled and even described in the protest by that name. If calling it "malt extract" makes it malt extract the appellant has no standing in court. But the question is, what is it? not what is it called? Keeping this distinction in mind the evidence in this court seems to establish the proposition that it is not the malt extract of commerce and not the article which the lawmakers must have had in mind when paragraph 338 was enacted. The Johann Hoff Malt Extract is a compound of many ingredients, made by a secret formula, consisting of herbs, roots, leaves, dextrine, water, hop extract and malt extract, but there is only 12 per cent. of the latter. It might with equal propriety be called a "hop extract," or by any one of its numerous ingredients. If this course had been adopted, and the compound had been known, for instance, as "Hoff's Herb Extract," it will hardly be contended that the presence of 12 per cent. of malt would make it dutiable under paragraph 338. Although some matters might, perhaps, have been made clearer by the proof, the court is satisfied that the merchandise in question was never known as a "malt extract" commercially, in the sense in which that word must be used as applicable to the tariff law. Of course this particular compound has long been known to the trade and commerce of this country, but it is thought that importers and large dealers would not understand the term "malt extract" to include Hoff's extract, and would not fill an order for malt extract by sending the Hoff compound. The very fact that its composition is unknown would prevent such a classification. That it is a medicinal proprietary preparation is not disputed, and it is not argued for the collector that it contains alcohol. It is thought, therefore, that paragraph 75 specifically describes it, and that the collector should have classified it under that paragraph.

It is not often that an authority is found which is an exact precedent for the case in hand. There are always some distinguishing facts, but the case of *Ferguson v. Arthur*, 117 U. S. 482, 6 Sup. Ct. Rep. 861, approaches much nearer than is usual to the facts of the present case. In principle the two cases are identical. "Henry's Calcined Magnesia" was held to be dutiable as a "proprietary medicine," although another paragraph assessed duty upon "magnesia, calcined, twelve cents per pound." Indeed, it would seem that the merchandise in the *Ferguson* Case was much nearer to "magnesia, calcined," than the merchandise here is to "malt extract, fluid." It was, in fact, calcined magnesia, but prepared by a secret formula, which gave it peculiar advantages. Here the merchandise in ques-

tion is not in a proper sense "malt extract" at all. It will be seen by the following comparison that every argument applicable to "Henry's Calcined Magnesia" applies with equal or greater force to "Hoff's Malt Extract."

Henry's Calcined Magnesia.

It has been prepared by the same family, a firm of manufacturing chemists in Manchester, England, for the last one hundred years, and has a peculiar value in the market.

That the article in question is a medicinal preparation there can be no doubt. The circular sets forth its virtues as a remedy in disease, and calls it a "medicine."

It has a character of its own, distinct from the ordinary calcined magnesia, which must arise from the special mode of manufacture.

Henry's article is not the ordinary calcined magnesia, dutiable by the pound, but something is done to that ordinary calcined magnesia by the Henrys which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine, although the base of it is magnesia calcined.

Hoff's Malt Extract.

It has been prepared by the same family, a firm of manufacturing chemists in Berlin, Germany, for the last twenty-five years, and over, and has a peculiar value in the market.

That the Hoff extract is a medicinal preparation there can be no doubt. The circulars and labels set forth its virtues as a remedy in disease, call it a "medicine," and recommend that it should be taken under the advice of a physician.

It has a character of its own, distinct from the ordinary malt extract, which arises from the special mode of manufacture and from the fact that only twelve per cent. of malt is used.

Hoff's article is not the ordinary malt extract dutiable by the gallon, but something is done to the small percentage of malt extract found there, together with the other ingredients, by Hoff, which, in connection with the manner in which it is put up and sent forth, makes it a proprietary medicine. The base of it is not shown to be malt extract.

The court does not lose sight of the distinctions pointed out by the counsel for the collector, based upon the changed language of the tariff, since the decision of the Ferguson Case; but it seems to the court, in view of the principle there enunciated and of the conceded facts that the article in question contains but 12 per cent. of malt extract, and is a proprietary medicine put up by a secret formula, that it is more appropriately assessed under paragraph 75 than under paragraph 338. Immutability of the law is a wise maxim of political economy which is too often lost sight of by the legislative power both state and national. Frequent alteration, whether by the legislature, or by those who interpret the law in the first instance, unsettles business and retards prosperity. By adopting a reasonable uniformity of construction the courts, as far as possible, should see to it that commerce is not vexed by unnecessary changes. For fifteen years the merchandise in question has entered our ports as a proprietary medicine. No reason exists for a change now.

The decision of the board is reversed.

WOOTTON v. MAGONE.

(Circuit Court, S. D. New York. November 17, 1892.)

CUSTOMS DUTIES—ASPHALT MASTIC—CLASSIFICATION UNDER THE TARIFF ACT OF MARCH 3, 1883.

Asphalt mastic, an article produced by crushing an asphaltum mined or quarried in rough chunks, often called "rock," and by melting and mixing together such crushed asphaltum and a natural mineral bitumen gathered in the island of Trinidad or elsewhere, and by afterwards casting for transportation the mixture so obtained in molds into loaves or cakes, is not

free of duty as crude asphaltum, under the provision for "asphaltum and bitumen, crude," contained in the free list (Tariff Ind., New, par. 643) of the tariff act of March 3, 1883, (22 U. S. St. p. 517,) but is dutiable at the rate of 10 per cent. ad valorem under the provision for "all nondutiable crude minerals, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, not specially enumerated or provided for in this act," contained in Schedule A (Tariff Ind., New, par. 95) of the same tariff act, (22 U. S. St. p. 494.)

At Law. Action by ——— **Wootton, executrix of Edwin H. Wootton, against Daniel Magone, collector of the port of New York, to recover back customs duties. Judgment on verdict for defendant. Statement by LACOMBE, Circuit Judge:**

During the years 1886, 1887, and 1888 the plaintiff's testator, Edwin H. Wootton, imported from France into the United States at the port of New York certain articles which were invoiced as "mastic d'asphalte" and "asphalte en pains," and entered as "asphalte crude." These articles, having been returned by the local appraiser as "crude minerals, advanced by manufacture," were classified for duty at the rate of ten per cent. ad valorem, under the provision for "All nondutiable crude minerals, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, not specially enumerated or provided for in this act," contained in schedule A (Tariff Ind., New, par. 95) of the tariff act of March 3, 1883, (22 U. S. St. p. 494,) and duty at that rate was exacted thereon by the defendant as collector of customs at that port. Against this classification and this exaction, the plaintiff's testator protested, claiming that these articles were crude asphaltum, and, therefore, free of duty, under the provision for "asphaltum and bitumen, crude," contained in the free list (Tariff Ind., New, par. 643) of the aforesaid tariff act, (22 U. S. St. p. 517.) Thereafter the plaintiff's testator made due appeals to the secretary of the treasury, and, within ninety days after adverse decisions had been made by him thereon, brought this case to recover the duty exacted upon these articles.

Upon the trial it appeared that these articles were bought and sold in the markets of this country under the name of "asphalt mastic," and consisted of loaves or cakes of an asphaltum, to which a natural mineral bitumen had been added; that this asphaltum was a fine oolite stone or carbonate of lime naturally impregnated with from 7 to 10 per cent. of mineral pitch, and was mined or quarried in rough chunks, often called "rock;" that the principal asphaltum mines in Europe were Seyssel, (ain Mons Gara,) in France, Rayusa, in Italy, (Sicily,) Travers, in Switzerland, and Limmer, in Germany; that the natural mineral bitumen of the kind added was black and viscous, and was gathered in the island of Trinidad, where its chief deposit was found, and in various other parts of the globe; that the asphaltum so mined or quarried as aforesaid was crushed; that the bitumen gathered as aforesaid was put into large melting pots, and the crushed asphaltum emptied in; that this bitumen and this crushed asphaltum were melted and mixed together, and afterwards, for transportation, cast in molds into loaves or cakes of the shape of a short section of a cylinder, constituting the articles of the kind in suit; that such articles, broken up into small pieces, a certain amount of refined bitumen, and from 40 to 50 per cent. of grit or very coarse sand, were boiled together for a certain length of time to a certain degree of heat, and the compound so formed was then taken from the fire, and used for laying sidewalks, cellar floors, roofs, and for other like purposes; that, except in combination with other substances, and after some such manipulation as described, there was no use to which such articles as those in suit could be applied; that articles similar to these in suit, and produced in Germany, in substantially the same way, from asphaltum mined or quarried there and Trinidad bitumen, were worth about half as much again as the value of such asphaltum as mined or quarried and the value of raw Trinidad bitumen taken together. Both sides having rested, defendant's counsel moved the court to direct a verdict for the defendant on the ground that the articles in suit were not crude asphaltum.

Comstock & Brown, (Stephen G. Clarke, of counsel,) for plaintiff.
Edward Mitchell, U. S. Atty., and Thomas Greenwood, Asst. U. S. Atty., for defendant.

LACOMBE, Circuit Judge, (orally.) I am inclined to grant the motion on the ground that the phraseology of the particular paragraph referred to (paragraph 95) is somewhat different from other paragraphs which have in other suits been held inapplicable to articles elsewhere enumerated by reason of the use of general or special words. The tariff act of 1883, taken together, provides, in the first place, (paragraph 215,) that certain crude articles shall pay one rate of duty, and (paragraph 638 and elsewhere in free list) that certain other crude articles shall not pay duty; in some instances by general enumeration, in others by special reference. Then there is a general paragraph, (paragraph 95,) providing that all crude materials which, by reason of the fact that there is no duty provided for them, or that they are on the free list under some general or special name, shall pay a certain rate of duty if they have been advanced in value or condition by refining, grinding, or other process of manufacture. There seems to have been in this case certainly a process of manufacture in the way of boiling; and, if requested, I would leave it to the jury to say if, under the evidence, it has been advanced in value or condition. I am free to say that I do not think there could be any dispute upon the fact that there has been some advance in value, since labor has been put upon it. It is a perfectly fair inference with regard to the French product that there was an advance in value, although no evidence has been offered except as to the German product.

Plaintiff's Counsel. I do not think it is worth while to trouble the jury on that point.

LACOMBE, Circuit Judge. As to the question of an advance in condition, I should leave that to the jury if it were a point to be determined irrespective of value, because an article may be "changed" in condition and yet not "advanced" in condition. If the question of value were entirely out of the case, I would leave it to the jury under a charge that they must be satisfied by the evidence not only that the articles were changed in form, but that the change had been itself an advance. But from the testimony here as to the value of the German article, and from the fact that in the French manufacture both capital and labor had been applied to the raw material, it would seem idle to submit any question as to whether there has been any advance in value.

Plaintiff's Counsel. I claim that what has been done was done for convenience in transportation, and that the mere process of putting it together is not a "manufacture," within the meaning of the act.

LACOMBE, Circuit Judge. I shall rule against you on that question of law, and direct a verdict for the defendant.

In re CRUIKSHANK.

(Circuit Court, S. D. New York. March 6, 1893.)

1. **CUSTOMS DUTIES—CLASSIFICATION—SIERRA LEONE BIRD PEPPER.**
Sierra Leone bird pepper unground is dutiable under paragraph 326 of the tariff act of October 1, 1890, at 2½ cents per pound, as Cayenne pepper unground, and is not within paragraph 560 of the free list exempting from duty "spices, vegetables, seeds aromatic and seeds of morbid growth, weeds, woods used expressly for dyeing; any of the foregoing which are not edible, and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially provided for in this act."
2. **SAME—DEFINITIONS.**
"Foregoing" in paragraph 560 refers to all the articles therein enumerated.
3. **SAME.**
"Edible," as applied to spices, in paragraph 560, means spices which are eaten as a sauce or condiment and not as a food product capable of sustaining life.

Appeal by the Importer from a Decision of the Board of United States General Appraisers affirming a decision of the collector of the port of New York. Affirmed.

Statement by COXE, District Judge:

The decision of the board is as follows: "The merchandise in question is invoiced as Sierra Leone bird pepper. The appraiser returned the same as Cayenne pepper unground, and the collector assessed duty upon it at two and one half cents per pound, under paragraph 326, Act October 1, 1890. The appellant claims in his protest that the merchandise is entitled to free entry as spices not edible, in a crude state, and not advanced in condition by refining or grinding or any other process. Cayenne pepper is a preparation from the dried fruit of various species of capsicum. The bird pepper or chilles in question are a species of capsicum, and we find from the testimony of witnesses who appeared before us that it is of a kind largely used in the manufacture of Cayenne pepper. Without giving further consideration to what class of merchandise congress intended to cover by the term 'Cayenne pepper unground,' we hold that the claim of the importer that the merchandise in question is a spice which is not edible is not well taken. The protest is accordingly overruled, and the action of the collector stands." Subsequently the board made a further return as follows: "First. They find that the merchandise subject of this proceeding is a spice, and that it is edible. Second. They find that the said merchandise is in a crude state, and not advanced in condition by refining or grinding or any other process." The provision of the new tariff act under which the importation was classified by the collector is subdivision b of paragraph 326. It reads as follows: "Cayenne pepper, two and one half cents per pound, unground." Paragraph 560 of the free list under which the importer insists his merchandise should have been classified, so far as it is applicable to the present controversy, reads as follows: "Spices, vegetables, seeds aromatic, and seeds of morbid growth, weeds, and woods used expressly for dyeing; any of the foregoing, which are not edible and are in a crude state, and not advanced in value or condition, by refining or grinding, or by other process of manufacture, and not specially provided for in this act." The importer insists that the merchandise in question is a spice unground, not edible, and in a crude state. After the board made its last return, additional evidence was taken in this court.

Albert Comstock, for importer.

Thomas Greenwood, Asst. U. S. Atty, for collector.

COXE, District Judge, (after stating the facts as above.) I cannot think that the appellant is right in his contention that the limiting clause, "any of the foregoing which are not edible," has no application to spices. There is no reason for excepting spices which does not apply with almost equal force to each of the other enumerated articles. They are all "foregoing." The statute, therefore, so far as it relates to the present controversy, should read as follows:

"Spices, not edible and in a crude state, and not advanced in value or condition, by refining or grinding, or by other process of manufacture, and not specially provided for in this act."

A spice entitled to free entry under this paragraph must, therefore, possess the following qualities: First, not edible; second, crude; third, not advanced in value or condition; fourth, not elsewhere provided for. The appraisers do not in terms decide whether the appellant's importation is, *eo nomine*, provided for under paragraph 326; but, in other respects, they find that it possesses all the requirements necessary to a position on the free list save one,—it is edible. An edible spice is not free. Congress has recognized the existence of an edible spice not only by providing for spices which are not edible, but by levying duties (paragraphs 713-720) upon certain spices which, clearly, must be considered as edible. The adjective "edible" found in this connection must be considered as a relative term qualified somewhat by the noun which follows it. As applied to spices it means a spice which is eaten as spices are eaten; namely, as a sauce, a condiment, a relish, not as a food product, capable of sustaining life. We speak of edible fruits and edible meats; we also speak of edible oils and edible salts; but no one supposes that the adjective is used in the same sense regarding all of these, or that when so used it is intended to convey the idea that the salt and oil are eaten in the same manner as the fruit and meat. It is fair to assume that this distinction was in the legislative mind when the tariff law was enacted. If the word has this significance in paragraph 560 the decision of the board should not be disturbed. The burden was on the importer to establish the allegation of the protest that the bird pepper imported by him was not edible. The appraisers' decision, in substance, is that he failed to sustain this burden, not having satisfied them that his merchandise was not edible. The finding that the peppers in question are edible is not so clearly against the weight of evidence as to justify the court in setting the decision aside. Affirmed.

EDISON ELECTRIC LIGHT CO. v. BEACON VACUUM PUMP & ELECTRICAL CO. et al.

(Circuit Court, D. Massachusetts. February 18, 1893.)

No. 3,096.

PATENTS FOR INVENTIONS—ANTICIPATION—EVIDENCE—INCANDESCENT LAMPS.

An application for a preliminary injunction against the infringement of Edison's patent for an incandescent electric lamp, based on prior adjudications that this patent covered a broad and fundamental invention, was resisted on the ground of newly-discovered evidence of anticipation. This evidence consisted of several incandescent electric lamps rudely fashioned of glass, with carbon filaments and iron or copper leading-in wires sealed by fusion of the glass, which the accompanying affidavit of the maker, G., stated that he had made in the fifties, producing a vacuum in the lamps by the Torricellian method. He further stated that he had used them for the purpose of display and of advertising his business of clockmaker, and that they gave a steady and lasting light, in which he was corroborated by the affidavits of numerous credible witnesses. A number of electrical experts testified, on the contrary, that the exhibits did not constitute practical lamps, inasmuch as the vacuum was originally imperfect, and was subject to further impairment because of the varying rates of expansion of glass and iron or copper. All these exhibits at the time of the trial had been damaged so as to be useless as lamps. After the argument G. produced another lamp of far superior workmanship, having a U-shaped carbon burner and leading-in wires of platinum, which he stated was made prior to 1872. It appeared, however, that this lamp bore internal evidence that it had not been exhausted by the Torricellian method, as stated by G.; and that at various times before this trial negotiations were had with G. by both the Edison Company and its rivals, wherein he was pressed to produce a practical lamp made by him before the Edison patent issued, and when it would have been greatly to his advantage to do so; and yet at such times no such lamp was forthcoming. Furthermore, while he testified that in a period of some 20 or more years he had made over a hundred lamps, continually improving them in construction and workmanship, he was only able to produce three crude examples, made in the fifties, and the one fair specimen mentioned. It was shown that he had ample opportunity to learn of the Edison patent, though he testified that he had no knowledge of it; and he never applied for a patent on his lamp, though during the period as to which he testified patents were issued to him for other articles. *Held*, that not only did this evidence lack that degree of probability which would warrant a refusal of the preliminary injunction, but, even if it were true, it would show only experiments made by G., and abandoned, which did not amount to an anticipation of the Edison invention.

In Equity. Suit by the Edison Electric Light Company against the Beacon Vacuum Pump & Electrical Company and others for the infringement of a patent. On motion for preliminary injunction. Granted.

Fish, Richardson & Storow, C. A. Seward, and Richard N. Dyer, for complainant.

Witter & Kenyon and Louis D. Brandeis, for defendants.

COLT, Circuit Judge. In May, 1885, the plaintiff brought suit in the United States circuit court for the southern district of New York against the United States Electric Lighting Company for infringement of the patent now in controversy, which was granted to Thomas A. Edison, January 27, 1880, for an improvement in electric

lamps; and on July 23, 1891, a decree was entered, adjudging the validity of the patent, and ordering an injunction and account. 47 Fed. Rep. 454. Upon appeal to the circuit court of appeals for the second circuit the decree was affirmed in October, 1892. 3 C. C. A. 83, 52 Fed. Rep. 300. Another suit was then brought in the same court against the Sawyer-Man Electric Company, and a preliminary injunction was granted pro forma until a decision could be had by the circuit court of appeals, which, on December 19, 1892, affirmed the order, and directed an injunction. Suits were then immediately brought against the Westinghouse Electric Company in Pennsylvania, the Perkins Electric Lamp Company, and the Mather Electric Company in Connecticut, and preliminary injunctions obtained. The present bill was filed January 10, 1893, and the plaintiff now moves for a preliminary injunction against the defendants, based upon the foregoing prior adjudications. This motion is resisted on the ground of newly-discovered evidence bearing on the question of novelty of the Edison invention, which was not before the courts in the other cases. As to these other cases, it is said that there has been but one final adjudication upon the merits, which was in the suit against the United States Electric Lighting Company; that the defendants in the other prior suits were so connected with that company that they were in privity with it, and that therefore injunctions were granted as a matter of course.

The suit against the United States Company was thoroughly and obstinately contested, as is shown by the record which covers about 6,000 printed pages. The general rule is that where the validity of a patent has been sustained by prior adjudication, and especially after a long, arduous, and expensive litigation, the only question open on motion for a preliminary injunction in a subsequent suit against another defendant is the question of infringement, the consideration of other defenses being postponed until final hearing. *Brush Electric Co. v. Accumulator Co.*, 50 Fed. Rep. 833; *Robertson v. Hill*, 6 Fish. Pat. Cas. 465; *Cary v. Domestic Co.*, 27 Fed. Rep. 299; *Coburn v. Clark*, 15 Fed. Rep. 804; *Mallory Manufacturing Co. v. Hickok*, 20 Fed. Rep. 116; *Green v. French*, 4 Ban. & A. 169; *Blanchard v. Reeves*, 1 Fish. Pat. Cas. 103; *Goodyear v. Rust*, 6 Blatchf. 229; *Cary v. Manufacturing Co.*, 24 Fed. Rep. 141; *Sargent Manufacturing Co. v. Woodruff*, 5 Biss. 444; *Kirby Bung Manufacturing Co. v. White*, 1 McCrary, 155, 1 Fed. Rep. 604; *Putnam v. Bottle Stopper Co.*, 38 Fed. Rep. 234; *Consolidated Bunting Apparatus Co. v. Peter Schoenhofen Brewing Co.*, 28 Fed. Rep. 428; *Newall v. Wilson*, 2 De Gex, M. & G. 282; *Davenport v. Jepson*, 4 De Gex, F. & J. 440; *Bovill v. Goodier*, 35 Beav. 427.

The only exception to this general rule seems to be where the new evidence is of such a conclusive character that, if it had been introduced in the former case, it probably would have led to a different conclusion. The burden is on the defendant to establish this, and every reasonable doubt must be resolved against him. *Ladd v. Cameron*, 25 Fed. Rep. 37; *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. Rep. 970; *Winans v. Eaton*, 1 Fish. Pat. Cas. 181; *Machine Co. v. Adams*, 3 Ban. & A. 96; *Spring Co. v. Hall*, 37 Fed. Rep. 691;

Lockwood v. Faber, 27 Fed. Rep. 63; Glaenzer v. Wiederer, 33 Fed. Rep. 583; Cary v. Spring Bed Co., 26 Fed. Rep. 38.

There is no denial of infringement in the present case under the construction given to the patent in prior adjudications. The contention of the defendants is that this motion should be denied on the ground that they have recently discovered that Henry Goebel, a German watchmaker, living in New York, invented the Edison incandescent lamp as early as 1854, and that, therefore, the Edison patent is void for want of novelty, or at least must be limited to the coiled form of filament. This is the same line of attack upon the patent which was unsuccessfully made in the case against the United States Company. It was there urged that the Starr lamp of 1845, the Roberts lamp of 1852, the Lodyguine, Konn, and other lamps which appeared between 1872 and 1876, the Bouliguine lamp of 1877, the Sawyer and Man lamp of 1878, and the Edison platinum lamp of 1879, limited the Edison patent to narrow inventions, or rendered it void for want of patentable novelty. But the court, with a most exhaustive review of the prior art before it, refused to take this view, and held that the second claim of the patent, read with the specification, covered a broad and fundamental invention, namely, an incandescent lamp, composed of a carbon filament, hermetically sealed in an all glass chamber exhausted to a practically perfect vacuum, and having leading-in wires of platinum. Judge Wallace, in his opinion in the circuit court, says:

"Read by those having this knowledge, the radically new discovery disclosed by the specification is that a carbon as attenuated before carbonization as a linen or cotton thread, or a wire seven one thousandths of an inch in diameter, and still more attenuated after carbonization, can be made which will have extremely high resistance, and be absolutely stable when maintained in a practically perfect vacuum. It informs them of everything necessary to utilize this discovery, and to incorporate it into a practical lamp. It describes, with the assistance of the recital in the second claim, as the vacuum in which the burner is to be maintained, a bulb made wholly of glass, exhausted of air, sealed at all points by the fusion of the glass, and in which platinum leading wires are sealed by the fusion of the glass. It describes the materials of which the burner is to be made, and instructs them that the materials are to be shaped into their ultimate form before carbonization. It describes the use of platinum for the leading wires, and a method of securing the leading wires and filaments, intended to dispense with clamping, which consists in moulding tar putty about the joints, and carbonizing the whole in a closed chamber."

By this invention Edison disclosed to the world for the first time a practical, commercial incandescent lamp, adapted for domestic uses. The problem was by no means easy of solution.

To subdivide the electric light, and embody it in a cheap and durable domestic lamp, capable of successfully competing with gas, had for years baffled the science and skill of the most eminent electricians in this country and in Europe. The difficulty lay in the practical construction of a durable incandescent lamp, rather than in a knowledge of the elements which should compose such a structure. Carbon burners, platinum wires, exhausted glass receivers, were old and well known. As early as 1845, Starr suggested in the King patent a lamp composed of a thin pencil of carbon, inclosed in a

Torricellian vacuum; and Roberts, in 1852, proposed to cement the neck of the glass globe into a metallic cup, and to provide it with a tube for exhaustion by means of a hand pump. Later, Lodyguine and others provided their lamps with several short carbon pencils, which were successively brought into circuit as the pencils were consumed, also various devices for perfecting the joints between the metal base and the glass globe, while Sawyer and Man, in 1878, made the bottom plate of glass instead of metal, and charged the lamp with an atmosphere of nitrogen gas, to avoid destruction of the burner from oxidation. In his 1879 lamp Edison used a platinum burner, which proved a failure, because the platinum melted near the point of incandescence. Mr. Schwendler, a noted English electrician, said in 1879:

"Unless we shall be fortunate enough to discover a conductor of electricity with a much higher melting point than platinum, and which at the same time does not combine at high temperature with oxygen, we can scarcely expect that the principle of incandescence will be made use of for practical illumination."

The arc lamp was known as early as 1844, but its great light made it unfit for use in dwellings. The question was how to divide the electric light for domestic purposes. Many scientists considered the problem as hardly within the range of possibility. From the results of the experiments of Fontaine, the French scientist, published in 1877, it would seem that almost insurmountable obstacles, founded on the operation of natural laws, stood in the way of the successful division of the electric light. Mr. Preece, the electrician for the British general post office, pronounced early in 1879 that "the division of the electric light is an absolute ignis fatuus."

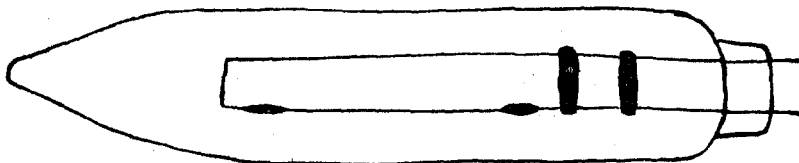
Those who dissented from this view were Mr. Edison in this country, and Mr. Lane-Fox in England, who both reached the conclusion that the subdivision of the electric light could be accomplished, provided the radiating surface of the burner of the lamp was reduced in extent, so that only a moderate volume of light would be emitted, while at the same time the resistance of the burner was increased so as to enable the employment of relatively small conductors for leading the electric current to the lamps; or, shortly stated, the burner should have a high ratio of resistance to radiating surface. Edison first embodied this discovery in his platinum lamp in 1879, but this lamp was unsatisfactory, and the problem remained unsolved. While experimenting with the platinum lamp, Edison discovered that the passage of a current through the platinum during the process of exhausting the inclosing chamber would drive out occluded gases and thereby raise the melting point of the burner. This led him to secure greater perfection in the vacuum by the employment of a highly exhausted glass chamber similar to those used by Crookes, made entirely of glass, and with all the joints closed by the fusion of the glass. After the failure of the platinum lamp, it occurred to Edison to substitute a short filament of carbon in place of the long platinum burner, into the nearly perfect vacuum chamber, and it was found that such filament was stable at high temperature, and free from disintegration and oxidation. It was thus made known that

the disintegration of the carbon burner was not caused by the electric current, but was due to "air washing," or the attrition produced by the passage of the air over the highly heated surface of the carbon.

As late as 1878, Mr. Sawyer, in a patent to Sawyer and Man, stated that no incandescent lamp had yet been devised which was practically operative, because of the defective methods employed for charging the lamp with artificial atmosphere, which resulted in the disintegration of the carbon; second, because it was impossible, under varying degrees of heat and pressure, to maintain perfect joints; third, because unequal expansion of the carbon and its holder had resulted in fractures of the burner. But Edison overcame these obstacles, and produced a practical lamp. When we review the literature which preceded this invention, the subtle force with which it had to deal, whose laws had to be intelligently investigated and understood, the well-nigh perfect workmanship necessary in construction, and the slow steps by which the end was finally reached, it seems on its face almost incredible that the incandescent lamp of Edison was in fact invented and operated by Henry Goebel in New York 40 years ago, and publicly exhibited before hundreds of people.

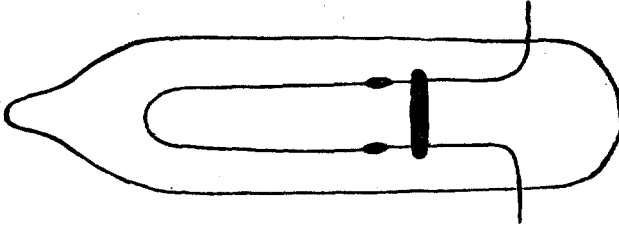
Goebel's story runs thus: He came to this country from Germany in 1848. He was a watchmaker and optician by trade, and opened a shop on Monroe street in New York. While in Germany he received instruction in physics from Prof. Munchhausen of Hanover, and assisted him in making experiments, such as obtaining light from electricity, and making galvanic batteries. Through this means he learned to make the arc lamp, and he believed that an incandescent lamp could be produced by a small continuous carbon inclosed in an exhausted glass tube hermetically sealed. He also became familiar with the use of the common air pump, the blowpipe, the method of producing the Torricellian vacuum, and the making of carbon conductors. He says he learned at this time that the coefficient of the expansion of glass and platinum were the same. As soon as he obtained money enough from his regular business, he began experimenting with electricity in his shop in New York. Soon after his arrival he exhibited an arc lamp on the top of his house, which called out the fire engines, and caused his arrest. He then turned his attention to incandescent lamps, and made a number of them. The first form of lamp he constructed was called a "fiddle bow" or "meat saw," and it consisted of an exhausted tube, made of glass, in one piece, with leading-in wires sealed into the inclosing chamber by fusion of the glass. The wires, with the carbon burner attached, resembled in form a fiddle bow.

Goebel Fiddle Bow Lamp.



The next style of lamp was called the "hairpin," from the shape of the carbon burner.

Goebel Hairpin Lamp.



A third form of lamp was also made about this time, presenting the carbon and connecting wires in a straight line, but this proved unsatisfactory as the burner broke with the heat. The leading wires were sometimes made of platinum, but generally of iron or copper, which was less expensive. The carbons used were less than one one-hundredth of an inch in diameter, and were made from flax, reed, and black cane. The first lamps were exhausted by the common air pump, but, not getting a good vacuum, they were subsequently exhausted by filling the tubes with mercury, inverting them, and allowing the mercury to run out, and then sealing them off. Before sealing, the incandescent conductor was heated slightly, which, together with a little shaking, made the mercury that stuck to the carbon fall off. The ends of the leading wires were flattened, then twisted into a spiral tube, into which the ends of the carbons were inserted, and the tubes were then compressed. The joints were generally cemented with heated stove polish, though sometimes the ends of the carbon were electro-plated with copper, and an amalgam of gold and mercury applied to the joints, which adhered to the copper; and sometimes a platinum sponge was used for this purpose. The electric current was produced by chemical action from batteries. The first lamps were made from cologne bottles, but afterwards from glass tubes.

A large number of the fiddle bow and hairpin lamps were made while living on Monroe street, between 1850 and 1872, and there was no six months up to the year 1880 when a number were not made, and prior to 1879 more than a hundred were constructed. No secret was made of any part of their construction, and they were lighted and shown to whomever desired to see them, and there was no time until after 1880 when several of the lamps were not in his possession. If the carbons did not burn up as soon as the current was turned on, the life of the lamp was almost indefinite, but it could not be run very long at a time because the battery would give out. These lamps were used upon a wagon carrying a telescope, which was taken to Union Square and Cooper Institute for exhibition. For looking through the telescope a small fee was charged, and the lamps were used partly for light and partly to attract attention. Many hundreds of people saw these lamps while so exhibited. Another lamp was arranged to illuminate the face of a clock which hung in his bed

room, and this use was continued in his Grand street house. After removing to 468 Grand street, which was in 1877, he made a mercury vacuum pump, the idea having been suggested by hearing of the Geissler pump. In using the old process to exhaust the lamps, particles of mercury adhered to the interior parts, and it was with considerable difficulty that these particles were got out. A patent was obtained on this pump January 24, 1882. In 1881, he was employed by the American Electric Light Company. He refused to leave his shop, but his son Adolph, now dead, worked for the company at its factory. About this time Mr. Crosby, who was connected with the company, called upon him several times, and was much interested with his lamps, and engaged him to make carbons and exhaust lamps. Until he worked for the company he never heard of Edison, or his incandescent lamp, or of a dynamo machine for electric lighting, and had never read anything on the subject in the public prints. He does not read English, but speaks and understands it fairly well. The Goebel lamp, Exhibits 1, 2 and 3, he recognizes as his own manufacture, and says that these very lamps were made before gas was put into his house on Monroe street. These lamps are of the fiddle bow form. He is positive they were made before gas was introduced into his house, because they are discolored by smoke from an oil lamp flame employed in the use of the blow-pipe.

After arguments on the motion, Goebel filed a supplemental affidavit, and produced another lamp, known as "Exhibit 4." This lamp has leading-in wires of platinum, and is of much superior workmanship and finish. He also produced several tools for making carbons, and describes their use. He declares that before 1872 he had arrived at a definite conclusion as to the best material for making carbons, and had settled upon bamboo. He had also decided upon platinum as the best leading-in wire, and stove polish as the best material for cementing the joints. He says that lamp No. 4 has been in his possession since before moving from Monroe street in 1872; that he made it and burned it a good many times before and since; that he made other lamps, both in Monroe and Grand streets, with carbonized bamboo burner, platinum leading wire connections, and glass tube, similar to No. 4, but he doubts if in any other lamps the glass feature was as handsome as in this exhibit. He has recently been informed that Mr. Pope had given as a reason why he did not think this lamp was made by the Torricellian vacuum that there would in such case be a deposit of mercury upon the surface of the copper wire which connects the carbon with the platinum wire, and that he discovered no such appearance. He told Mr. Pope he was mistaken, provided that distilled mercury was used in producing the vacuum. The mercury that he used in producing the vacuum in these lamps was carefully distilled, sometimes three or four times, before it was used, and the process was always performed in a dry atmosphere, and other safeguards used, such as heating the mercury slightly. He had also employed, previous to 1872, a mercury pump, in which no mercury was present in the glass part of the lamp, but he succeeded better with the Torricellian process than with this early

mercury pump. As compared with the incandescent lamps of to-day, these early lamps gave a fairly good light. He declares he has received no money for his affidavits, and has no interest in this suit, and that he has given his evidence reluctantly, and after considerable urging.

I have given the substance of the leading points of Goebel's affidavits, because this case rests largely upon them. With respect to the age and history of lamp No. 4, it may be said that the evidence rests entirely upon his affidavits and that of his son, Henry Goebel, Jr.

The defendants produce some forty affidavits in confirmation of the statement of Goebel respecting his lamp. Of these witnesses, five are his children, one his niece, and the remainder nearly all friends or acquaintances. So far as appears, these people are respectable and truthful. They testify generally to seeing the Goebel electric lamp in his shop and on his wagon containing the telescope, at various times between 1850 and 1882, the time and the circumstances in many instances being given in detail, and some 20 witnesses identify the early fiddle bow lamps as the same as those which they saw. Several witnesses also observed the lamp connected with the clock. To some, Goebel explained how the lamps were made, and several assisted him in their construction. Some declare the light was good, but do not state the length of time the lamp would burn. Generally speaking, the testimony is confined to the old fiddle bow lamp, and relates to a period prior to or about 1860. A number of witnesses testify as to the good character, honesty, and truthfulness of Henry Goebel.

It appears from the affidavit of Mr. Bull, an attorney at law, that Henry Goebel, Jr., delivered lamp No. 1 to him at his office in New York, October 18, and lamp No. 2, November 28, 1892, and that when received both the carbons were detached from the leading-in wires, and that he was then informed by Goebel that both the carbons were intact when he put the lamps in his pocket to bring them to his office. Henry Goebel, Jr., states that he delivered lamp No. 3 to Mr. Bull at the same time with No. 2, and that he broke the carbons in lamps 1 and 2 on the way to Mr. Bull's office. From Mr. Williams' affidavit, it seems that gas was introduced in Monroe street in or about the year 1854. This, with the testimony of the elder Goebel and other witnesses, fixes the date of the construction of lamps 1, 2, and 3, as early as 1854. Mr. Curtis, the counsel for the defendants in the New York cases, states that he first heard of Henry Goebel in the early part of 1882, and that in answer to his questions he said that he had made incandescent lamps like Edison's as early as about 1850. Owing to Goebel's imperfect English, he had difficulty in understanding him. He gathered from the conversation that Goebel had not made any use of the lamps except for laboratory experiments, and that his work was not continued for more than a year or two after 1850. He asked him to produce some lamps, and he said he would look them up. His recollection is that he saw Goebel again, but that he had no further information to impart. In the latter part of 1890, Mr. Bull, who had been counsel for the Consol-

idated Electric Company, informed him that Goebel's sons corroborated their father's statement, and that further additional evidence could be procured, but, after consultation with Gen. Duncan, they concluded that the evidence was not sufficient to warrant an application to reopen their case to admit it. At the time of the injunction motion in the Sawyer-Man case in November, 1892, he made further inquiry in regard to Goebel, and was informed that some additional evidence had been obtained. Upon consultation with his associates, Mr. Wetmore and Mr. Root, it was concluded that the matter had not been sufficiently developed to present it as a defense in that case. Mr. Curtis goes on to state that, had he known of anything like the character and extent of the Goebel evidence as presented in this case, he should have regarded it of the greatest importance as constituting one of the best defenses in their cases.

In further support of the Goebel anticipation, several experts give affidavits to the effect that the Goebel lamp, assuming that it was made prior to 1879, contains the broad invention covered by the second claim of the Edison patent, as it embodies the same combination of a carbon filament with an all glass exhausted receiver and conductors passing through the glass. Mr. Pope declares that Goebel lamps 1, 2, and 3 have a carbon filament, within the meaning of the second claim of the Edison patent, as defined by the court, a receiver made entirely of glass, and exhausted of air, and conductors passing through the glass; and all these elements combined for the purpose set forth in the patent; that these structures embodied the conception that carbon would stand high temperature, even when very attenuated, if operated in a high vacuum without the phenomenon of disintegration. He finds these particular lamps are not now in a condition to be operated, but he is satisfied that when first constructed they were capable of such operation, and had in fact been so operated. He knows of no reason why these lamps should not have been made long prior to 1879, and should not last as long and be as practically useful as many forms of lamp described by Edison in his patent. He finds the leading-in wires in lamps 1 and 2 to be of iron, and in 3 of copper. In No. 3 he finds the leading-in wires are sealed by fusion into the lower end of the glass chamber, the glass being pressed around them when hot. The filament is made of carbonized woody fiber, apparently of bamboo or cane, and has a diameter approximately of eight to ten one thousandths of an inch. The glass chamber is five inches long and seven eighths of an inch in diameter, but is now cracked near the bottom, and consequently there is no vacuum.

Mr. Cross confirms these statements, and calls particular attention to the fact that the Goebel carbon is, by reason of its small diameter, a "filament," as distinguished from a "rod," according to Prof. Barker's tables, and in the sense in which that term is used in the Edison patent as judicially construed.

In a second and supplementary affidavit, Mr. Pope says, with respect to the highly finished Goebel lamp No. 4, which has platinum leading-in wires and hairpin-shaped carbon, that at first he had

doubts whether it was constructed as early as Goebel and his son Henry said, or prior to 1872. This arose from the circumstance that the joint between the carbon and copper wire appears to have been made in part by electro-plating, and his experience led to the opinion that if the lamp had been first filled with mercury and then exhausted by inverting the tube, in one of the ways Goebel practiced, the mercury would have united with the surface of deposited copper, and some traces of it remained, but, as no such traces appeared visible in this lamp, he was led to believe that it must have been exhausted upon a vacuum pump. Upon questioning Goebel, however, he found that he had used chemically pure or distilled mercury. Afterwards, Mr. Pope, by experiments, discovered that chemically pure mercury did not adhere to copper, nor leave any discoverable trace. This is the reason why this lamp was not before the court at the arguments on this motion.

Mr. Pope is unable to get a current through this lamp because the circuit is somewhere broken. He sees no reason why it might not have been made before 1872. He is of opinion that it represents an advance over the prior Goebel lamps in details of construction and general workmanship, and that it is entirely capable, with the break repaired, of practical use as an incandescent lamp. He thinks it would burn, without doubt, three or four hundred hours, and that it clearly embodies the invention of the second claim of the Edison patent, as construed by the court. He is also of opinion that iron leading-in wires are practicable in the construction of an incandescent lamp, and the next best thing to platinum. Mr. Cross, in a supplemental affidavit, confirms these statements. Mr. Cary, the electrician of the defendant company, states in an affidavit that, from experiments he has recently tried, incandescent lamps capable of practical use can be made with iron leading-in wires.

There was filed at the same time with the foregoing supplemental affidavits other affidavits of persons who knew Goebel and saw his lamps. The light from the Goebel lamp seems to grow brighter and more steady as the affidavits multiply. For example, Mr. Voss, in his second affidavit, says: "Some of the larger lamps were attached in the store like gas fixtures. * * * I have seen the store lighted with these electric lamps alone when the gas was turned off, and the light in the store was a nice brilliant light of, I should say, from eight to ten candle power to the lamp." Again, Mr. Hall states that the store was entirely lighted up by these lamps, which were brighter than gas jets; in fact, too bright; and that the light was very steady. Mrs. Stark says the lamps were brighter than an oil lamp or gas flame, and would burn an hour. George Pasbach, who married Goebel's niece, declares he could see to read by their light, and do fine work. Edward F. Mulligan says the lamps in the Monroe street store gave a nice, bright light, whiter and much better than gas, and that you could easily read or do work by it.

To meet this alleged Goebel anticipation, the plaintiff introduces the prior adjudications upon the Edison patent, the affidavits of Edison and Barker relating to the history of the invention and the prior state of the art, and the affidavit of Upton, showing that the

defendant company was incorporated in 1890, and is now an active competitor in manufacturing and selling incandescent lamps. The plaintiff also produces the affidavit of Prof. Elihu Thomson to the effect that the Goebel lamps, like Exhibits 1, 2, and 3, could not have been useful for ordinary lighting purposes, and were never a practically operative light. One reason for this is because the leading-in wires are of iron or copper, under which conditions a vacuum cannot be maintained, since the rate of expansion of iron and copper is very different from glass, the result being that the lamp begins to lose its vacuum as soon as it is heated and cooled. Another reason is that the leading-in wires are poorly and crudely sealed in, the glass work being thoroughly bad, and the lamps cracked and blackened on the ends by improper flame. While these lamps, in spite of leakage, might have been used for a short time, they could not have had a sufficient brilliancy for ordinary lighting purposes, nor possessed any commercial value. The vacuum not being maintained, the heat would be carried away from the incandescent body by currents of gas, and this waste of energy robs the burner of its light-giving power. This statement, by Prof. Thomson, is agreed to and confirmed by the affidavits of John W. Howell and John E. Randall. Prof. Thomson further says that he remembers Henry Goebel as far back as 1881 or 1882, and that he visited his shop at that time, and that an endeavor was made to impress him with the value of the Goebel anticipation.

The plaintiff, also, by permission of court, filed affidavits after the arguments on the motion. These are important, not only as contradicting statements found in the affidavits of defendants, but for other reasons. A number of these witnesses who were neighbors or acquaintances of Goebel, or had other means of knowledge, deny that he exhibited any electric lights in connection with his telescope or in his shop about 1860 or the years following. There are the affidavits of John W. Howell and Frank Holzer, electricians, who corroborate the statement of Prof. Thomson that the Goebel lamps, 1, 2, and 3, were never practically operative by reason of a defective vacuum, and never possessed any commercial value. Several witnesses state that Goebel spoke English well, and it is also proved that articles relating to the subject of incandescent lamps and Edison's inventions were printed during 1880 in the *Staats-Zeitung*, a German daily newspaper, published in New York. But the more important evidence has reference to those persons who saw or dealt with Goebel, and who investigated his claim to have anticipated Edison in the art of incandescent lighting.

William C. Dreyer states that he undertook to form a company to purchase from Henry Goebel his inventions and patents, and that in 1882 he did procure from him an option for three months of all his inventions relating to electric lighting upon payment to him of \$500, and an extension of the option for another three months, for which an additional \$425 was paid. Goebel was also to have a large compensation from the company if formed. At that time he said he had patented or applied for patents on a mercury pump, and a spiral holder for the carbon in an incandescent lamp. He said he had made

small incandescent lamps called the "fiddle bow." It was considered of great importance to have one of these lamps, and he made every effort to find one, but never succeeded. The conversations with Goebel were carried on in German. The production of an old lamp was vital in this matter. During this time negotiations with the Edison Company were attempted through S. B. Eaton. The whole subject was gone over with E. N. Dickerson, the patent lawyer, who said that, even if Goebel did what he claims, it was nothing but an abandoned experiment. The negotiations with the Edison Company were in consequence dropped.

Albert Hetschel, a manufacturer of thermometers and scientific apparatus, states that in 1881 he was in the employ of the American Electric Light Company, and was directed to work with and help Henry Goebel, and was at his shop for several months. Hetschel describes how Goebel in a crude way made three or four little incandescent lamps with the use of a poor vacuum pump; that he was unable to make a successful lamp; and he is certain that if he had possessed at that time any incandescent lamps he would have shown them.

Otto A. Moses, a mining engineer, then in the service of the Edison Company, visited Goebel in 1884. Goebel made some carbons for him. During this time, being much interested in the subject, he inquired of Goebel what he had done in the field of incandescent lamps. He examined all the lamps Goebel had, and asked him to produce some of his old ones. Goebel requested permission to visit his laboratory, and did so, and afterwards solicited employment for himself and his son. Under these circumstances, he says it is improbable that Goebel at that time had any old meat-saw or hairpin lamps in his possession.

Ludwig K. Bohm, an electrical expert, who was associated with Edison in 1879, and afterwards, in 1881, electrician of the American Electric Light Company, had several conversations with Goebel at the office of the company. At that time Edison's invention had been published in the English and German papers in New York. He conversed with Goebel in German on the subject of incandescent lighting, and he is certain that he would have mentioned his historical lamps if he had made them. He then proceeds to discuss the lamps described in Goebel's affidavit, and declares that a vacuum sufficiently high to enable a filamentary carbon to last could not be made by filling the tube with mercury, and then inverting it, because there is always air in the mercury, and that air also clings to the glass walls. In making standard barometers by the Torricellian vacuum it was found necessary to boil them out for hours in specially constructed apparatus. Further, owing to the specific gravity of mercury, the filamentary carbon would be broken during the operation of filling and inverting the chamber. The lamps are likewise imperfect from the use of iron or copper leading-in wires, and no one of them shows any evidence that it ever contained a good vacuum.

William McMahon, in 1880, was interested in starting a company to compete with the Edison lamp, and he and his associates, George Crosby and Edwin Fox, organized the American Electric Light Company in 1881. Crosby took him and his brother to Goebel's

shop to talk over electrical matters. Goebel showed him an arc lamp, but said he had never made any incandescent lamps. He remembers also seeing some carbons and a vacuum pump, which appeared like a swinging pump. Goebel's son was soon after employed by the American Company. There was intense excitement at this time over the Edison incandescent lamp. Everybody recognized that Edison had made the invention. There was every reason at the time why Goebel and his son should have disclosed fully what they had done in this direction. If any one had preceded Edison in his invention, unlimited capital could have been secured for an opposition company. The American Company wanted to make the Edison lamp, but did not dare to. For these reasons he is satisfied that Goebel never made an incandescent lamp prior to March, 1881. Thomas G. McMahon, his brother, confirms this story in his affidavit.

Sherburne B. Eaton, the legal adviser of the Edison Company, states that in May, 1882, the law firm of Dickerson & Dickerson called his attention to the alleged inventions of Henry Goebel. They said that he claimed to have invented an incandescent lamp resembling the Edison. Goebel's representative in this matter was William C. Dreyer. No price was made, but they were asked to look into the matter. The subject was laid before the executive committee of the Edison Company, and it was decided that Goebel had nothing worth buying. Mr. Dickerson's opinion was that, if Goebel had made the inventions he claimed, they amounted to nothing more than an abandoned experiment. On November 28, 1882, Henry Goebel, Jr., called upon him, as representing the Edison Company, and made another offer to sell the inventions and good will of his father, naming the price of \$20,000, and the matter was again submitted to the company. On December 12, 1882, he called again, and was informed that the company did not wish to buy.

A patent was issued to Henry Goebel for an improvement in electric incandescent lamp, October 24, 1882. This invention has reference to securing and cementing the carbon burner into flattened and spirally coiled ends of the conducting wires. The second claim, as drawn in the original application, was rejected by reference to the Edison patent now in suit.

Upon consideration of the whole evidence on this motion I have reached the following conclusion:

It is extremely improbable that Henry Goebel constructed a practical incandescent lamp in 1854. This is manifest from the history of the art for the past 50 years, the electrical laws which since that time have been discovered as applicable to the incandescent lamp, the imperfect means which then existed for obtaining a vacuum, the high degree of skill necessary in the construction of all its parts, and the crude instruments with which Goebel worked.

Whether Goebel made the fiddle bow lamps 1, 2, and 3 it is not necessary to determine. The weight of evidence on this motion is in the direction that he made these lamps, or lamps similar in general appearance, though it is manifest that few, if any, of the many witnesses who saw the Goebel lamp could form an accurate judg-

ment of the size of the filament or burner. But assuming they were made, they do not anticipate the invention of Edison. At most they were experimental toys, used to advertise his telescope, or to flash a light upon his clock, or to attract customers to his shop. They were crudely constructed, and their life was brief. They could not be used for domestic purposes. They were in no proper sense the practical commercial lamp of Edison. The literature of the art is full of better lamps, all of which were held not to anticipate the Edison patent. The prior art demonstrates that to protect a carbon filament ten one thousandths of an inch in diameter from speedy disintegration the lamp chamber must maintain a nearly perfect and stable vacuum, and every part of the structure must be composed of such materials, and so put together, as not to imperil this vital condition. Leaving out other defects, it is abundantly shown that the Goebel lamp did not possess this requirement, and could not by reason of the elements which entered into its composition, and the mode in which it was constructed. Goebel says he made more than a hundred lamps, and that a continual improvement took place in their construction, and yet the only three lamps produced at the hearing by his own confession were made as early as 1854, or before gas was introduced into his house. Where are the other lamps, which show these improvements, except Exhibit 4, which I will deal with presently? The evidence of Goebel and his witnesses points to the conclusion that work ceased on these lamps in the "fifties," and was not revived until Edison, 20 years later, startled the electric world with his invention. Goebel brought from Germany the ideas contained in the old lamp of Starr, with its carbon pencil inclosed in a Torricellian vacuum, and he probably constructed some lamps after that pattern. In doing this he was up to and in line with the art as it existed at that early day, but to say that with a sudden bound he jumped from Starr to Edison passes the limits of credulity. The history of great inventions shows a gradual and labored progress. Each new investigator records some advance until it may be the desired discovery is almost within his grasp, but it is only after many attempts and many failures that some one appears who accomplishes the long sought-for result. The discovery of the domestic incandescent lamp is no exception to this rule, as the record in the New York case bears witness. Speaking from the standpoint of the art of incandescent lighting in 1854 and in 1892 are two different things, and it is therefore quite easy for witnesses to think that Goebel did much more than there is any legitimate reason to suppose.

As for lamp No. 4, I cannot but view it with suspicion. It presents a new appearance. The reason given for not introducing it before the hearing is unsatisfactory. This lamp, to my mind, envelops with a cloud of distrust the whole Goebel story. It is simply impossible, under the circumstances, to believe that a lamp so constructed could have been made by Goebel before 1872. Nothing in the evidence warrants such a supposition, and other things show it to be untrue. This lamp has a carbon filament, platinum leading-in wires, a good vacuum, and is well sealed and highly fin-

ished. It is said that this lamp shows no traces of mercury in the bulb because the mercury was distilled, but Goebel says nothing about distilled mercury in his first affidavit, and twice he speaks of the particles of mercury clinging to the inside of the chamber, and that for this reason he constructed a Geissler pump after he moved to 468 Grand street, which was in 1877. Again, if this lamp has been in his possession since before 1872, as he and his son swear, why was it not shown to Mr. Crosby, of the American Company, when he visited his shop in 1881, and was much interested in his lamps? Why was it not shown to Mr. Curtis, the leading counsel for the defendants in the New York cases, when he was asked to produce a lamp and promised to do so? Why did not his son take this lamp to Mr. Bull's office in 1892, when he took the old fiddle bow lamps 1, 2, and 3? Why did not his son take this lamp to Mr. Eaton's office in 1882, when he tried to negotiate the sale of his father's inventions to the Edison Company? A lamp so constructed and made before 1872 was worth a large sum of money to those interested in defeating the Edison patent, like the American Company, and Goebel was not a rich man. Both he and one of his sons were employed in 1881 by the American Company. Why did he not show this lamp to McMahon when he called in the interests of the American Company and talked over electrical matters? When Mr. Dreyer tried to organize a company in 1882, and procured an option from him of all his inventions relating to electric lighting, for which \$925 was paid, and when an old lamp of this kind was of vital consequence, and would have insured a fortune, why was it not forthcoming? Mr. Dreyer asked Goebel to produce an old lamp, and was especially anxious to find one pending his negotiations with the Edison Company for the sale of Goebel's inventions. Why did he not produce this lamp in his interviews with Bohm of the American Company, or Moses of the Edison Company, when it was for his interest so to do? The value of such an anticipation of the Edison lamp was made known to him. He was desirous of realizing upon his inventions. He was proud of his incandescent lamps, and was pleased to talk about them with anybody who would listen. Is it conceivable, under all these circumstances, that he should have had this all-important lamp in his possession from 1872 to 1893, and yet no one have heard of it or seen it except his son? It cannot be said that ignorance of the English language offers an excuse. He knew English very well, although Bohm and Dreyer conversed with him in German. His children spoke English. Neither his ignorance nor his simplicity prevented him from taking out three patents,—the first in 1865 for a hemmer, and the last in 1882, for an improvement in incandescent lamps. If he made lamp No. 4 previous to 1872, why was it not also patented?

There are other circumstances which throw doubt on this alleged Goebel anticipation. The suit against the United States Electric Lighting Company was brought in the southern district of New York, in 1885. Large interests were at stake, and the main defense to the Edison patent was based upon prior inventions. This Goebel claim was then investigated by the leading counsel for the defense.

Mr. Curtis. It was further inquired into in 1892, in the case against the Sawyer-Man Company. It was brought to the attention of and considered by the Edison Company in 1882. It was at that time known to the American Company, who hoped by this means to defeat the monopoly under the Edison patent. Dreyer tried to organize a company for its purchase. Young Goebel tried to sell it. It must have been known to hundreds of people. And now, when the Edison Company, after years of litigation, leaving but a short time for the patent to run, have obtained a final adjudication establishing its validity, this claim is again resurrected to defeat the operation of the judgment so obtained. A court of equity should not look with favor on such a defense. Upon the evidence here presented, I agree with the first impressions of Mr. Curtis, and with the opinion of Mr. Dickerson, that whatever Goebel did must be considered as an abandoned experiment.

It has often been laid down that a meritorious invention is not to be defeated by something which rests in speculation or experiment, or which is rudimentary or incomplete. The law requires not conjecture, but certainty. It is easy, after an important invention has gone into public use, for persons to come forward with claims that they invented the same thing years before, and to endeavor to establish this by the recollection of witnesses as to events long past. Such evidence is to be received with great caution, and the presumption of novelty arising from the grant of the patent is not to be overcome except upon clear and convincing proof. *Coffin v. Ogden*, 18 Wall. 120; *Brush v. Condit*, 132 U. S. 39, 10 Sup. Ct. Rep. 1; *The Telephone Cases*, 126 U. S. 1, 2, 8 Sup. Ct. Rep. 778; *American Bell Tel. Co. v. People's Tel. Co.*, 22 Fed. Rep. 309; *Motte v. Bennett*, 2 Fish. Pat. Cas. 642; *Parham v. Buttonhole Co.*, 4 Fish. Pat. Cas. 468; *La Baw v. Hawkins*, 1 Ban. & A. 428; *Gottfried v. Brewing Co.*, 5 Ban. & A. 4; *Worswick Manuf'g Co. v. City of Buffalo*, 20 Fed. Rep. 128.

When the defendant company entered upon the manufacture of incandescent lamps in May, 1891, it well knew the consequences which must follow a favorable decision for the Edison Company in the New York case. Owing to the large interests involved, I have carefully considered this motion, and I am satisfied upon the evidence, and the law applicable thereto, that it should be granted.

Injunction granted.

SAWYER SPINDLE CO. et al. v. W. G. & A. R. MORRISON CO.

(Circuit Court, D. Connecticut. February 13, 1893.)

No. 735.

1. PATENTS FOR INVENTIONS—ANTICIPATION—SPINDLE BEARINGS.

Letters patent No. 253,572, granted February 14, 1882, to John E. Atwood, for an improved support for spindles in spinning machines, is not anticipated by patent No. 82,049, granted September 8, 1868, to David M. Weston, for an improved self-balancing centrifugal machine, wherein the shaft revolves in a box at its base, having an easily yielding spring, made of rubber or other elastic material, around its outer circumference, and

within a stationary bushing which is firmly secured to the cross timbers below; for the needs of the respective structures are different, and require a different character and location of pivot bearings.

2. SAME—INFRINGEMENT—SPINDLE BEARINGS.

The second and third claims of the Atwood patent are infringed by a spindle in which the spring surrounding the supporting tube, which contains both step and bolster bearings, is interposed between a shoulder on the tube and a shoulder on the base piece so as to press the former on the latter, the latter being a separate nut which screws into the upper end of the base piece; for this is a mere change in the location of the nut which operates the spiral spring in the patented device.

3. SAME.

It is doubted whether the patent is infringed by a spindle which has its supporting tube divided transversely into two parts, the lower part resting upon the bottom of the oil cup, and acting as the step bearing of the spindle, with the spring surrounding the part of the tube that contains the bolster bearing; inasmuch as it is doubted whether the two parts of the tube necessarily move together laterally, in all directions, during the self-adjustment of the spindle, as is required by the claims of the patent.

In Equity. Suit by the Sawyer Spindle Company and others against the W. G. & A. R. Morrison Company for the infringement of a patent. Heard on motion for a preliminary injunction. Granted as to one of the machines complained of, and refused as to the other.

Fish, Richardson & Storrow, for complainants.
Charles L. Burdett, for defendant.

SHIPMAN, Circuit Judge. This is a motion for a preliminary injunction to restrain the infringement of letters patent to John E. Atwood, No. 253,572, dated February 14, 1882, for an improved support for spindles in spinning machines. This patent was recently examined by this court, upon final hearing, in a suit in equity between the parties in this case. The history, patentable character, and novelty of the invention, and a description of the spindle which was held to be an infringement, were stated in the opinion. 52 Fed. Rep. 590. Upon the present hearing the defendant has presented, as an anticipation of the patented device, the structure described in letters patent No. 82,049, dated September 8, 1868, to David M. Weston, for an improved self-balancing centrifugal machine. This heavy machine consisted of a revolving cylinder which was to contain wet sugar, or other semiliquid material, to be freed from water, and which was firmly attached to the top of a perpendicular shaft, which shaft revolved in a box at its base. To this shaft power was applied by means of a driving belt attached to a pulley. A flexible, easily yielding spring, made of rubber or other elastic material, was placed around the outer circumference of the box, and within a stationary bushing which was firmly secured to the cross timbers below. The improvement described in the patent consisted in mounting the machine so as to have a flexible pivot bearing at the base, rather than to suspend it upon bearings at the top of the upright shaft. This machine contained nothing anticipative of the Atwood mechanism for a spindle support. The needs of the respective structures are different, and call for a different character and location of pivot bearings, and therefore the box at the bottom of the shaft of the

Weston machine has no patentable relation to the tube around the Atwood spindle, which supports both step and bolster bearings.

The next question relates to the fact of infringement by the manufacture and sale of two spindles which differ from each other, and also from the infringing spindle in the former case. They are known as the "Hammond" and the "Dady" spindles.

In the Hammond spindle, a spring surrounding the supporting tube, which contains both step and bolster bearings, is interposed between a shoulder on the tube and a shoulder on the base piece, and presses the shoulder on the tube against the shoulder on the base piece. This shoulder on the base piece is a separate nut, which screws into the upper end of the base piece. In the former infringing device the spring was held between a nut upon the supporting tube and the lower part of the base piece, and the spring pulled down the tube so as to clamp it against a shoulder on the upper side of the base piece. No substantial difference, so far as the second and third claims of the patent are concerned, is created by the change of location of the nut which operates upon the spiral spring, and causes it to press upon and hold the tube in place. I think that the fifth claim, when it speaks of a nut, means a nut which would, in the language of the specification, "serve as a means for graduating the degree of the elastic flexibility of the spindle;" and I agree with the suggestion of Mr. Livermore, that, "in practice, the nut which compresses the spring in these structures [the Hammond and Dady spindle] is not employed for varying the compression of the spring and controlling its force;" and consequently the fifth claim is not infringed.

The Dady spindle differs from the Hammond spindle because its supporting tube is transversely divided into two parts. The lower part, which is about thirteen sixteenths of an inch in height, and which rests upon the bottom of the oil cup, receives the step of the spindle, and is its step bearing. The spring surrounds that part of the tube which contains the bolster bearing. The difference is that one supporting tube or piece of metal does not contain both bearings; but the complainants earnestly contend that the spindle and the two parts of the tube have the same working relation to each other as if the tube was made in one piece, and that the severed parts are so held, in fact, as to operate as if they were firmly united together. I have no doubt that the Dady spindle is not the Rabbeth spindle, in which the supporting tube was rigidly connected with the rail, and could not adapt itself to the movements of the spindle, and the spindle and bolster bearing moved "within, and independently of, the supporting tube." Neither part of the supporting tube of the Dady spindle is rigidly connected with the rail, and each part moves, to a certain extent, with the spindle, during its vibrations. My doubt is whether the two parts of the tube and the spindle "move together laterally, in all directions, during the self-adjustment of the spindle," as required by the letters patent,—in other words, whether the two parts move in line with each other, so that there is no independent movement of the step bearing. I do not now clearly see why the socket which forms the step bearing, and rests upon the bottom of the oil cup, may not move laterally, and, to a certain extent, in-

dependently of that part of the tube which contains the bolster bearing. This doubt causes me not to grant an injunction pendente lite against the manufacture or sale of the Dady spindle. Let there be an injunction against the manufacture, use, or sale of the Hammond spindle.

KELLOGG et al. v. CLYNE, Intervener.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1893.)

No. 158.

1. FRAUDULENT CONVEYANCES—WHAT CONSTITUTES.

A mortgage executed by a debtor in falling circumstances, for a sum known to be in excess of what is actually due, and known by the creditor at the time he takes it to be in excess of what is due him, is presumptively fraudulent.

2. SAME—EVIDENCE—ADMISSIBILITY.

Where the issue is whether A. gave a chattel mortgage to B. in good faith, or with the intention of defrauding creditors, it is competent to show that A., at about the same time, conveyed other property to C., and that C. conveyed such property to B., and it is also competent to prove what C. said and did with reference to the conveyance to him of such property.

3. FRAUDULENT CONVEYANCES—INSTRUCTIONS—EXPRESSION OF OPINION.

On a question as to whether a chattel mortgage between brothers is fraudulent as to creditors, there being evidence tending to show fraud, the following instruction is not merely the expression of opinion such as federal judges are authorized to give, but amounts to a peremptory instruction to return a verdict, and is erroneous, to wit: "A great deal has been said about brothers, and the conspiracy between them. I do not know of any testimony that tends to show any conspiracy between the brothers for the purpose of defrauding creditors, so far as I am able to see; and I think I ought to say to the jury that under no circumstances does the testimony justify the inference that there was a conspiracy entered into between the brothers for the purpose of defrauding these creditors of John Clyne."

4. TRIAL—INSTRUCTIONS—HYPOTHETICAL CASE.

An instruction by the court to the jury ought not to be predicated upon a purely hypothetical state of facts, for which neither party contends, as it tends to divert the attention of the jury from the issues which are really in controversy.

In Error to the Circuit Court of the United States for the District of Nebraska.

Action by William H. Kellogg and others, composing the firm of Charles P. Kellogg & Co., against John Clyne, for goods sold and delivered. An attachment was issued in the action, and levied upon property which Louis C. Clyne claimed to own by virtue of a chattel mortgage to him from John Clyne. Louis C. Clyne intervened, claiming the property, and judgment was entered in his favor. Plaintiffs bring error. Reversed.

Statement by THAYER, District Judge:

This was an intervention by Louis C. Clyne in an attachment suit brought by Charles P. Kellogg & Co. against his brother John Clyne, whereby the intervener sought to recover from the firm of Charles P. Kellogg & Co. the proceeds of certain merchandise which that firm had caused to be attached and sold as the property of John Clyne. The intervener based his claim to the

proceeds of the goods upon a mortgage in his favor which had been executed by John Clyne on January 3, 1891, some three weeks prior to the commencement of the attachment suit. The firm of Charles P. Kellogg & Co. alleged that the mortgage under which the intervenor claimed was contrived by and between John and Louis C. Clyne for the purpose of hindering and delaying the creditors of the former in the collection of their just debts. There was a trial of this issue before a jury, which resulted in a verdict in favor of the intervenor, and against the attaching creditors, in the sum of \$3,265.50. To establish the charge of fraud, Charles P. Kellogg & Co. offered testimony which established, or tended to establish, the following facts:

For about three years prior to January 3, 1891, John Clyne resided at Friend, Neb., and was engaged in business at that place as a merchant. Prior thereto he had resided for three or four years at Stafford, Kan., and had acquired considerable real property in and about Stafford. Before taking up his abode in Kansas, Clyne had resided for several years at Maple Park, Ill., and had also been engaged in business at that place as a merchant. While thus engaged in business in Maple Park, Louis C. Clyne was in the service of his brother John as a clerk, from 1879 until April 15, 1884. On the last-mentioned date, John and Louis C. Clyne became partners in the mercantile business at Maple Park under the name of L. C. Clyne & Co., and immediately thereafter John removed to Kansas, leaving Louis in full charge of the business at Maple Park. The total capital invested in that firm amounted to \$3,000, of which sum Louis contributed \$1,500, being the amount that John was then indebted to him for services theretofore rendered. The firm of L. C. Clyne & Co. continued in existence until January, 1888, when John withdrew, and the business was thereafter conducted by Louis on his own account. The net profits of the business transacted by L. C. Clyne & Co. for the whole period from April, 1884, to January, 1888, amounted to \$12,527. The business at Maple Park was transacted in a building hereafter termed the "Maple Park Property," the title whereof stood in the name of John Clyne, so far as the record showed, from 1876, when he acquired it, until February 22, 1889. For the use of such building and premises the firm of L. C. Clyne & Co., during its existence, and subsequently Louis C. Clyne, paid rent to John Clyne until January 7, 1890, at the rate of \$240 per year. On the 22d of February, 1889, a deed was placed on record, bearing date September 1, 1876, whereby John Clyne conveyed the Maple Park property to Joseph Clyne, another brother of John, who resided at Stafford, Kan., for an expressed consideration of \$3,000. There was considerable testimony offered which tended to show, and from which a jury might infer, that the conveyance to Joseph Clyne of the Maple Park property was made with a view of preventing the collection of a note which had been signed by John Clyne, and on which suit was brought against him by attachment, by a certain bank, on the 7th of February, 1889, in Kane county, Ill. On the 22d of September, 1890, Joseph Clyne conveyed the Maple Park property to Louis C. Clyne, by a quitclaim deed, for the expressed consideration of \$3,000. Joseph and Louis Clyne were both called as witnesses. Louis did not venture to give any explanation of the purchase of the Maple Park property in September, 1890, but Joseph claimed that it was a bona fide sale, for which he had received notes made by Louis to the amount of \$3,000.

The testimony further tended to show that John Clyne was largely indebted in the fall of 1890; that in November of that year he conveyed all of his real estate situated in and about Stafford, Kan., to Ed. H. Landes, without any consideration moving from said Landes, and that on January 12, 1891, Landes conveyed the same property to Joseph Clyne for an expressed consideration of \$3,600 but without any actual consideration, and that Landes was a mere conduit through whom the title to that property was conveyed by John to his brother Joseph. On the 3d of January, 1891, John Clyne executed two mortgages on his stock in trade situated at Friend, Neb.,—one in favor of a bank located at that place, for the sum of \$803.23, and the other in favor of his brother Louis, (which was charged to be fraudulent,) to secure a note for \$3,265 which was dated January 3, 1891, and was payable one day after date, with interest at the rate of 10 per cent. per annum. Within one week thereafter he also executed six other mortgages on the same stock of goods to secure debts due to other parties, but these mortgages were made subject to the lien in favor of

the bank and his brother Louis. The entire stock was eventually sold in behalf of the attaching creditors and mortgagees for about \$4,500. Outside of the stock of goods thus mortgaged, and the real estate conveyed to Landes, it did not appear that John Clyne had any other property. The intervener claimed that the mortgage in his favor for \$3,265 was given to secure money which he had previously loaned to his brother John, and had advanced to pay certain notes which the latter owed. It also appeared in evidence that on February 10, 1890, Louis C. Clyne had made a statement to a commercial agency showing that his net assets were then \$12,843; that on February 11, 1891, he had made another statement, showing his net assets to be \$21,500. It further appeared that the average profits of the intervener's business did not exceed \$3,500 per year, and that the increase in his means between February, 1890, and February, 1891, was about equal to the sum of his average annual profits, and the value of the property which he was charged to have received in the mean time from his brother John, without consideration. The intervener made no effort to explain how it happened that his assets had increased to such extent during the year 1890.

C. S. Montgomery, for plaintiffs in error.
Robert Ryan, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, after stating the facts as above, delivered the opinion of the court.

In view of the nature of the case, and the evidence offered to substantiate the allegations of fraud, we think that some of the exceptions to the charge are well founded. In the course of the charge the trial court made use of the following language:

"A great deal has been said about brothers, and the conspiracy between them. I do not know of any testimony that tends to show any conspiracy between the brothers for the purpose of defrauding creditors, so far as I am able to see, and I think I ought to say to the jury that under no circumstances does the testimony justify [the inference] that there was a conspiracy entered into between the brothers for the purpose of defrauding these creditors of John Clyne."

We are unable to regard this portion of the charge as a mere opinion as to what the finding ought to be, such as a court is entitled to express, if, in its judgment, the case is one which warrants such action. It was a definite statement to the jury that there was no testimony, so far as the court could see, which tended to show the existence of such a conspiracy to defraud the creditors of John Clyne as the plaintiffs in error had alleged; and it was reinforced by the further remark, that under no circumstances would the testimony justify the conclusion or inference that such a scheme had been formed. The statement as made, even if it could be regarded as a mere expression of opinion on a question of fact, was not supplemented by the further statement that the jury were at liberty to disregard such opinion, if they thought proper. We are unable to see that there is any material difference between such a direction as was given, and a peremptory instruction to return a verdict in favor of the intervener. The sole issue in the case was whether the mortgage of date January 3, 1891, had been contrived by and between John and Louis C. Clyne with a view of hindering, delaying, or defrauding the creditors of the former. While that

issue was ostensibly left to the determination of the jury, yet it seems to have been submitted to the triers of the fact under directions from the court which practically left them no freedom of action. We cannot presume in view of the very positive assertion that there was no evidence to support the charge of fraud and collusion, that the jurors took a contrary view, and that they fairly exercised their undoubted right to weigh the evidence bearing on that issue, and to determine it as they thought proper. We entertain no doubt that the facts and circumstances developed on the trial formed a sufficient basis for an inference that the chattel mortgage in controversy had been executed under an arrangement, express or implied, between the mortgagor and the mortgagee, with a view of withdrawing a portion of the mortgagor's property from the reach of his creditors. Whether that was a justifiable inference, in view of the relationship of the parties, and all of the circumstances in evidence, was peculiarly a question for the jury, and the jury should have been left at full liberty to determine it. A peremptory instruction to return a verdict in favor of the intervenor would have been erroneous, and the course actually pursued seems to us to have been equally prejudicial.

The contention of the plaintiffs in error in the lower court appears to have been that the evidence justified an inference that John Clyne was not indebted to his brother Louis on January 3, 1891, when the chattel mortgage was executed, or, if he was indebted to him in any sum, that he was not then indebted to the amount of the mortgage, and that the amount of such indebtedness had been intentionally exaggerated to cover up the mortgagor's property. With reference to that contention the trial court charged the jury as follows, and an exception was duly taken by the plaintiffs in error:

"But there is another attitude in which that claim may be placed. I know there is a controversy, and of course you know that there is a controversy, between the parties, as to the existence of this indebtedness from John to Louis of \$3,500, \$3,200, or \$3,600, or whatever sum it is. The testimony may satisfy you that at least a portion of that indebtedness existed at the time that the mortgage was given; and, if it does, it will be the duty of the jury to find that fact, and for the mortgagee to that extent, as I think, in any event. You may believe from the testimony, all taken and considered together, that the real indebtedness from John to Louis Clyne did not equal \$3,200, and that the mortgage was given for the purpose of covering up a part of the property on which the mortgage was given. If the testimony does not satisfy you that the whole of it was due, then you ought to find from the testimony just what amount was due at the time of the giving of the mortgage from John to Louis."

The same idea, in substance, was conveyed in another part of the charge, where the court gave directions as to the form and amount of the verdict. It is evident, we think, that this portion of the charge was vicious, and prejudicial to the plaintiffs in error. It declared, in effect, that if a debtor executes a mortgage in favor of his creditor for a greater sum than is due to him, and with intent to cover up a part of his property, such mortgage may nevertheless be upheld as a valid security for whatever sum is actually due to the creditor. This is not the law, if the creditor accepts the

mortgage with knowledge that his claim has thus been intentionally exaggerated. A mortgage executed by a debtor in failing circumstances, for a sum known to be in excess of what is actually due to a creditor, is presumptively fraudulent. From the fact that the jury found that the sum due, of principal and interest, on November 25, 1891, was only \$3,265.50, it would seem that they must have concluded that the indebtedness of the mortgagor to the mortgagee on January 3, 1891, was considerably less than the face of the mortgage. Under these circumstances, we are not able to say that the misdirection last complained of was a harmless error.

It is further assigned for error that the court gave the following direction:

"A great deal has been said about the testimony that relates to the store buildings. Suppose that all that was claimed with reference to that is actually true; that it was originally conveyed by John Clyne to Joseph Clyne for the purpose of cheating and defrauding and hindering the bank in the effort of collecting its debt; that Joseph kept it, and after a while it was transferred from Joseph to Louis, without any consideration whatever; and that Louis held it as a pledge or security for the payment of his alleged debt. He would not be bound to rely on that at all. If he got other security, he could rely on the other security for the payment of his debt, and have a perfect right to receive a chattel mortgage for the payment of that debt."

In this instruction there is an evident assumption that Louis C. Clyne received the conveyance of the Maple Park property as security for the debt of John Clyne, which was subsequently further secured by the chattel mortgage in controversy, and upon that assumption the court proceeded to direct the jury that the intervenor had a perfect right to take such additional security, and to rely upon it. The record shows, however, that there was no testimony to support the assumption on which the instruction was predicated. The attaching creditors claimed that the conveyance of the Maple Park property to the intervenor was but one step in a scheme whereby John Clyne had attempted to withdraw a portion of his property from the reach of his creditors, and that Louis C. Clyne held the Maple Park property in secret trust for his brother John. On the other hand, all of the evidence offered by the intervenor tended to show, and such was his contention, that he had bought the Maple Park property outright from his brother Joseph Clyne, the real owner, for the sum of \$3,000. We think, therefore, that the portion of the charge last quoted was misleading, and for that reason erroneous. An instruction ought not to be predicated upon a purely hypothetical state of facts, for which neither party contends. Instructions of that kind tend to divert the attention of a jury from those issues which are really in controversy.

We are also of the opinion that the trial court erred in directing the jury, in substance, that they should ignore all of the evidence concerning "the alleged transfers of Joseph Clyne," and "what he had said and done." It was clearly competent for the attaching creditors to show, as they did show, that John Clyne had transferred all of his real estate at Stafford, Kan., to E. H. Landes, in November, 1890, with the understanding that the latter should convey it to Joseph Clyne, and that such conveyance was subse-

quently made by Landes. It was also competent to show Joseph Clyne's connection with the Maple Park property. All of this testimony had a direct bearing on the issue whether John Clyne had acted in good faith in executing the chattel mortgage, or whether that was merely one step in a scheme to cover up his property, and to defraud his creditors. The direction given, to ignore all evidence of what Joseph Clyne had said and done, and all evidence of alleged transfers of property, seems to us to have had the effect of withdrawing from the jury much relevant and competent testimony, and that the action of the court in that respect was erroneous.

Some exceptions were also taken to the action of the trial court in excluding testimony. With reference to such exceptions, it is sufficient to say, that in our judgment they are without merit. Such relevant and material facts as were at first excluded were eventually proven by intervenor's own witnesses. Under these circumstances, we do not see that the plaintiffs in error have any just cause for complaint. For errors apparent in the charge, the cause is reversed and remanded, with directions to grant a new trial.

MORSS v. KNAPP et al.

(Circuit Court, D. Connecticut. March 23, 1893.)

No. 639.

PATENTS FOR INVENTIONS—VALIDITY—INFRINGEMENT—DRESS FORMS.

Letters patent No. 233,440, issued to John Hall, October 12, 1880, for an adjustable dress form, are valid, and are not infringed by the dress form made under letters patent No. 373,988, to W. H. Knapp, dated November 29, 1887. *Morss v. Ufford*, 34 Fed. Rep. 37, and *Morss v. Knapp*, 37 Fed. Rep. 352, followed.

In Equity. Suit by Charles A. Morss against William H. Knapp and others for infringement of a patent. Bill dismissed.

Charles F. Perkins and Payson E. Tucker, for complainant.
John Dane, Jr., for defendants.

TOWNSEND, District Judge. This is a bill in equity praying for an injunction and accounting by reason of an alleged infringement by the defendant of the second claim of letters patent No. 233,440, issued to John Hall October 12, 1880, for an adjustable dress form. The principal defense is noninfringement. Defendant also claims that the patent is invalid by reason of anticipation, want of patentable novelty, and lack of invention. The claim in controversy is as follows:

"In combination with the standard, a, and ribs, c, the double braces, e', sliding blocks, f', f'', and rests, h' and h'', substantially as and for the purpose set forth."

Judge Shipman gives a description of the invention and of the defendants' device in his opinions in *Morss v. Knapp*, 37 Fed. Rep. 351, and 39 Fed. Rep. 608. Defendants' form is made under, and

is also fully described in United States letters patent No. 373,988, to W. H. Knapp, dated November 29, 1887. As to the validity of complainant's patent and of the claim in question I shall hold, in conformity with the opinion of Judge Shipman in another case between the same parties, that the question was settled by the decision of the court in *Morss v. Ufford*, 34 Fed. Rep. 37. See *Morss v. Knapp*, 37 Fed. Rep. 352.

Counsel on both sides have given much attention to the question whether the links in defendants' device serve the purpose of the double braces in the Hall patent in resisting pressure applied from without in the direction of the standard. Whether this be so or not, I am not clear that the use of converging braces for resisting lateral pressure after the expansion has been accomplished would be an appropriation of the invention of the patent. The essence of complainant's invention has been repeatedly stated by Judge Shipman in his opinions. He says: "The principle of the invention is the expansion or adjustment of a skeleton frame radially in all directions from a common center." The question to be decided in the present case, then, is this: Is the defendants' form expanded and adjusted by the use of the same elements, or their mechanical equivalents, as are enumerated in the second claim of complainant's patent? The complainant insists that the defendants' device is substantially the same as that of the Hall patent; that the defendants have taken the invention of the Hall patent, and merely arranged the apparatus so as to operate horizontally instead of vertically. The complainant says that the standard of defendants' device is the same as that of the Hall patent; that the quarter sections of defendants' rigid band are the equivalents of the ribs of the patent; that the links connecting the sections of defendants' band to the disk are the equivalents of the double braces of the patent; that defendants' disks are equivalents to the sliding blocks of the patent; that the clamping screw which holds the disks, and thereby the links and band, in place, is the equivalent of the rests and set screws of the patent. I am unable to agree with all these claims. It seems to me that the means of expanding the form in defendants' apparatus differ substantially from those of the Hall patent. Complainant seems to me to claim substantially that any use of the converging braces in the dress form would be an infringement, and that the second claim of the Hall patent should be construed as if it were broadly for the use of converging braces in an adjustable dress form. Even if the inventor were entitled to make this claim, and to have it allowed by the patent office, I do not think that he has made it in the patent, and I do not think that complainant is entitled to have the patent so construed. In all of the cases in which this patent has been held to be infringed, the infringing device contains the double braces, with their inner ends against the standard and their outer ends fixed to a rib at or near the same point, so that by moving the inner ends of the double braces upon the standard the rib will be moved nearer to or further from the standard. In *Morss v. Ufford* the inner ends of the braces in the infringing form were caused to

approach each other to expand the frame. In *Morss v. Knapp* they were pulled further apart.

Complainant's counsel says that "this arrangement of a wheel and rod to convert rotary into rectilinear motion is present in a great variety of machines, and is a matter of common knowledge." This is true, but the Hall patent does not convert rotary into rectilinear motion; it converts rectilinear motion in one direction into rectilinear motion in another. No example has been shown of the use of two wheels with rods, turning in different directions, in order to produce rectilinear motion or expansion prior to the defendants' device. The standard in the Hall patent is the base upon which the inner ends of the double braces are brought closer to each other. It furnishes the third side of the triangle necessary for the operation of the device. It does not perform this function in the defendants' device unless the holding of the disks in place be construed as an equivalent function. The disks do not seem to me to be mechanical equivalents of the sliding blocks, f^1 and f^2 . The inner end of the link in defendants' device is taken by the disk or wheel and carried by a circular path to another position. The outer end is moved further outward, partly by the lateral movement involved in the circular movement of the inner end, but to a greater degree by the carrying of the inner end further outward. The practical method of expanding the form is to take hold of two opposite segments of the band and pull them outward. This causes the disks to rotate, and the other segments are moved outward correspondingly. The mode of expanding the device of defendants' form, as a whole, does not seem to me to be an equivalent of or analogous to that of the Hall patent. So far as expanding the form is concerned, defendants' counsel appear to me to be substantially correct in claiming that, if defendants' device does contain the double braces, such braces consist of the radii or spokes of the wheel or disk and the links taken together, so that each brace is really a jointed brace. Let a decree be entered dismissing the bill.

WINCHESTER REPEATING ARMS CO. v. AMERICAN BUCKLE & CARTRIDGE CO.

(Circuit Court, D. Connecticut. March 10, 1893.)

Nos. 676, 677, and 678.

1. PATENTS FOR INVENTIONS—ANTICIPATION—CARTRIDGE MACHINERY.

Letters patent No. 237,605, granted February 8, 1881, to Salisbury, for a wad-winding machine, was for a device in which a strip of paper is automatically fed into a slot formed in one end of an intermittently rotated spindle. Then the spindle is allowed to rotate, and wind the strip upon it in the form of a coil, until it is stopped by the resistance to rotation developed by the frictional contact of the edge of the coil with the inner periphery of a gauge consisting of a fixed bushing or sleeve, the inner diameter of which exactly corresponds to the diameter of the wads to be formed. Then the coil or wad is automatically cut from the strip, and the wad is stripped from the spindle, and by appro-

ropriate automatic means forced into place in the shell. The spindle is given a partial rotation as soon as the wad is stripped from it, and stopped with its slot in the right position to receive again the end of the wad strip. *Held*, that this was not anticipated by letters patent No. 104, 312, to Conrad Holtz, in whose machine paper was likewise wound on a slit spindle; for in it the paper was cut before the winding commenced, and the stoppage of the spindle was not controlled by the paper or the diameter of the tube as it is in the Salisbury machine.

3. SAME.

Nor was the Sallsbury patent anticipated by letters patent No. 137, 773, to Hobbs, for a wad-winding machine; for in this latter the paper is placed in the spindle by hand, and there is neither guiding device, cutter, nor means for automatic stoppage of the spindle.

3. SAME—CARTRIDGE ASSEMBLING MACHINE.

Letters patent No. 232,907, granted October 5, 1880, to George P. Salisbury, for an improved cartridge assembling machine, are not anticipated by the patents for similar machines put in evidence, inasmuch as none of them contain the different elements combined in the Salisbury patent, nor are they designed to perform the work which is its function.

4. SAME—PRIMING MACHINE.

Letters patent No. 181,309, granted August 22, 1876, to Burton, Salisbury, and Wells, for an improved machine for priming cartridges, covered a machine wherein, in the first place, the loose cap or primers are arranged with their open ends forward in a flat hopper or reservoir, wide at its upper, and narrow at its lower, end, and just deep enough to receive a single vertical layer of caps piled one on the other in a side to side or axial arrangement, and to permit them to move up and down, but not to turn over. From the narrow lower end of this hopper the caps gravitate, without changing their relative axial position, into a guide tube in which they form a single column. An agitator is employed to prevent the caps from clogging over the upper end of the tube, but it does not interfere with their axial arrangement, for on that depends their right presentation when they are taken one by one from the lower end of the tube by a carrier having a pair of spring fingers, and swung over the headed shells which are automatically fed into range. Then a punch descends, and forces the primer into the seat formed for it. *Held*, that as it is essential that the caps be preserved in their axial arrangement, with their open ends forward, this patent is not anticipated by patents wherein articles are placed in the hopper without regard to their relation to each other, and are dependent on mechanism between the hopper and the conductor to bring them into such proper relation.

5. SAME—INFRINGEMENT.

The agitator mentioned in the Salisbury patent, which has a vertical reciprocating motion, is infringed by an agitator in a similar machine, performing the same function, but having a vibratory motion to right and left through the mass of caps.

6. SAME—INFRINGEMENT—PLEADING—WANT OF NOTICE.

In a suit for the infringement of a patent, allegations in the answer that neither complainant nor any one for it duly notified defendant of the existence of the patent charged to be infringed constitutes no defense, for defendant must negative notice of such patents from any source whatever.

7. SAME—DISMISSAL OF BILL.

It is no ground for dismissing the bill in such suit, and remanding complainant to his remedy at law, that defendant has sold his patents alleged to infringe those of plaintiff, and has delivered all patterns and drawings for their manufacture to the purchaser.

In Equity. Suit by the Winchester Repeating Arms Company against the American Buckle & Cartridge Company. Decree for complainant.

Charles R. Ingersoll and George D. Seymour, for complainant.
Henry G. Newton, for defendant.

SHIPMAN, Circuit Judge. These are three bills in equity which are respectively based upon the alleged respective infringement of three letters patent, viz.: No. 181,309, dated August 22, 1876, to Burton, Salisbury, and Wells, for an improved machine for "priming" cartridges; No. 232,907, dated October 5, 1880, to George P. Salisbury, for an improved cartridge assembling machine; and No. 237,605, dated February 8, 1881, to said Salisbury, for a machine for winding and introducing wads into paper cartridge shells. The respective bills are Nos. 676, 677, and 678. The machinery described in these patents is designed for the automatic manufacture of paper cartridge shells with metal heads, and which are used in shotguns. The complainant, the owner of each patent, is now, and the defendant formerly was, engaged in such manufacture. In May, 1889, the complainant brought a bill in equity for an injunction against the defendant's alleged infringement of the wad-winding patent; and on May 24, 1889, the defendant sold to the complainant all its machinery and tools which were used in the paper and brass cartridge shell business, and its partially made shells to be completed by the defendant, and its stock of paper, but not its patents. The complainant agreed, upon the complete execution of the contract of sale, to withdraw the suit, and waive damages for the previous infringement of the patent. The machinery so sold, consisting of three wad-winding, two priming, and two assembling machines, was retained for a time by the defendant in order to complete the shells, which were being finished under the complainant's inspection, and on August 23, 1889, was delivered to the complainant. On July 3, 1889, the defendant sold its patents to the Peters Cartridge Company, of Ohio, and also thereupon secretly manufactured for it two full sets of machines for making shells, including two wad-winding, two assembling, and two priming machines, which were, in substance, duplicates of the machines sold to the complainant, and in November, 1889, sent them to the factory of the purchasers in Kings Mills, Ohio, where they were set up by the defendant's workmen. It also sent the Peters Company, at the same time, its drawings and patterns of these machines, and has not since that time engaged in the manufacture of paper-shell machinery. The machines were destroyed by fire about July 1, 1890. The complainant, when it examined the assembling and priming machines which it had purchased of the defendant, was of opinion that they infringed the first and second patents hereinbefore mentioned. These suits were brought in October, 1890. About May 1, 1892, the complainant brought suits in the United States circuit court for the southern district of Ohio, against the Peters Cartridge Company, for infringement by the use of the machines it had purchased.

Before entering upon a description of the inventions which are described in the three patents in controversy, it is proper to say that the defendant placed in evidence a large number of patents, but has given no testimony in regard to the bearing which they have upon the patents in suit. The court is therefore deprived of the benefit

which it would have had from an explanation by a mechanic of the defendant's view of the mechanical questions in the cases. The devices described in the three patents were designed to perform automatically the work which had theretofore been done by hand. The tightly-wound base, called a "wad," is wound and inserted in one end of the paper tube, a metal head is placed over the same end, and a primer is put in its proper place in the head. The description of the mechanism which is contained either in the specifications or in the testimony of the complainant's expert is and must be long, if accuracy is to be attained, and without the aid of drawings cannot be very clear. I therefore use the much shorter statements which are contained in the complainant's brief, and which are sufficiently explicit for the purpose of a general description. As the winding of the wad precedes the other operations in order of time, the mechanism of No. 237,605 is first explained:

"A strip of paper is automatically fed into a slot formed in one end of an intermittently rotated spindle, much the same as a needle is threaded, but for the difference that one is an automatic, and the other a manual, operation. Then the spindle is allowed to rotate, and wind the strip upon it in the form of a coil, until it is stopped by the resistance to rotation developed by the frictional contact of the edge of the coil, with the inner periphery of a gauge consisting of a fixed bushing or sleeve, the inner diameter of which exactly corresponds to the diameter of the wads to be formed. Then the coil or wad is automatically cut from the strip. Then the wad is stripped from the spindle, and is ejected from the bushing into a tube which has been automatically expanded and brought into position to receive it, the spindle being given a partial, intermediate rotation as soon as the wad is stripped from it, and stopped with its slot in right position to again receive the end of the stock or wad strip, and then allowed to rotate again until stopped by the wad, thus newly wound upon it, and so on."

Inasmuch as the spindle is not stopped after a predeterminate number of revolutions, but, by the wad, after an undeterminate number, which depend upon the thickness of the strip of paper which forms the wad, there must be a partial rotation of the spindle between its winding rotation, so as to bring its slot again into the right position to have another end of the wad strip fed into it. This operation of the spindle is provided for—

"By furnishing it with a small pulley, over which a friction belt runs constantly when the machine is in operation, and with a positive stop mechanism, which operates intermittently, and which holds the spindle with its slot in right position to receive the end of the wad strip, against the power of the friction belt, which at this time slips on the said pulley. The action of the said stop mechanism is timed, so that, as soon as the strip has been fed to the spindle, it releases the same, and permits the friction belt to reassert itself, and rotate the spindle until it is overpowered by the friction developed between the bushing and the wad now on the spindle, which will be stopped and held again, this time by the wad, the belt again slipping on the said pulley; but, the moment the wad has been stripped from the spindle, the friction belt again comes into play, and carries the spindle through an intermediate, partial rotation, which while varying in degree, is always sufficient to bring it into right position to receive the stock strip, in which position it is arrested by the stop mechanism, which is brought into operation for the purpose."

The five claims which are alleged to have been infringed are as follows:

"(2) In a wad winder, the combination of the revolving spindle, constructed to engage the end of the strip from which the wad is to be wound, a stop to arrest the revolution of the spindle in position to receive the end of the strip, a feeding device to force the end of the strip into engagement with the spindle, and a cutter, operating to cut off the strip when the requisite length has been taken by the revolving spindle, substantially as described. (3) In a wad winder, the combination of a revolving spindle, constructed to engage the end of the strip from which the wad is to be wound, a sleeve around said spindle, and within which the wad is wound, a stop to arrest the spindle when in position to receive the end of the strip from which the wad is to be wound, a feed to present the end of the strip for engagement with the spindle, and a follower within said sleeve to eject the completely wound wad, substantially as described. (4) In a wad winder, the combination of a revolving spindle, constructed to engage the end of the strip from which the wad is to be wound, a sleeve around said spindle, and within which the wad is wound, a stop to arrest the spindle when in motion to receive the end of the strip from which the wad is to be wound, a feed to present the end of the strip for engagement with the spindle, a follower within said sleeve to eject the completely wound wad, with a cutter operating to cut off the strip when the requisite length has been wound, substantially as described. (5) The combination of a wad-winding mechanism in which the winding spindle is constructed to engage the end of the strip from which the wad is to be wound, with feeding devices, substantially such as described, to present the cartridge tubes into axial line with the said winding spindle, and a follower to force the wad from the spindle into the tubes, substantially as described. (6) The combination of a wad winder, substantially as described, with feeding device, substantially such as described, to successively present the cartridge tubes to the wad winder to receive the wad, with a device, substantially such as described, to expand the end of the tube to receive the wad, and a follower to force the wad from the spindle into the tube, substantially as described."

It will be perceived that each of these claims is for a combination of several elements, each one of which performs one of the successive operations which have been described. No pre-existing machine contained these respective combinations. The pre-existing mechanisms which have the most important bearing upon this patent are those described in the patents to Conrad Holtz, No. 104,312, and to Alfred Charles Hobbs, No. 137,773. The Holtz machine was for making paper tubes for use in spinning machinery, and had a split spindle around which the paper was wound in tubular form and an ejector; but the piece of paper was cut before the winding commenced, whereas in the machine of Salisbury the piece of paper is not cut until the predetermined external diameter has been attained. Moreover, the spindle of the Salisbury machine is stopped when this required diameter of the tube has been attained, whereas in the Holtz machine the stoppage of the spindle is not controlled by the paper or the diameter of the tube. The essential peculiarities of the Salisbury machine do not exist in the Holtz device. The Hobbs patent is for a wad-winding machine, and contains a split spindle and an ejector; but inasmuch as the paper is placed in the spindle by hand, and has no guiding device, there are no means for the automatic stoppage of the spindle, and there is no cutter. The absence of feeding device, sleeve, stop, and cutter prevent this machine from anticipating the combinations which are present in each of the quoted claims of the Salisbury patent.

The patentee says in the specification of the "Assembling Machine" patent:

"Paper cartridge shells, such as are ordinarily used in shotguns, are composed usually of four parts, viz.: An open-ended tube, which constitutes the body of the shell; second, a short tube called a 'reinforce;' third, a wad to close the ends; and, fourth, a metallic cap or head. Heretofore these parts have been put together, or, as it is technically termed, 'assembled' by hand, which is necessarily a slow and tedious process. The object of my present invention is to produce a machine by which this work may be done automatically by simply supplying it with the parts before mentioned. The machine may be of various forms or styles; but the style shown in the accompanying drawings is one of the simplest and most convenient known to me."

The wad-winding machine had not been invented when the assembling machine patent was applied for, and therefore it is only necessary to state in general the mode of operation of the parts of the machine which have no reference to the manipulation of the wad, and which are included in claims 3 and 4:

"Tubes, each with a wad in one end, are stuck by hand, wad end up, on vertically arranged pins carried by an intermittently rotated horizontal dial, which presents them to the action of crimpers, whereby their upper ends are contracted, and cups or heads are thrown open side up, on a horizontal friction-feed dial, which co-operates with a fixed guide or channel located just above it, to feed them in single file onto a bed or table, from which they are picked up one by one by a pair of oscillating, spring fingers, which swing them over the contracted ends of the tubes, when a punch comes down and drives them thereupon, the tubes or shells being then automatically picked off the pins and discharged from the machine."

The third and fourth claims are as follows:

"The crimping tools, f and g, arranged to operate consecutively on the shell or tube, b, to prepare it for the reception of the metal head, in combination with mechanism, substantially such as described, for delivering and forcing the metal head upon the shell, as set forth. (4) The combination of a shell-carrying dial, D, a friction feed dial, L, with the spring transfer jaws, m, and reciprocating punch, h, for feeding, placing, and forcing the metal head on the shell, substantially as described."

The patents for cartridge machines which the defendant has put in evidence describe, as a part of the mechanism, intermittently rotating disks, and sometimes in connection therewith tubular punches, but do not contain the different elements which are in combination in the third and fourth claims, or equivalents therefor; and neither of these patents describes a machine which was designed to perform the work which was the office of the Salisbury machine. For example, in the Payne patent, No. 50,489, a descending punch passed upon the open end of the shell, and swaged or reduced the shell throughout a portion of its length, from that end towards the head, while in the Salisbury machine a reciprocating punch came down upon the head end of the tube, and crimped it around its edge, so as to prepare it for the cap. The invention contained in the priming machine is said in the specification of the patent to have consisted in an improved device for feeding caps or primers to cartridge shells, and in a novel contrivance for setting the caps or primers in place. The following description states as briefly as I think is practicable the characteristics of the machine:

"In the first place, the loose caps or primers are arranged with their open ends forward, in a flat hopper or reservoir, wide at its upper and narrow at its lower end, and just deep enough in transverse section to receive a

single vertical layer of caps piled one on the other in a side to side or axial arrangement, and to permit them to move up and down, but not deep enough to let them turn over. From the narrow lower end of this hopper the caps gravitate, without changing their relative axial positions, into a guide tube, in which they form a single column. An agitator is employed to prevent the caps from clogging over the upper end of the tube, but, though it moves them about, it does not interfere with their axial arrangement, for on that depends their right presentation later on, when they are taken one by one from the lower end of the tube by an oscillating carrier, having a pair of spring fingers, and swung over the headed shells, which are automatically fed into range with the said fingers by an intermittently actuated dial, furnished with pins, on which the shells are struck by hand. Then, when the fingers have swung a cap over a shell thus presented, a punch comes down between the fingers, and pushes the primer into the seat formed for it in the sheet-metal cup or head which was put onto the tube of the shell in the assembling machine. The primer is now in place, and is retained therein by the friction between its sides and the sides of the said seat. A spring-actuated stop normally closes the lower end of the guide tube, and holds the column of caps therein, while a movable, spring-actuated gate is provided to stand in front of the fingers of the carrier when they are separated to take a cap, and prevent the same from falling outward through the fingers in which the gate retains it until they close upon it, and need no further assistance. A pointed screw is arranged to separate the fingers when they are brought into position to take a cap or primer from the lower end of the guide tube. It will be readily understood that it is imperative that the caps be arranged with their open ends outward, and so passed on through the machine, for in no other way can their right presentation to the cups of the shells be insured. The construction by which that arrangement is held is one of the leading features of the invention disclosed in the patent in suit, and the oscillating carrier having spring arms is another, but above either is the automatic character of the machine."

The claims of the patent are as follows:

"(1) The magazine or hopper, D, with the reciprocating tube, T, constructed to operate substantially as and for the purpose set forth. (2) The combination of the hopper, D, reciprocating tube, T, and the stationary tube, G, substantially as set forth. (3) The pivoted arm, N, provided with the spring clamps, a, in combination with the gate, L, the yielding stop piece, H, and the pointed pin or screw, J, all constructed and arranged to operate substantially as described, whereby the primers are transferred from the tube, G, to the head of the shell, as set forth. (4) The combination, substantially as set forth, of the tube, G, stop, H, carrier arm, N, sliding gate, L, and reciprocating punch, M, all arranged to operate substantially as set forth. (5) In a capping machine, a pivoted or swinging arm, N, constructed to operate substantially as described, whereby it shall receive a primer from the mouth of a supply tube, and transfer it to a cartridge shell, substantially as set forth."

The devices shown in the patents introduced by the defendant present to the eye more apparent resemblances to the mechanism of the patent in suit than do the alleged anticipations of the other patented inventions. They show hoppers and single file conductors, which have a general external likeness to the hopper and conductor of the patent in suit, and they also contain agitators, but they do not possess the peculiarities of the machine in controversy. The defendant has introduced, without explanation, some 16 patents as an anticipation of No. 181,309. I shall not assume the unnecessary burden of endeavoring to explain each device, but shall content myself with stating the result, which is manifest with sufficient clearness, and which I state in the language in which the complainant's expert has summarized his conclusions:

"The hopper of the patent in suit differs essentially from the construction of any of the hoppers in the patents to which I have referred. In the hoppers of all the patents so referred to, the hoppers are irrespective of the shape of the articles to be placed therein, and so that the articles are dumped in mass therein, irrespective of the relation of one article with another, and are dependent upon a mechanism between the hopper and conductor to bring them into proper relation to each other in or on the conductor; whereas in the patent in suit the hopper is constructed of a width corresponding substantially to the length of the primers or caps to be placed therein, and so that the caps, in order to enter the hopper, must have their axes all parallel with each other, and not only in such relation to each other, but they must have their open ends all in the same direction, and because of this shape of the hoppers it is impossible to change the axial relation of one cap to another while it is in the hopper or passing through it. Again, the conductor of the patent must be in such relation to the hopper that it will receive caps direct from the hopper without the possibility of changing the axial relation of the caps or primers. Again, the agitator which is combined with the hopper is, and must be, of such a character that, while agitating the caps at the delivery end of the hopper to prevent clogging, it cannot act to disturb the axial relation of the caps. Neither of the patents prior to the patent in suit shows a hopper combined with an agitator like the hopper and agitator of the patent in suit, or any equivalent therefor, and therefore neither of the patents contains, in my opinion, the invention of the first claim of the patent in suit. For the reasons given regarding the first claim, none of the patents referred to, in my opinion, contain the invention recited in the second claim, which includes the combination of the hopper and agitator of the first claim, with the conductor, as I have described; neither do those patents disclose any equivalents therefor. None of the patents disclose mechanism substantially like or equivalent for the devices for transferring the primers as in the patent in suit, and therefore, in my opinion, do not contain the invention recited in the third, fourth, or fifth claims of the patent in suit, or any equivalent therefor."

Upon the question of infringement, no attempt was made upon the oral argument by the defendant to discriminate between the wad winding and the assembling machines, which were made by the defendant, and were sent to Kings Mills, and the complainant's respective patents, so far as these machines were claimed to have infringed. The defendant, in argument, denied infringement of the priming machine patent principally upon the ground of the difference in the character of the agitators. The defendant's agitator vibrated or swung to the right and left through the mass of primers, instead of having the vertical reciprocating movement of the complainant's device; but this change created only an apparent, and not a real, difference. Upon this point it is important to state that the defendant's agitator was not the one shown in the William B. Place patent, No. 406,466, dated July 9, 1889.

The questions in regard to a decree remain to be considered. It is admitted that the machines which the complainant made and used contained no notice of their patented character, and it is claimed that the defendant was ignorant of the existence of the assembling machine and priming machine patents, and that, therefore, no damage can be recovered against it for their infringement. Knowledge of the existence of the wad-winding patent after May 24, 1889, is conceded. The defendant's answers in Nos. 676 and 677 each aver that it was never duly notified by the complainant, or by any one for it, of the alleged infringements before the filing of the bills, and that it did not make infringing machines after

it had been notified. The answer did not aver the defendant's ignorance before it made the machines, and of the existence of the complainant's letters patent, and that they were being infringed by such manufacture, but cautiously averred that it was not duly notified by the complainant, or by any one for it. The defendant, "who relies upon a want of knowledge, upon his part, of the actual existence of the patent, should aver the same in his answer." *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. Rep. 799. The conduct of the defendant, coupled with the testimony of Dunn, the mechanic who made the infringing machines, shows that it had actual knowledge of the existence of the patents owned by the complainant, and that it had received information, while the machines were being made, that they infringed.

It is next insisted that the complainant is not entitled to relief in equity, because, although infringement had taken place, yet it must be apparent from the sale of the patents and the delivery to the purchaser of all the defendant's patterns and drawings that it had necessarily abandoned the manufacture of cartridge machinery; that an injunction was therefore useless, and should not be issued merely for the purpose of compelling the defendant to an accounting, but that the complainant should be sent to an action at law. The patents upon which the bills are based are still in life. When the cases were brought, the complainant sought equitable relief to protect itself against renewed infringement. An abandonment of intention to infringe does not destroy or take away the jurisdiction of the court, which has, notwithstanding, the power to grant either an injunction or the incidental relief of an accounting. It is a matter of discretion. *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. Rep. 217. In my opinion, the cases were properly brought. The defendant, without controversy, knew in 1889 that it was infringing the wad-winding machine patent. It infringed under circumstances of some aggravation, and the complainant might properly think that it would be willing to re-engage in infringement, and again build machines for the Ohio company. The mere fact that a court can properly find that renewed infringement will not probably take place is no sufficient ground, after the testimony has been taken, for dismissing the bills, turning the complainant out of court, and compelling it to seek for damages in an action at law.

Let a decree be entered in No. 676 for an injunction against the infringement of letters patent No. 181,309; in No. 677 against an infringement of the third and fourth claims of No. 232,907; and in No. 678 against an infringement of the last five claims of No. 237,605; and for an accounting in each of said cases.

to TROY LAUNDRY MACHINERY CO., Limited, et al. v. SHARP et al.

(Circuit Court, N. D. New York. March 2, 1893.)

No. 5,901.

PATENTS FOR INVENTIONS—INFRINGEMENT—DAMPENING MACHINES.

Letters patent No. 401,770, granted April 23, 1889, to Wendell & Wiles for an improvement in dampening machines, were for a machine consisting of rollers each having a nonabsorbent or elastic body or periphery covered by a thin, textile fabric, and arranged "to run in contact" with each other, having adjustable bearings, by means of which they can be moved a limited space apart, in combination with separate water-supply rollers; the object being to dampen articles to be laundered by passing them between the first described rollers, and to moisten their whole surface equally, though they may not be of a uniform thickness, or may have seams or buttons. *Held* that, as the invention is a meritorious one, the claim will not be restricted to rollers actually in contact, especially as such contact is repugnant to the elsewhere expressed purpose of the machine; and the patent is infringed by a device similar in all respects save that these rollers are separated from each other by something less than one sixteenth of an inch.

In Equity. Bill by the Troy Laundry Machinery Company, Limited, and others against Alonzo Sharp and others to restrain the infringement of a patent. Decree for complainants.

Statement by COXE, District Judge:

This action, for infringement, is based on letters patent No. 401,770, granted April 23, 1889, to Wendell & Wiles for improvements in dampening machines. The patent is now owned by the complainants. The object of the invention is to provide a machine for dampening articles to be laundered, particularly collars and cuffs, during the process of laundering the same. The specification says:

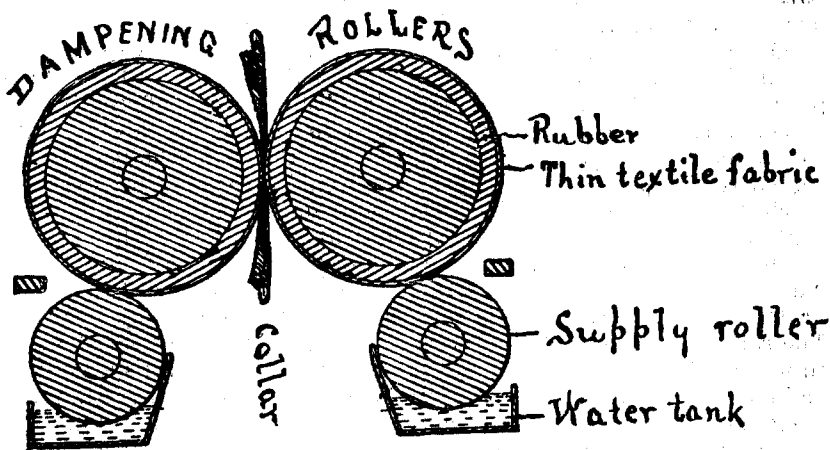
"One of the requisites of the problem is to secure the uniform application of a limited quantity of water; another, to provide for the passage through the machine of articles having seams, buttons, or other protrusions, and yet to insure a uniformity in the dampening process, especially at and adjacent to said protrusions. It is also requisite that the successful machine should be capable of dampening large quantities of goods in a given time. With these objects in view we have constructed a machine whereby they are attained; and our invention consists in the novel features of construction and arrangement hereinafter described, and particularly pointed out in the claims."

The goods are dampened by being passed between two dampening rollers, which are arranged over and in contact with smaller metal rollers, which revolve in a water trough and supply the dampening rollers with water. The dampening rollers are provided with adjustable bearings so that they can be moved, within a limited space, towards and away from each other and set at any desired distance, depending upon the thickness of the articles to be dampened. The specification says further:

"The dampening rollers are arranged over and in contact with the supply rollers and also in contact with each other in a vertical plane passing between said supply rollers, whereby goods after being dampened fall unassisted into any suitable receptacle under the dampening rollers. Each of the dampening rollers consists in this instance of a shaft, a core of wood, an elastic or yielding nonabsorbing bed or body mounted on the wood, and an outer covering of thin textile fabric. The body of the roller itself may be described as being essentially of any nonabsorbing elastic substance. In this instance rubber is employed, and the purpose of the wooden core is simply to economize in the quantity of rubber necessary in a roller of a desired diameter. The purpose of the thin textile covering is that the water taken up by the rollers shall be limited in quantity, as in dampening starched goods a uniform and

more or less slight moisture only is required. If woolen, felt, cotton, or other fabric of too great thickness were employed as a cover of the nonabsorbing portion of the roller, a sufficient quantity of water would be absorbed (or taken up from the supply roller and conducted to the article being dampened) to more or less effectually wash out, dissolve, or remove the starch therefrom, so that when ironed a defective finish would be the result. By arranging two dampening rollers of the character described to run in contact with each other the elasticity thereof acts during the passage of seams or other protrusions in that each roller conforms to the irregularity of the surface of the article coming in contact therewith. In other words, both surfaces are uniformly moistened, and an excess of protrusions upon one surface of an article is compensated for by the elasticity of the roller in contact with its opposite surface. Separating the water-supply rollers and arranging the line of contact of the dampening rollers between the supply rollers also provides an unobstructed passage for the dampened goods through the machine and into any suitable receptacle placed below the dampening rollers to receive the goods."

The following diagram, in cross section, will sufficiently explain the operation of the machine:



The patentees disclaim dampening rollers having a rubber body or periphery and a cover of woolen or other similar fabric. The claims are as follows:

"In a dampening machine for laundry purposes, a pair of rollers each having a nonabsorbent elastic body or periphery covered by a thin textile fabric and arranged to run in contact with each other, in combination with separated water-supply rollers, substantially as specified. (2) The combination of the rollers R^1 , R^2 , each having the rubber body or periphery b^1 , and thin textile covering b^2 , and arranged to run in contact with each other, the separated water-supply rollers W^1 , W^2 , the troughs D^1 , connecting troughs D^2 , supply pipe I , overflow nipple n , and discharge pipe o , substantially as specified. (3) The combination, with the rollers R^1 , R^2 , arranged to run in contact with each other, having the nonabsorbent elastic bodies or peripheries b^1 and thin textile covering b^2 , of the adjustable bearings J^1 , the water-supply rollers W^1 , W^2 , the adjustable bearings J^2 , J^4 , and the troughs D^1 , D^2 , substantially as specified. (4) The combination, with the two dampening rollers R^1 , R^2 , each having a rubber body or periphery, b^1 , and thin textile covering b^2 , running in contact with each other, of the supply rollers W^1 , W^2 , each running in contact with one of the rollers R^1 , R^2 , and a suitable framework, substantially as specified."

It was admitted on the argument that in all essential features the defendants' machine is substantially the same as the patented machine. In fact, if

the patent is held to be valid and the claims are construed to cover a machine where the dampening rollers operate in conjunction, but not in actual contact, the defendants concede that they infringe.

The defenses are two: First, that the patented machine, as described and claimed, is inoperative; and, second, that the patent is void for want of novelty and invention. All of the other defenses alleged in the answer are waived.

John H. Peck, (E. B. Stocking, of counsel,) for complainants.

William W. Morrill, (Nelson Davenport, of counsel,) for defendants.

COXE, District Judge, (after stating the facts.) The problem presented to the patentees was how to dampen laundered articles by machinery, preparatory to being ironed, so as to prevent the starch from being washed out and insure uniformity in dampening and rapidity in execution. Prior to the patent attempts to produce these results had ended in incomplete success or in absolute failure. The patentees have produced a successful machine which solves the problem. They are, therefore, entitled to rank as inventors.

All of the elements of the combination were old save one—the dampening rollers covered with a thin textile fabric. The Beach patent, No. 18,032, is, it is thought, the best reference offered by the defendants. It shows rollers arranged in similar juxtaposition to the rollers of the patent in hand, but the Beach mechanism is designed to dampen and cut paper. It would be wholly useless as a machine for dampening collars and cuffs, for the reason, principally, that its rollers are covered with cloth and not by the thin textile fabric of the patent. It was the adoption of this thin fabric which made success out of failure. Other coverings had produced too much or too little water, but this one seems to hit the happy medium. The rollers so covered do the work required with perfect satisfaction fulfilling all the requirements demanded by the launderer's art. The claims contain the expression, regarding the rollers, that they are "arranged to run in contact" and the defendants argue, first, that the patent is inoperative because the machine cannot be run successfully when the rollers are in contact, and, second, that the defendants do not infringe because their rollers are not in absolute contact but are separated by a space which is, probably, less than the sixteenth of an inch. It is thought that the strict construction contended for by the defendants, viz.: that the rollers must be in close junction, actually touching each other, is not required and should not be sustained. The reasons for this opinion may be briefly stated as follows:

First. The patentees having made a meritorious invention, the court should seek to uphold their patent and not to destroy it by illiberal construction.

Second. Nothing in the prior art required that the patentees should restrict themselves to rollers actually touching each other. It can hardly be imagined that they intended to introduce, or supposed that they had introduced, a limitation so opposed to common sense and so unnecessary. *Dugan v. Gregg*, 48 Fed. Rep. 227.

Third. A careful reading of the specification makes it plain that the patentees did not mean that the rollers should be in actual con-

tact when in operation, but, rather, that they should be run in conjunction with and in juxtaposition to each other.

Fourth. The specification describes adjustable bearings by means of which the rollers may be separated for a short distance, a totally useless function if they were always to touch each other.

Fifth. The specification also refers to the passage through the machine of articles having seams, buttons and protrusions; evidently requiring a wider space than collars and cuffs, which do not have buttons.

Sixth. Again, the operation of the machine is described, which is in direct conflict with the literal meaning of the word "contact," for it is manifest that the rollers cannot run in contact when they are separated by the article which is passing between them.

Seventh. The words "in contact" were not wisely chosen, but when the entire surroundings are considered it is evident that the patentees meant that the words should be construed as synonymous with "in connection." As no one has been or can be misled by this construction there is no reason why it should not be adopted.

Eighth. If the defendants' contention were adopted a machine which was originally arranged with the dampening rollers in contact and, therefore, an unquestioned infringement, would, by reason of the wear incident to the operation of dampening, cease to be an infringement, because the proof shows that the rollers change with use so that parts, at least, are not in contact. It will hardly do to adopt a construction which would absolve a licensee from paying royalties after a month or so of use; a construction which would make the operator of one and the same machine an infringer one day and a legitimate user the next.

Ninth. The equities are with the patentees. They have constructed a valuable and successful machine which performs the work required in a satisfactory manner. They were the first to make a success in this particular branch of industry. The defendants have copied all the essential features of the machine, and no reason is suggested which entitles them to a harsh and narrow construction.

It is thought, therefore, that the patent is valid, that the claims have been infringed by the defendants, and that the complainants are entitled to the usual decree.

KAESTNER v. NATIONAL BREWING CO. et al.

(Circuit Court, N. D. Illinois. February 18, 1893.)

1. PATENTS FOR INVENTIONS—NOVELTY—INVENTION—MASH RAKES.

Claim 1 of letters patent No. 207,283, issued August 20, 1878, to Charles Kaestner, for an improvement in mash rakes, which is for the construction of vertically and horizontally revolving rakes or agitators, and horizontally rotating scrapers, operating in the usual form of mash tub, is invalid for want of novelty and invention, the prior art showing that the patentee did not introduce any new operation or device; that the purpose of this claim, and the means therein employed, were old.

2. SAME.

The second claim was for the combination in a mash tub of scrapers which are secured upon a fixed arm that revolves around the axis of said tub, and have their faces inclined rearward, and towards the circle upon which is located the discharge opening, whereby the solid contents of said mash tub may be moved to, and caused to pass through, said opening. *Held*, that the claim is invalid for want of invention,—it being common in the art to use scrapers without agitators, and the changes in devices being only due to the skill of the mechanic,—even though the machine, as a whole, may be better.

3. SAME—INFRINGEMENT.

Even if the claims can be held valid by reason of special construction, then the defendants do not infringe, as they use an old, sweeping, single scraper, and do not use the scrapers, L, of either claim.

In Equity. Suit by Charles Kaestner against the National Brewing Company, Henry Olsen, Gustave Tilgner, and others for infringement of a patent. Bill dismissed.

Offield, Towle & Linthicum, for complainant.

Banning & Banning & Payson, for defendants.

GRESHAM, Circuit Judge. This suit is brought for the infringement of the first and second claims of the patent to Charles Kaestner for mash rakes, dated August 20, 1878. So far as the tub is concerned, it contains nothing new. The statement is, A and B represent the side wall and bottom "of a mash tub of the usual form," and further on the discharge hole is incidentally referred to. The drawing does not indicate that the tub has a double bottom or a false bottom, and the specification is silent as to this, for the words "usual form" refer to the entire tub; but, for the purposes of the improvements claimed, it seems not to be material whether the bottom is double or single, as both forms are shown to be old. The difficulty in the older machines, to be remedied by the improvements, is stated to be that the portion of grain "near the bottom of the tub being liable to be passed over by the revolving rakes usually employed," and that to obviate this difficulty the principal improvement consists in combining rotating scrapers with revolving agitators so as to raise the grain from the bottom of the tub. The first claim corresponds with this statement. It is:

"(1) In a mash tub, the combination of vertically and horizontally revolving rakes or agitators, K, and horizontally rotating scrapers, L, substantially as and for the purpose specified."

This claim is for the rakes, K, which are carried around the tub by the vertical shaft, and their supporting shaft is made to revolve by the gearing near the bottom of the tub. A set of scrapers is also carried around in the tub by the vertical shaft, but without being revolved by their carrying shaft or bar, or, in other words, the rakes have two motions, while the scrapers have only one, both sets operating in any suitable mash tub; the purpose being to lift the bottom grain so as to bring it within the action of the rakes, and for this purpose the hole in the bottom must be plugged or closed during the entire period of agitation. The agitators do not move the grain towards the discharge hole when it is open, any more than

they move it away from such opening. The absence of the hole is more essential, during agitation, than its presence. The prior art shows that the patentee did not introduce any new operation or device. The Schwalbe mash machine, from the Polytechnisches Centralblatt, (1859,) shows a mash tub in which there are two rakes or agitators, one of which has the same double movement as that of the rakes, K, of the patent, and scrapers on the opposite side of the vertical shaft. Over these scrapers there is another agitator, which has a double horizontal rotation. The statement as to the scrapers is:

"Two wings, S, S, hanging near the bottom in the rotation of [shaft] L, stir up the mass that has deposited on the bottom."

The Volckner mash machine, from the same German publication of 1864, shows a similar machine, except that the doubly rotating agitator is shorter, and considerably above the scraper. The statement here is:

"The vertical agitator, H, carries two gratings, T and U, as well as two knives, V, hanging near the bottom. The latter stir up the mass that has settled on the bottom of the vat."

The Schwager meat cutter, of 1874, shows two sets of knives, having the same double rotation as the Kaestner rakes have, which is caused by a central shaft, and an arm having the same single rotation, which carries several stirring scrapers, or a single, full-width, cleaning scraper. Brand & Hoffman, in 1866, show a mash tub in which two agitators, having a double horizontal rotation, are used with scrapers at the bottom. They say, "The service performed by this scraper is to scrape up the mash, and prevent it from settling to the bottom of the tub," and their first claim is, "The adjustable scraper on bottom of tub." Other patents might be referred to, but these are sufficient to show that the purpose of the Kaestner first claim was old, that the means employed were old, and the use of more than one agitator would seem to depend on the amount of agitation desired.

The second claim is as follows:

"(2) In combination with a mash tub, scrapers, L, which are secured upon a fixed arm that revolves around the axis of said tub, and have their faces inclined rearward, and towards the circle upon which is located the discharge opening, b, whereby the solid contents of said mash tub may be moved to, and caused to pass through, said opening, substantially as and for the purpose shown."

Securing scrapers on a fixed arm is shown in the Schwager patent of 1874. A single curved scraper delivering mixed paint to a discharge hole in the bottom is shown by Poole in 1867. A series of scrapers on fixed arms, delivering salt or "other substances" to a discharge side hole, which scrapers can be adjusted in regard to their edge lines, is shown by Winegar in 1868; and scrapers which are attached to fixed arms that revolve around the axis of the tub, and have faces with an upward and rearward incline, which are so arranged as to bring the mixed material to a discharge hole in the bottom, are shown in the Martien patent of 1872. These scrapers

are also "dodged." The prior art illustrated by the exhibits shows that it is also common in the art to use agitators without scrapers, and scrapers without agitators; and, as the combination of the second claim is complete without the rakes or agitators which are included in the first claim, I do not see how the rakes or agitators can be carried into this claim, and thus make it substantially like the first. I do not think, in view of the first claim, that this was the intention of the patentee. The changes in devices, in so far as they differ from older ones, appear to be only due to the skill of the mechanic, even though the machine, as a whole, may be better. Better or worse, in kind, belongs to skill, and not to invention. The combinations of both claims are found in the older art in several forms.

If the claims could be held valid by reason of special constructions, then the defendants would not infringe, as they use an old, sweeping, single scraper, and do not use scrapers, L, of either claim. The bill is dismissed for want of equity.

BIXBY et al. v. DEEMAR.

(Circuit Court of Appeals, Fifth Circuit. March 13, 1893.)

No. 107.

1. SHIPPING—CARRIAGE OF GOODS—LIABILITY FOR LOSS—MASTER'S NEGLECT TO SAVE CARGO.

It is the duty of the master of a wrecked vessel, whether insured or not, to use reasonable diligence to save and reship the cargo; and where it appears that a part of the cargo was so stored that it might have easily been saved, and that several opportunities to reship what was saved were neglected, the carrier is responsible to the shipper for his loss, although the shipment was at the owner's risk, and "dangers of the river" were excepted.

2. SAME.

Where the master of a wrecked vessel abandons her to the underwriters without the exercise of due diligence to save the cargo, the fact that the underwriters take possession, and sell a part of the cargo which is not insured, does not exempt the carrier from liability to the shipper for his loss.

3. ADMIRALTY—APPEAL.

A decree in admiralty, awarding damages to a shipper, should be affirmed on appeal when it does not clearly appear on what grounds the district court based its award, and the proof does not clearly fail to show that the loss was caused by the master's neglect to use proper means for saving the cargo.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Admiralty. Libel in personam by H. H. Deemar against Horace E. Bixby and the St. Louis & New Orleans Anchor Line for loss of cargo on respondents' steamer. Decree for libellant. Respondents appeal. Affirmed.

R. H. Browne, (Browne & Choate, on the brief,) for appellants.

J. W. Gurley, Jr., (Gurley & Mellen, on the brief,) for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

McCORMICK, Circuit Judge. On the 3d December, 1890, H. H. Deemar, the appellee, shipped on board the steamer City of Baton Rouge, whereof the appellants were master and owners, in the port of St. Louis, 61 beehives filled with bees, and other articles, not necessary to specify, to be delivered to him in the port of New Orleans. He paid the freight, \$13.65, and received a bill of lading in which were expressed "dangers of the river excepted," and at "owner's risk." The steamboat proceeded on her voyage until the 12th of December, when, without her fault or the fault of her master or other officers or employes, she struck a hidden obstruction, and in a few minutes filled with water. The hull parted from her cabin, and sank in very deep water. The cabin, sustained by buoyant freight, floated in an eddy until it, partly submerged, was drawn to shore and fastened. The master, deeming both vessel and cargo a total loss, came to New Orleans the next day, and abandoned the cargo to the underwriters. The agent of the underwriters sent a steamer from New Orleans to the place of the wreck, the Hermitage landing, in Louisiana, only a short distance from New Orleans, to save what of the cargo could be saved, and bring it to New Orleans. The appellee's goods were not insured. The beehives had been placed on the cabin or saloon deck, and the day after the wreck—that is, on the 13th of December—most of them were taken on shore. Several boats passed the Hermitage landing, and proceeded to New Orleans, between the 13th of December and the 24th of that month, on which last day the beehives were brought to New Orleans on the steamer which had been sent to the wreck by the agent of the underwriters, and were sent to auction, and sold for account of whom it might concern, and were never delivered to appellee. Most of the bees—about two thirds in each hive—were dead, and the hives, 46 in number, were sold for only \$5.06, or 11 cents a hive. The appellee exhibited his libel against the appellants, and the customary proceedings were had, and at the hearing on the proofs the district court gave judgment for appellee against the appellants in solido for \$367.66.

Respondents appealed, and assign the following errors:

"(1) That, the carrier having established that the damage and loss occurring were within the exceptions contained in the bill of lading, the burden of proof was on the shipper to prove want of skill or diligence; and, the libellant having failed to show this, the judgment should have been in defendants' favor. (2) That the vessel being wholly lost, and every part and parcel of the cargo either wholly lost or greatly damaged, (to more than 50%,) the carrier had the right to abandon the cargo to the underwriters. And the master having abandoned the cargo to the underwriters, and the underwriters having taken possession of and sold the goods, the value of which is herein sued for, the court erred in holding the carrier responsible for any sum whatever. (3) That the bees, etc., having been sold at public auction by the underwriters, who had taken charge of them, the amount they brought in open market, after due advertisement, was the real value thereof, and the court having found the carrier liable, there being no neglect, want of skill, or negligence, the court erred in adjudging the carrier liable for any greater amount

than what the salvaged goods sold for in open market. (4) That the underwriters having taken possession of and sold the bees, beehives, etc., abandoned to them by the carrier, the underwriters, and not the carrier are responsible for whatever value they possessed, January 4, 1893."

The proof shows that there was not a total loss of these beehives and bees. It was the master's duty to use all reasonable care in saving the cargo, and sending forward such as was saved, if reasonable opportunity offered. 1 Pars. Shipp. & Adm. 234; Abb. Shipp. 455. Whether insured or not insured, this duty the carrier owed to whom it might concern, to save what could be saved by reasonable care and effort, and to reship. Three fourths of the beehives were gotten on shore within 24 hours. The proof does not show what proportion of the bees had then perished, but it does show that, after being abandoned 11 days, and then sent to auction, the purchaser found even then one third of the bees in each hive still alive; and his testimony indicates that, while some were drowned, others, and perhaps the greater part of those that died, were smothered by reason of the drowned ones falling before the entrance. The master's care of cargo relates to its nature. He is to give such reasonable care as that nature calls for, and he must deliver the goods, unless excused by the excepted risks. While the proof does not show what was the exact condition of these bees when they were got ashore, it does show that they were so stored on the boat as to be most accessible and easy to have been gotten ashore after the disaster, that much more than 50 per cent. of the hives were in fact got ashore within 24 hours, that there were at least two convenient opportunities to have reshipped them neglected; and, on the whole proof, our judgment is that appellants' first and second propositions, if sound, are not well taken. And the fourth proposition appears to us to be unsound.

The third proposition presents more difficulty, not because it states a general rule with exactness, and applicable to the case, for it does not do that, in our judgment, but because of our inability to discover in the proof, with certainty, the basis or the support on which the amount of damages adjudged by the district court rests. It appears to us that the district judge probably held that the proof was not sufficient to show that these bees were necessarily materially damaged by the disaster the boat encountered; that the great injury they did receive resulted from the master's neglect after encountering the peril in which his boat perished. If such was his view, we cannot, from all the proof, say it was so erroneous as to justify us in setting his judgment aside; for, that being so, the proof does sufficiently support the judgment. On the whole case, therefore, we consider that the judgment of the district court should be affirmed.

COLLINS MANUF'G CO. v. FERGUSON & HUTTER'S TRUSTEE et al.¹

(Circuit Court, W. D. Virginia. March 18, 1893.)

CIRCUIT COURTS—EQUITY JURISDICTION—ABSENCE OF PROPER PARTIES.

A circuit court cannot make a decree affecting absent parties to a suit, or a decree which so involves the rights of such absentees that complete and final judgment cannot be had between the parties present without affecting those rights, although equity rule 47 and Rev. St. § 737, give the court discretion to proceed in the absence of proper parties when an effective judgment can be rendered as to the parties present without prejudice to the rights of the absentees. *Bank v. Carrollton Railroad*, 11 Wall. 624, and *Hagan v. Walker*, 14 How. 29, followed.

In Equity. Suit by the Collins Manufacturing Company against Ferguson & Hutter's Trustee and others to annul a deed of trust. The defendant A. H. Burroughs, trustee for said Ferguson & Hutter, demurs to the bill. Demurrer sustained and bill dismissed.

Volney E. Howard, for complainant.

A. H. Burroughs and John H. Lewis, for defendants.

PAUL, District Judge. This is a suit brought to set aside and annul a deed of trust executed by Ferguson & Hutter to A. H. Burroughs, trustee, on the 15th of January, 1892. The deed was executed to secure a large number of creditors, mentioned therein, residing in different states. The bill makes the grantors in the deed, Ferguson & Hutter, the trustee, Burroughs, and all the creditors named in the deed, parties defendant. The defendant Burroughs, trustee, files a demurrer to the bill on the following grounds:

"First. That the said bill does not show on its face the residence of the following parties, all of whom are named as defendants thereto, to wit, L. & M. Woodhull, and a number of others."

The complainant asks leave, which could be granted, to file an amended bill, giving, where these are omitted, the residences of the parties. So the demurrer on this ground could not be sustained.

"Secondly. That 'the said bill joins defendants of different jurisdictions and of the following states, respectively: Ohio, Indiana, Maryland, Illinois, New Jersey, Pennsylvania, Wisconsin, Massachusetts, and Virginia. From the nature of the subject and the relief sought by the bill the suit cannot be tried when only a portion of the parties thereto have been served with process, the others not volunteering to appear.'"

Rule 47 of the rules of practice in equity is as follows:

"In all cases where it shall appear to the court that the persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree should be without prejudice to the rights of the absent parties."

¹Reported by Col. William D. Coleman, of the Danville, Va., bar.

Section 737 of the Revised Statutes of the United States says:

"Where there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district within which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties that are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer. * * *

The rule and statute cited comprise the only guide of law in considering the case before the court. There is no other rule of practice or provision of law prescribed. The demurrer alleges that complainant's bill "joins defendants of different jurisdictions," and contends that "from the nature of the subject and the relief sought by the bill the suit cannot be tried when only a portion of the parties thereto have been served with process, the others not volunteering to appear." Complainant alleges, among other things, in his bill, the very serious charge of collusion and fraud against the Davis Carriage Company, of Cincinnati, Ohio, a preferred creditor for a large amount under the deed of trust, and one of the parties to the suit who have not been served with process, and have not volunteered to appear; and under the statute cited any judgment or decree which might be rendered in this suit shall not be conclusive or prejudice the said party named, who has not been served with process, and has not voluntarily appeared. The rights of the large number of other defendants named in the bill, who have not been served with process, and have not voluntarily appeared, are also involved in the deed of trust which is sought to be set aside and annulled, and therefore a decree, if rendered in this suit, would practically be of no effect, and valueless. "It is doubtless the general rule that a bill in chancery will not be dismissed for want of proper parties, but the rule is not universally true. It rests upon the supposition that the fault may be remedied, and the necessary parties supplied. When this is impossible, and whenever a decree cannot be made without prejudice to one not a party, the bill must be dismissed." *Bank v. Carrollton Railroad*, 11 Wall. 624. "It remains true, notwithstanding the act of congress and the forty-seventh rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights." *Hagan v. Walker*, 14 How. 29. These authorities are decisive of the question before the court.

The demurrer must be sustained, and the bill dismissed.

CENTRAL TRUST CO. v. RICHMOND, N., I. & B. R. CO.

(Circuit Court, D. Kentucky. May 3, 1892.)

1. MECHANICS' LIENS—CONSTRUCTION OF LAWS — SUBCONTRACTORS — RAILROAD COMPANIES.

The provision of Laws Ky. 1888, that persons furnishing labor or materials for the construction of railroads and other public improvements, "by contract, express or implied, with the owner or owners thereof, or by subcontract thereunder, shall have a lien thereon" for the price of such labor and materials, does not embrace one who furnishes such labor and materials under a contract with a subcontractor.

2. SAME—WHO ENTITLED TO.

The language, "all persons who perform labor or furnish labor," does not intend only those who perform manual labor. It will embrace the services of a civil engineer, who actually superintended and directed the construction of the work.

3. SAME—TIME OF FILING—SUFFICIENCY OF CLAIM.

The further provision of the act that persons performing such labor must file a verified statement of the amount claimed, in the clerk's office, "within 60 days after the last day of the last month in which any labor was performed, or materials or teams furnished," was sufficiently complied with, in the case of laborers hired by the month, who, while working, filed a statement and claim for the previous month, for which they had not been paid, and after they ceased working filed another claim and statement for such labor performed, after, and not included in, the first statement. The requirement that the statement must set forth the "amount due, and for which the lien is claimed," does not necessitate a detailed statement of the claim.

In Equity. Bill by the Central Trust Company of New York against the Richmond, Nicholasville, Irvine & Beattysville Railroad Company to foreclose a mortgage. Heard on demurrers to intervening petitions setting up contractors' and mechanics' liens.

Butler, Stillwell & Hubbard and Richards, Weissinger & Baskin, for plaintiff.

Humphrey & Davis, Stone & Sudduth, St. John Boyle, C. G. Gilbert, Ernest McPherson, and Matt O'Doherty, for interveners.

BARR, District Judge. One of the principal questions raised by the demurrers to the intervening petitions is whether the lien given by the act of 1888 extends to labor and materials furnished or performed under contracts made with subcontractors, and others beyond subcontractors. The title of the act is:

"An act to create a lien on canals, railroads, and other public improvements, in favor of persons furnishing labor or materials for the construction or improvement thereof."

And the first section is:

"That all persons who perform labor, or who furnish labor, materials, or teams, for the construction or improvement of any canal, railroad, turnpike, or other public improvement in this commonwealth, by contract, express or implied, with the owner or owners thereof, or by subcontract thereunder, shall have a lien thereon, and upon all the property and franchises of the owner thereof, for the full contract price of such labor, materials, and teams so furnished or performed, which said lien shall be prior and superior to all other liens theretofore or thereafter created thereon."

The second section provides that the liens given shall in no case exceed, in the aggregate, the contract price of the original contractor; and, if they shall exceed the price agreed upon between the original contractor and the owner or owners, then there shall be a pro rata distribution of the original contract price among the lienholders.

The third section provides that—

"No lien provided for in this act shall attach unless the person who performs the labor, or furnishes the labor, material, or teams, shall, within sixty days after the last day of the last month in which any labor was performed, or materials or teams were furnished, file in the county clerk's office of each county in which the labor was performed, or materials or teams furnished, a statement in writing, verified by affidavit, setting forth the amount due therefor, and for which the lien is claimed, and the name of the canal, railroad, or other public improvement upon which it is claimed. Said claim shall be filed and indorsed by the clerk of said court, giving the date of its filing."

The fourth section provides that—

"Liens acquired under this act shall be enforced by proper proceedings in equity, to which other lienholders shall be made parties, but such proceedings must be begun within one year from the filing of the claim in county clerk's office, as required by the third section of this act."

The rule of the common law, that statutes in derogation thereof are to be strictly construed, has been changed in this state, and it has been declared that "all statutes shall be construed with a view to carry out the intention of the legislature." This would be the rule of construction in the absence of such a statute, but it is not always easy to ascertain the intention of the legislature. The language of the first section is, "all persons who perform labor, or who furnish labor, * * * by contract * * * with the owner or owners, * * * or by subcontract thereunder, shall have a lien," etc., and the controlling words on this inquiry are, "by subcontract thereunder." "Subcontract" is defined to be "a contract under another," and "thereunder," "under that or this." See Worcester and Webster. The sentence means contracts under the contract made with the owner or owners. Worcester defines a "subcontractor" as "one who contracts for the principal contractor." This, we think, is the meaning of the sentence, when taken in connection with the entire section, and there is nothing in the other provisions of the act to change or modify this construction. The act gives persons who labor, and furnish labor, materials, and teams, for the construction of a railroad, a lien on the entire property, to the extent of the original contract price for the construction, and this right to the lien commences when the labor commences, or the material begins to be furnished; and thus this inchoate right of lien practically suspends both the right of the owners of the railroads to pay, and the original contractor's right to demand payment of the owners, to the extent of the contract price or the value of work to be done, and materials to be furnished, under subcontracts, if there be any. This suspension continues during the time the work is being done, or the materials are being furnished, and more than 60 days thereafter, unless the subcontractor consents

to such payments, or in some way waives his lien. In view of this fact, it would seem to be just that the original contractor should have, not only the right to determine whether he would have a subcontractor, but also who should continue to be contractors, and thus lienholders, with equal rights as himself.

Whatever liens may be allowed subcontractors are of equal dignity with those of the original contractor, and are, as between him and the owner, deducted from the original contract price, and lessen to that extent his lien. It may be assumed, from the provisions of this act, that it was not intended for the benefit of owners of railroads and other public improvements; but the legislature having given a direct lien for work done and materials furnished, to the extent of the original contract price of the construction or improvement, the owner must, of necessity, see to the application of his payments. This necessity of the owner to see to the application of his payments gives him the right to suspend payments to the original contractor, to the extent of the possible claim of subcontractors. Thus the original contractor has the deepest interest, not only in selecting his subcontractors, but in controlling the possible liens they may create. This he can do, under the construction indicated; but if these liens may be created by any and all persons who may be employed or contracted with by contractors and those under them, the original contractor is helpless, since he has no contractual relations with or control over them. To illustrate, suppose the owners of a right of way contract with B. to construct for them a complete railroad of, say, 100 miles in length, for \$2,000,000, and B. sublets the construction of one half of it for \$900,000, and himself constructs the other half. B. can readily protect himself from the lien of the subcontractor, as affecting his own lien. This can be done by a proper contract, or by payments to him based upon the contract price. But if the law be that any and all of those who labor, or furnish labor and materials, for the construction of the railroad under said subcontractor, have a lien for their work done and materials furnished, then B. is perfectly helpless, since the contract price, or the reasonable value of the work done and the materials furnished, may be \$1,100,000, instead of \$900,000. The liens for this \$1,100,000 must share equally with other liens, including the lien of the original contractor. Thus, in the case given, B. would get only \$900,000 of the \$2,000,000, instead of \$1,100,000, as he was clearly entitled. It may be suggested that, in distributing money among these lienholders, the proper basis would be \$900,000, and that each lienholder under the subcontractor should get only nine elevenths, instead of the entire amount, but such is not the law.

The second section provides that—

"The liens provided for in the foregoing section shall in no case be for a greater amount, in the aggregate, than the contract price of the original contractor; and, should the aggregate amount of liens exceed the price agreed upon between the original contractor and the owner, * * * then there shall be a pro rata distribution of the original contract price among said lienholders."

If, therefore, we consider this act only from the standpoint of a lienholder, and ignore the interest and convenience of the owner of railroads and other public improvements, the construction given, which we think is fully sustained by the language of the act, must be the correct one. This act, in so far as it gives a direct lien to a subcontractor who has no contractual relations with the owner of the property, and without notice to or the consent of the owner, is a departure from the previous policy of this state; and this court, in construing the act, should not make the departure greater than the plain and usual meaning of the act would indicate. See "Mechanic Law" (Gen. St. c. 70) and "Local Mechanic Lien Laws," (Acts 1831, 1858, Loughborough St. 409; Myers St. 300;) *Fetter v. Wilson*, 12 B. Mon. 90; *Institute v. Young*, 2 Duv. 584.

The argument that the construction indicated will permit the act to be evaded, and thus needy and industrious people may fail to get the benefit of the law, is one not to be addressed to the court, but the legislature.

The argument is, however, without force, wherever made, because, if the meaning of the law is once definitely settled, persons will adjust their contracts and acts to that construction, and there need not be any hardship or loss, except such as may result from willful stupidity or ignorance. This a state cannot provide against, and it would be vain and hopeless to attempt it. The decisions in the different states are in seeming conflict, and it is unnecessary to review all of them, as each state has its own peculiar law and state policy. In some of the states it seems to be the policy to create the lien, without regard to any contractual relation with the owner of the building or structure, and in other states to confine the lien to those who have contractual relations, directly or indirectly, with the owners of the building or structure, and, in some others, to combine the two by having regard to the contractual relations of the parties, by limiting the persons who, beside the owners, can create a contractual relation under which a lien can be created under the statute. The late railroad lien law of Wisconsin, and also that of Indiana, seems to be of the first class mentioned above. See *Mundt v. Railroad Co.*, 31 Wis. 454, also *Redmond v. Railway Co.*, 39 Wis. 426; *Colter v. Frese*, 45 Ind. 97. The laws of other states are to the same effect. The statute of New Hampshire, as construed by the courts of that state, seems to be of the second class. See *Jacobs v. Knapp*, 50 N. H. 71.

The act of 1888, as we construe it, is of the third class, as are also the lien laws of Pennsylvania, West Virginia, Illinois, and the mechanic law of Wisconsin. In *Harlan v. Rand*, 27 Pa. St. 514, the court, after stating the great inconvenience of an indefinite extension of the liens under the construction of the statute contended for by counsel, asked, "What, then, is the limit of these lien rights?" and said:

"We must look to the law for an answer, and we find it in the twelfth section. It distributes all the parties to the work into three classes, according to their several functions: First, the owner; second, the contractor,—called, also, 'architect' and 'builder;' and, third, the workmen and material men.

The law establishes one link, and only one link, between the owner, on the one hand, and the workmen and material men, on the other. It requires the lien to be founded on contract, and it recognizes no one as having power to contract, so as to make a lien against the building, except the owner and the contractor or architect." Page 518.

The West Virginia statutes provide that any mechanic, etc., who performs work or furnishes materials "by virtue of any contract with the owner thereof, or his agents, or any person who, in pursuance of an agreement with any subcontractor, shall, in conformity with the terms of the contract with such owners or agents, do or perform any labor or work, or furnish any material, in the erection or construction of a house," etc., shall have a lien thereon. In *McGugin v. Railway Co.*, 33 W. Va. 67, 10 S. E. Rep. 36, the court held a contractor one removed from the original contractor had no lien under this statute. In Illinois the lien law of 1869 provided that—

"Every subcontractor, mechanic, workman, or other person who shall hereafter, in pursuance of the purposes of the original contract between the owner of any lot or piece of ground, or his agent, and the original contractor, perform any labor or furnish materials in building, altering, repairing, beautifying, or ornamenting any house, * * * shall have a lien for the value of such labor and materials upon such house," etc.

The Illinois courts held that the statute did not extend and give a lien to a contractor with a subcontractor. *Newhall v. Kastens*, 70 Ill. 160; *Rothgerber v. Dupuy*, 64 Ill. 454; *Smith Bridge Co. v. Louisville, N. A. & St. L. R. Co.*, 72 Ill. 506. See, also, to the same effect, *Kirby v. McGarry*, 16 Wis. 68; *Harbeck v. Southwell*, 18 Wis. 425.

Another question raised by the demurrers is as to the character of labor which is included within this statute, and for which a lien is given. There is nothing in the language of the act, or in its spirit, which indicates that it was intended only for the benefit of day laborers, or those who perform manual labor. The language is, "All persons who perform labor, or furnish labor, * * * for the construction or improvement of any * * * railroad, * * * by contract," etc., "shall have a lien." If the labor is performed for the construction or improvement of the railroad of the defendant, it is within the terms and the spirit of the act. The civil engineer who surveys and lays out the route over which the road is constructed performs labor for its construction, and any civil engineer who supervises the construction of the bridges or the roadbed is within this act. Indeed, any necessary labor which is performed in and for the construction of the road of the defendants is within the act. It will be observed that the language of the act is, "All persons who perform labor, or who furnish labor, * * * for the construction of a railroad," etc., and not that all persons who perform manual labor, or who furnish manual labor, for the construction, etc. There is no kind of labor designated, but it must be "for the construction" of the railroad or other public improvements. The purpose for which the labor is furnished or performed, and not its kind, is to limit the extent of the lien to be acquired. The supreme court says:

"It is somewhat difficult to draw the line between the kind of work and labor which is entitled to a lien, and that which is mere professional or supervisory employment, not fairly to be included in those terms." *Mining Co. v. Cullins*, 104 U. S. 179.

The court was then considering and construing a statute which gave a lien to "any person or persons who shall perform any work or labor upon any mine * * * shall be entitled to a miner's lien," etc., and it then held that a person who was general manager of the development of a mine, and did some manual labor, was entitled to a lien under the act for all of his work, including superintendence. But that act seemed to give a lien only for manual labor, as is shown by being required to be performed "upon" a mine, and then a "miner's lien" given. In many of the lien laws there is a clear intent to confine the lien to, and be for the benefit of, material men and mechanics and laborers only, but when the act declares that the labor performed and the labor furnished for the construction of railroads, etc., without limiting words, it must, by its terms, include all labor which is necessary for the construction, and which was actually performed or furnished for that purpose, whether that be skilled or unskilled labor.

It is not intended to declare that a consulting engineer, whose sole business and duty is to advise as to the routes to be taken, or the kind of bridge to be used, by a railroad or construction company, is within the act; but I am of the opinion that a civil engineer, who has actually superintended and directed the construction of the work, is within the statute. A consulting engineer may or may not have a lien for his labor, depending whether it was performed for the construction of the road. *Foushee v. Grigsby*, 12 Bush, 76, which declares that the character of labor performed by an architect or superintendent was not given a lien by the act of 1858, is not conclusive upon this court in construing the act of 1888. The act of 1858 was a mechanic's and material man's lien law, and that only. The lien was by the first section given to "carpenters, joiners, brick masons, stone masons, plasterers, turners, painters, brickmakers, * * * and all others performing labor," etc; and the sixth section gave the lien to "any journeyman, laborer, subcontractor, carpenter, joiner, brick mason, stone mason, plasterer, turner, painter, brickmaker, * * * or other person performing labor," etc. Thus it will be seen that unless the labor performed was by one of the class named, or of like class, the lien was not given. The act of 1888 declares that "all persons who perform or furnish labor * * * for the construction of a railroad," without classifying them, or limiting the persons who may perform or furnish the labor.

The remaining question is as to the time and character of the claim of lien which is to be filed in the clerk's office. The third section of the act requires the person who performs the labor, or furnishes the labor, materials, and teams, "within sixty days after the last day of the last month in which any labor was performed, or materials or teams furnished, file in this county clerk's office of each county in which the labor was performed or materials furnished, a statement, in writing, verified by affidavit, setting forth the amount due there-

for, for which the lien is claimed, and the name of the canal, railroad, or other public improvement upon which it is claimed." The time indicated is within 60 days after the last day of the last month in which any labor was performed or materials furnished. I apprehend the labor performed or materials furnished mean the labor performed or materials and labor furnished by the person claiming the lien. There are some of the claimants of lien for labor who have filed two statements in the clerk's office, claiming liens. These are persons who were hired, and should have been paid, by the month. This being the fact, they, while working, filed a statement and claim of lien for the previous months for which they had not been paid; and, after they ceased working, filed another claim and statement for the labor performed thereafter, and not included in the first statement. We think this within the spirit of the act, and is a good claim of a lien, if otherwise properly done, for both demands for labor performed. In such cases the labor is by the month. Each month constitutes a complete cause of action for the month's labor, whether the labor is continued or discontinued. It might be different where the contract for labor was to complete a job, or for a definite time, or the materials to be furnished was one contract, embracing various kinds or quantities. Again, if the debt for which a lien is filed is a complete one, and entitled to the lien at the time of the claim and statement in clerk's office, and this is filed in clerk's office, and remains there until the time arrives fixed by the act, it should be as good constructive notice as if filed in the office for the first time within the time indicated by the act. In such a case it is in fact on file in the clerk's office at and within the time required by the act. The only difficulty would be, when the statute of limitation barred, whether the court should hold the limitation commenced to run from the actual filing of the statement, or the first day of the 60 which the claimant is allowed to file his claim. But this question is not before the court, and need not be decided, or an opinion indicated.

The statement which is to be filed must be in writing, verified by affidavit setting forth the amount due, and "for which the lien is claimed," and the name of the railroad upon which a lien is claimed. This statute does not require a detailed statement of the claim, but it should set out the amount due, and generally for what it is due, the name of the railroad upon which a lien is claimed, and with it a general description of the property upon which a lien is claimed. This description, however, is not required by the statute, except to show the county where the work has been done or the materials furnished.

These are my views as to the proper construction of the act of 1888, and I have indicated in separate memorandums what should be done with the various demurrers to intervening petitions.

TOLEDO, A. A. & N. M. RY. CO. v. PENNSYLVANIA CO. et al.

(Circuit Court, N. D. Ohio, W. D. April 8, 1893.)

1. CIRCUIT COURTS—JURISDICTION—INJUNCTION AGAINST VIOLATION OF INTERSTATE COMMERCE LAW.

Circuit courts of the United States have jurisdiction of a bill in equity to restrain violations of the interstate commerce law to the irreparable injury of complainant, because of the subject-matter, and without regard to the citizenship of the parties.

2. SAME—CONSPIRACY—WHAT CONSTITUTES—REV. ST. § 5440.

A combination to induce and procure the officers of a common carrier corporation subject to the provisions of the interstate commerce act, and its locomotive engineers, to refuse to receive, handle, and haul interstate freight from another like common carrier in order to injure the latter, is a combination or conspiracy to commit the misdemeanor described by section 10 of the interstate commerce act, and, if any person engaged in it does an act in furtherance thereof, all combining for the purpose are guilty of criminal conspiracy, as denounced by section 5440, Rev. St.

3. SAME—COMMON CARRIERS.

If the common carrier company against whom such a conspiracy is directed is injured by acts done in furtherance of it, it has a cause of action for its loss against all of those engaged in the conspiracy.

4. SAME—TEMPORARY INJUNCTION—WHEN ISSUED.

The injury which will be caused to the common carrier against which such a conspiracy is directed will be irreparable, and, in order to prevent this, and maintain the status quo until full relief can be granted, a preliminary and temporary mandatory injunction will issue against the company and its employes threatening the injury, restraining them from refusing to afford the proper interchange of interstate freight and traffic facilities to complainant.

5. SAME—ENJOINING RAILROAD COMPANY—EFFECT ON EMPLOYES.

The employes, while in the employ of the defendant company, must obey this mandatory injunction, but may, without contempt of court, avoid or evade obedience thereto by ceasing to be such employes; otherwise the injunction would, in effect, be an order compelling the employes to continue the relation of servant to the complainant,—a kind of order never yet issued by a court of equity.

6. SAME—ENJOINING CONSPIRATORS.

A preliminary injunction may issue against the chief member of such a conspiracy as that above described to restrain him from giving the order and signal which will result and is intended to result in the unlawful and irreparable injuries to the complainant. Where such chief member has already issued such an unlawful, willful, and criminal order, the injurious effect of which will be continuing, the court may by mandatory injunction compel him to rescind the same, especially when the necessary effect of the order or signal is to induce and procure flagrant violations of an injunction previously issued by the court.

In Equity. Bill by the Toledo, Ann Arbor & North Michigan Railway Company against the Pennsylvania Company and others. On motion for a temporary injunction against defendant P. M. Arthur, chief of the Brotherhood of Locomotive Engineers. Granted.

Alex. L. Smith and E. W. Tolerton, for complainant.

Frank H. Hurd, Jas. H. Southard, and Judge Barber, for defendant Arthur.

J. W. Harper, for defendant Sargent.

Before TAFT, Circuit Judge, and RICKS, District Judge.

TAFT, Circuit Judge. This is a motion by the complainant, the Toledo, Ann Arbor & North Michigan Railway Company, for a tem-

porary injunction, to remain in force pending this action, against P. M. Arthur, the chief executive of the Brotherhood of Locomotive Engineers, and a defendant herein, to restrain him from issuing, promulgating, or continuing in force any rule or order of said brotherhood, which shall require or command any employes of any of defendant railway companies herein to refuse to handle and deliver any cars of freight in course of transportation from one state to another to the complainant, or from refusing to receive and handle cars of such freight which have been hauled over complainant's road; and also from in any way, directly or indirectly, endeavoring to persuade any of the employes of the defendant railway companies whose lines connect with the railroad of complainant not to extend to said company the same facilities for interchange of interstate traffic as are extended by said companies to other railway companies. A temporary restraining order to this effect was issued by me against Arthur ex parte. A hearing has since been had, and the question now is whether, on the evidence produced, the order shall be continued in force until the final decision of the case.

The original bill was filed against eight railway companies and the superintendents of two of them, and averred that the defendants, who were operating lines of railway connecting with that of the complainant company at Toledo, had threatened to refuse to receive from and to deliver to the complainant company interstate freight on the ground that their locomotive engineers, who were members of the brotherhood, would refuse to haul or handle the same, because complainant employed on its line engineers who were not members of the brotherhood; and the bill further averred that if the threat was carried out it would work an irreparable injury to the complainant, for which damages could not be estimated, and the law afforded no adequate remedy. The prayer of the bill was for an order enjoining the defendant companies, their employes and servants, from refusing to receive and deliver complainant's interstate freight. A temporary order as prayed for was issued by Judge Ricks. An amendment to the bill was afterwards filed making two new defendants, P. M. Arthur and F. P. Sargent. Sargent, it subsequently appeared, was a nonresident of the district, and the bill as against him was dismissed for want of jurisdiction. As to Arthur, the amendment charges that he, as chief of the brotherhood, exercises a controlling influence upon its members in all matters treated by its rules and regulations; that one of its rules requires all of its members in the employ of any railway company, whenever an order to that effect shall be given by its said chief officer, to refuse to receive, handle, or carry cars of freight from any other railroad company whose employes, members of said association, have engaged in a strike; that such a strike has been declared against the complainant by the members of the brotherhood, with Arthur's consent and approval; that Arthur now publicly announces that, unless complainant shall submit to the demands of its striking employes, he will order the rule above stated enforced; that the rule is in direct contravention of the interstate commerce law, and is intended to induce the employes of the defendant companies to violate that law and the previ-

ous order of this court; and that Arthur, with others, is conspiring to that end.

The jurisdiction of this court to hear and decide the case made by the bill cannot be maintained on the ground of the diverse citizenship of the parties, for the complainant and at least one of the defendants are citizens of the same state. If it exists, it must arise from the subject-matter of the suit. The bill invokes the chancery powers of this court to protect the complainant in rights which it claims under the act of congress passed February 4, 1887, (24 St. at Large, p. 379,) known as the "Interstate Commerce Act," and an act amending it passed March 2, 1889, (25 St. at Large, p. 855.) These acts were passed by congress in the exercise of the power conferred on it by the federal constitution (article 1, § 8, par. 3) "to regulate commerce with foreign nations, among the several states, and with the Indian tribes." Counsel for defendant Arthur contend that the interstate commerce law and its amendments are only declaratory of the common law, which gave the same rights to complainant, and that, therefore, this is not a case of federal jurisdiction. The original jurisdiction of this court extends by act of congress passed August 13, 1888, (25 St. at Large, p. 433,) to "all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the constitution or laws of the United States." The bill makes the necessary averment as to the amount in dispute. It is immaterial what rights the complainant would have had before the passage of the interstate commerce law. It is sufficient that congress, in the constitutional exercise of power, has given the positive sanction of federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States.

The Brotherhood of Locomotive Engineers is an association, organized in 1863, whose members are locomotive engineers in active service in the United States, Mexico, and the dominion of Canada. Their number is 35,000. The engineers engaged with the defendant companies are most of them members of the brotherhood. The purpose of the brotherhood is declared in its constitution to be "more effectually to combine the interests of locomotive engineers, to elevate their standing as such, and their character as men." These ends are sought to be obtained by requiring that every member shall be a man of good moral character, of temperate habits, and a locomotive engineer in actual service with a year's experience, and by imposing the penalty of expulsion upon any member guilty of disgraceful conduct or drunkenness, of neglect of duty, of injury to the property of the employer, or of endangering the lives of persons. A mutual insurance association is supported in connection with the brotherhood, in which every member is required to carry a policy, and there is an efficient employment bureau for the members. A strong and complete organization is maintained for the systematic government of the brotherhood, and its rules are well adapted to establishing and carrying out general and local plans with respect to the terms of employment of its members. Submission to these

plans, when once adopted by requisite vote, is required of every member on penalty of expulsion. The management of controversies with employer companies is immediately with a chairman of a standing general adjustment committee for the particular railroad system involved and afterwards with the grand chief. The grand chief has large judicial and executive powers. He is the ultimate authority always called in to adjust differences between members and their employer, and he is the one to whom appeals are made to settle disputes arising between members and subdivisions. He is also the head of the insurance company.

Early last month the superintendent of complainant company refused to grant a demand by its engineers for higher wages. After some unsuccessful attempts at negotiation, Arthur, who had been called in, consented to the strike, which had previously been voted by two thirds of the brotherhood men in complainant's employ. As soon as the men went out on March 7th, Arthur sent to eleven chairmen of the general adjustment committees on as many different railroad systems in Ohio and the neighboring states the following dispatch:

"There is a legal strike in force upon the Toledo, Ann Arbor & North Michigan Railroad. See that the men on your road comply with the laws of the brotherhood. Notify your general manager."

A "legal" strike, in brotherhood parlance, means one consented to by the grand chief. His consent is necessary, under the rules of the order, to entitle the men thus out of employment to the three months' pay allowed to striking members. Arthur admits that the particular law to which he referred in this dispatch was one adopted by the brotherhood at Denver three years ago, but which is not published in the printed copy of the constitution and by-laws. It is as follows:

"Twelfth. That hereafter, when an issue has been sustained by the grand chief, and carried into effect by the B. of L. E., it shall be recognized as a violation of obligation for a member of the Brotherhood of Locomotive Engineers Association who may be employed on a railroad running in connection with or adjacent to said road, to handle the property belonging to said railroad or system in any way that may benefit said company in which the B. of L. E. is at issue until the grievance or issue of whatever nature or kind has been amicably settled."

It is quite clear from the evidence that "a violation of obligation" is the highest offense of which a member can be guilty, and merits expulsion. In obedience to Arthur's direction, it appears that several general managers were notified of the intention to enforce the rule. Watson, the chairman of the adjustment committee on the Lake Shore system, sent the general manager of that system the following telegram:

"We ask you, in the interests of peace and harmony, not to ask your engineers to handle Toledo, Ann Arbor & North Michigan freight business after 6 o'clock, March 8, as the engineers and firemen of said road go out on a strike."

Through the intervention of the Ohio labor commissioner, William Kirkby, negotiations for an adjustment began between Arthur and

the local brotherhood committee on the one side and the complainant on the other. Kirkby refused to take part until the embargo laid on complainant's freight was raised. Accordingly, on March 11th, in Arthur's absence, his assistant sent in Arthur's name the following dispatch to chairmen of adjustment committees:

"Pending negotiations with the president of the Toledo & Ann Arbor road, resolution twelve, page forty-five, of ritual is suspended. In case negotiations fail, you will be promptly notified."

Arthur says that he did not know of this dispatch when sent, but that he subsequently approved it. On March 13th, as a result of the negotiations referred to in the telegram of March 11th, the following paper was signed by Arthur and others for the striking engineers:

"We, the undersigned, late employes of the motive power department of the Toledo & Ann Arbor Railroad, have authorized our chief executive officers to withdraw the embargo against connecting roads. Should we be reinstated, we hereby agree each for himself to submit to William Kirkby, railroad commissioner, as our representative in all matters of grievances touching orders issued by officials, with authority to confer with Gov. Ashley, president of the Toledo & Ann Arbor Railroad, and we hereby agree to abide by their concurrent decision. This will also include the return of the men without prejudice, and the rates of pay to be agreed upon."

A schedule of wages was agreed upon, but the negotiations were subsequently broken off because the striking engineers refused to consent to a requirement that applications in writing should be made for employment by each one of their number. Thereupon, on March 16th, Arthur sent to the committee chairmen the following dispatch:

"All efforts to effect an honorable settlement of the grievances of the engineers and firemen on the Toledo, Ann Arbor & North Michigan Railroad have failed. See that your men comply with the laws of the brotherhood. Notify your general manager."

The result of this was that engineers, members of the brotherhood, did refuse to handle complainant's freight on connecting lines for a short time, and in several instances quit the service rather than do so. On the 17th of March the temporary restraining order issued by me, and above referred to, was served on Arthur. He was therein commanded to rescind any order he might have promulgated to engineers on connecting lines to refuse to handle complainant's freight. Under advice of counsel he obeyed, and sent a dispatch to committee chairmen rescinding his previous dispatch of March 16th. This had the effect to lift the "embargo," so called.

The result of this evidence is that the members of the Brotherhood of Locomotive Engineers have by the adoption of rule 12 made an agreement among themselves that whenever any of their comrades, with the consent of Arthur, leave the employ of one company, because the terms of employment are unsatisfactory, the members employed by companies operating connecting lines will inflict an injury on the first company by preventing, as far as possible, the first company from doing any business as a common carrier, involving the interchange of freight with connecting lines. The engineers of the

connecting lines are to effect this purpose—First, by refusing to handle the freight of the offending company, and, second, if necessary, by quitting the service to avoid handling it, in order that the connecting companies, by fear of the evil effect of a strike upon their own business, will be compelled to join with their engineers in a refusal to handle the offending company's freight and inflict the injury which is the main purpose of the combination. In this connection should be noted, in Arthur's telegrams of March 7th and 16th, directing the enforcement of rule 12, the significance of the sentence, "Notify your general manager," and the language of Watson's dispatch to the general manager of the Lake Shore system. These notifications were threats to the connecting companies, which it was hoped would lead them to assist in injuring the complainant company. No such notice was thought necessary when rule 12 was suspended.

Rule No. 12 is not operative until a strike has been declared with the consent of Arthur. Arthur states that there is nothing in the rules requiring him to communicate with the committee chairmen as he did, and that the rule would execute itself. But it is obvious that, as under the rule he must declare a strike "legal" before its consequences follow, he is the person upon whom devolves the task of authoritatively advising the rest of the brotherhood, through their immediate chairmen, that the time has come for the enforcement of the rule and the injury of the offending company. That he and the members of the brotherhood recognize this as a necessity is clear from the evidence of Watson, and what actually occurred here. On March 8th the rule was enforced by his order. On March 11th the rule was suspended by an order issued in his name. On March 16th the rule was again enforced by telegraphic order from him, and upon March 18th the enforcement of the rule was again suspended. Arthur says that neither he nor his assistant had power under the constitution and by-laws of the brotherhood to suspend the enforcement of rule 12, and that the dispatch of March 11th doing so was an unconstitutional assumption of power on his part. We are not called upon to construe the constitution and laws of the brotherhood except so far as they reflect on the actual power exercised by Arthur in the enforcement of rule 12. It suffices to say that so much of the governing law of the brotherhood as we have seen invests Arthur with wide powers, and a great influence over the actions of his subordinates and the brotherhood members, and that in the practical exercise of power he has twice both directed and suspended the enforcement of rule 12.

It will be convenient, in discussing the question whether any relief can properly be given to complainant against Arthur, to consider rule 12 and the acts done, or to be done, in pursuance thereof—First, in the light of the criminal law; second, with reference to their character as civil wrongs; and, third, with reference to the remedies which a court of equity may afford against them.

1. The complainant and defendant companies are common carriers, subject to the provisions of the interstate commerce act, and the business exchanged between them is averred by the bill to be

nearly all interstate freight. The second paragraph of the third section of the act provides that—

"All common carriers subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivery of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines." 24 St. at Large, p. 379.

In view of the foregoing section, it needs no argument to demonstrate that one common carrier is expressly required by the interstate commerce act to freely interchange interstate freight with another when their lines connect.

Section 10 of the act, as amended, (25 St. at Large, p. 855,) provides that—

"Any common carrier subject to the provisions of this act, or, when such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, or lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party, * * * shall willfully omit or fail to do any act, matter, or thing in this respect required to be done, or shall cause or willingly suffer or permit any act, matter, or thing, so directed or required by this act to be done, not to be done, or shall aid or abet such omission or failure, * * * shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not exceeding \$5,000."

By the foregoing section, a common carrier which is not a corporation is made liable criminally for violations of the interstate commerce law. But when the carrier is a corporation and violates the law, not the corporation, but its officers, agents, and persons acting for or employed by it who willfully do the wrongful work, are made liable. In *re Peasley*, 44 Fed. Rep. 271. The corporation is made civilly liable under section 8. As every locomotive engineer of the defendant companies is a "person employed by" a common carrier corporation subject to the provisions of the interstate commerce law, he is guilty of the offense described, and subject to the penalty imposed by section 10, if he, while acting as engineer for his corporation, refuses to handle interstate freight for the complainant, and thereby, in his discharge of a function of the company, willfully omits to do an act required by the law to be done; and it is immaterial whether what he does or fails to do in violation of the statute is with or without the orders of his principal. *U. S. v. Tozer*, 37 Fed. Rep. 635.

Arthur and all the members of the brotherhood engaged in enforcing rule 12, and in thereby aiding and abetting every such engineer to violate the section, are equally guilty with him as principals, (*U. S. v. Snyder*, 14 Fed. Rep. 554;) and they are thereby also guilty of conspiring to commit an offense against the United States, and subject to the penalties of section 5440, Rev. St., (*U. S. v. Stevens*, 44 Fed. Rep. 132.)

But suppose that this view of section 10 is erroneous, and that the words, "person acting for or employed by such corporation," refer only to its managing officer or agent, the enforcement of rule

12, with its evident purpose, would still be a violation of law; for even then it is quite clear that any one, though not an officer or agent, successfully aiding, abetting, or procuring such officer or agent to violate the section, would be punishable under it as a principal. Thus, in *U. S. v. Snyder*, 14 Fed. Rep. 554, under a statute making it a crime for a postmaster to render a false report to the government of his receipts, one who aided, abetted, and procured a postmaster to send such a report was found guilty as principal of violating the statute, and the conviction was sustained by Judges McCrary and Nelson, in an opinion citing authorities fully justifying their conclusion. It is therefore evident that Arthur and the other members of the brotherhood, if successful in procuring the managing officers of the defendant companies to refuse to handle interstate freight from complainant company, would be guilty of violating section 10, and punishable as principals thereunder.

Section 5440, Rev. St., provides that—

"If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than \$10,000, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

All persons combining to carry out rule 12 of the brotherhood against the complainant company, if any one of them does an act in furtherance of the combination, are punishable under the foregoing section. This is true, because, as already shown, the object of the conspiracy is to induce, procure, and compel the managing officers of the defendant companies to refuse equal facilities to the complainant for the interchange of interstate freight, which, as we have seen, is an offense against the United States by virtue of section 10, above quoted. For Arthur to send word to the committee chairmen to direct the men to refuse to handle interstate freight of complainant, and to notify the managing officers of the defendant companies with the intention of procuring them to do so, all in execution of rule 12, is an act in furtherance of the conspiracy to procure the managing officers of the defendant companies to commit a crime, and subjects him and all conspiring with him to the penalties of section 5440, Rev. St. Again, for the men, in furtherance of rule 12, either to refuse to handle the freight or to threaten to quit, or actually to quit, in order to procure or induce the officers of the defendant companies to violate the provisions of the interstate commerce law, would constitute acts in furtherance of the conspiracy, and would render them also liable to the penalty of the same section.

But it is said that it cannot be unlawful for an employe either to threaten to quit or actually to quit the service when not in violation of his contract, because a man has the inalienable right to bestow his labor where he will, and to withhold his labor as he will. Generally speaking, this is true, but not absolutely. If he uses the benefit which his labor is or will be to another, by threatening to withhold it or agreeing to bestow it, or by actually withholding it or bestowing it, for the purpose of inducing, procuring, or compel-

ling that other to commit an unlawful or criminal act, the withholding or bestowing of his labor for such a purpose is itself an unlawful and criminal act. The same thing is true with regard to the exercise of the right of property. A man has the right to give or sell his property where he will, but if he give or sell it, or refuse to give or sell it, as a means of inducing or compelling another to commit an unlawful act, his giving or selling it or refusal to do so is itself unlawful.

Herein is found the difference between the act of the employees of the complainant company in combining to withhold the benefit of their labor from it and the act of the employees of the defendant companies in combining to withhold their labor from them; that is, the difference between the strike and the boycott. The one combination, so far as its character is shown in the evidence, was lawful, because it was for the lawful purpose of selling the labor of those engaged in it for the highest price obtainable, and on the best terms. The probable inconvenience or loss which its employees might impose on the complainant company by withholding their labor would, under ordinary circumstances, be a legitimate means available to them for inducing a compliance with their demands. But the employees of defendant companies are not dissatisfied with the terms of their employment. So far as appears, those terms work a mutual benefit to employer and employed. What the employees threaten to do is to deprive the defendant companies of the benefit thus accruing from their labor, in order to induce, procure, and compel the companies and their managing officers to consent to do a criminal and unlawful injury to the complainant. Neither law nor morals can give a man the right to labor or withhold his labor for such a purpose.

It may be noted, in passing, that the enforcement of rule 12 presents a much stronger case of illegality than the ordinary boycott. As usually understood, a boycott is a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them. Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do that which the combiners seek to compel them to do. Such combinations are said to be unlawful conspiracies, though the acts in themselves and considered singly are innocent, when the acts are done with malice, i. e. with the intention to injure another without lawful excuse. See the judgment of Lord Justice Bowen in *Steamship Co. v. McGregor*, 23 Q. B. Div. 598; *Temperton v. Russell* [1893] 1 Q. B. 715; *Walker v. Cronin*, 107 Mass. 555; *Casey v. Typographical Union*, 45 Fed. Rep. 135; *Old Dominion Steamship Co. v. McKenna*, 30 Fed. Rep. 48; *State v. Glidden*, 55 Conn. 76, 8 Atl. Rep. 890; *State v. Stewart*, 59 Vt. 273, 9 Atl. Rep. 559;

Crump v. Com., 84 Va. 927, 6 S. E. Rep. 620; State v. Donaldson, 32 N. J. Law, 151; Carew v. Rutherford, 106 Mass. 1; Moores v. Bricklayers' Union, 23 Wkly. Law Bul. 48. But in the case at bar, although malice is certainly present, the illegality of the combination does not consist alone in that, for both the means taken by the combination and its object are direct violations of both the civil and the criminal law as embodied in a positive statute. Surely it cannot be doubted that such a combination is within the definition of an unlawful conspiracy, recognized and adopted by the supreme court of the United States in Pettibone v. U. S., (decided March 6, 1893,) 13 Sup. Ct. Rep. 542, to wit: "A combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose, not in itself criminal or unlawful, by criminal or unlawful means."

We have thus considered with some care the criminal character of rule 12 and its enforcement, not only because, as will presently be seen, it assists in determining the civil liabilities which grow out of them, but also because we wish to make plain, if we can, to the intelligent and generally law-abiding men who compose the Brotherhood of Locomotive Engineers, as well as to their usually conservative chief officer, what we cannot believe they appreciate, that, notwithstanding their perfect organization, and their charitable, temperance, and other elevating and most useful purposes, the existence and enforcement of rule 12, under their organic law, make the whole brotherhood a criminal conspiracy against the laws of their country.

2. We now come to the character of rule 12, and its enforcement as a civil wrong to complainant. Lord Justice Fry said in the case of Steamship Co. v. McGregor, 23 Q. B. Div. 598, 624:

"I cannot doubt that whenever persons enter into an indictable conspiracy, and that agreement is carried into execution by the conspirators by means of an unlawful act or acts which produce private injury to some person, that person has a cause of action against the conspirators."

See, also, Buffalo Lubricating Oil Co. v. Standard Oil Co., 106 N. Y. 669, 12 N. E. Rep. 825; Steamship Co. v. McKenna, 30 Fed. Rep. 48; Carew v. Rutherford, 106 Mass. 1; and Moores v. Bricklayers' Union, 23 Wkly. Law Bul. 48.

Under the principle above stated, Arthur and all the members of the brotherhood engaged in causing loss to the complainant are liable for any actual loss inflicted in pursuance of their conspiracy. The gist of any such action must be not in the combination or conspiracy, but in the actual loss occasioned thereby. No civil liability arises simply because of the rule 12, or its attempted enforcement, unless injury is done. Ordinarily the only difference between the civil liability for acts in pursuance of a conspiracy and for acts of the same character done by a single person is in the greater probability that such acts when done by many in a combination will cause injury. If a single engineer of one of defendant companies, acting alone, and with intent to injure the complainant, should cause the complainant loss by refusing to handle its interstate freight, complainant could maintain a right of action against him for dam-

ages. The refusal on his part would be a wrongful and illegal act under the interstate commerce law, and, as said by Lord Justice Brett in *Bowen v. Hall*, 6 Q. B. Div. 333, 337: "Whenever a man does an act which in law and in fact is an unlawful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie." And so, if a single engineer, with intent to injure complainant, could, by threatening to quit or by actually quitting for the purpose, procure or induce the defendant company, in whose employ he is, to inflict a loss upon complainant by unlawfully refusing to interchange interstate freight, complainant could hold him civilly liable for the loss. By section 8 of the interstate commerce law the complainant is expressly given a cause of action in damages against any connecting common carrier company for such a loss, and it is clear upon the authorities that any one intentionally procuring the connecting company to inflict such loss would be equally liable. Thus in *Walker v. Cronin*, 107 Mass. 555, the supreme judicial court of that state sustained an action for damages by the plaintiff, who was a shoe manufacturer, against the defendant, for inducing plaintiff's employes to break their contracts of service with him to his injury. In *Lumley v. Gye*, 2 El. & Bl. 216, it was held that the plaintiff could recover damages from the defendant for procuring a third person, with whom the plaintiff had made a contract, to break the contract, when such procuring was with the intention of injuring the plaintiff. The same principle was announced in *Bowen v. Hall*, 6 Q. B. Div. 333, 337, and has since been followed in other cases, and the doctrine has been applied, even where there was not a binding contract, but only the probability that one, though not binding, would be performed. See *Rice v. Manley*, 66 N. Y. 82, and *Benton v. Pratt*, 2 Wend. 385. If a person, with rights secured by a contract, may, in case of loss, recover damages from one not a party to the contract, who, with intent to injure him, induces a breach of it, a fortiori can one whose rights are secured by statute recover damages from a person who, with intent to injure him, procures the violation of those rights by another, and causes loss. The difficulty in supposing or stating any civil liability when the acts we have been discussing are done by a single engineer is in the improbability that either by singly refusing to handle the freight he could cause any injury to complainant, or by singly threatening to quit, or by quitting, he could procure his company to do so. But when we suppose that all, or nearly all, the engineers on the eight different defendant companies combine with their chief to do these unlawful acts for the purpose of injuring complainant, the intended loss becomes not only probable, but inevitable.

3. Having thus shown that Arthur and all the members of the brotherhood with him, conspiring by enforcing rule 12 to injure complainant, will be liable in damages to complainant for any loss they may thereby occasion, the question remains, can equity afford any relief by preliminary injunction to prevent the loss?

We shall be assisted in answering the question by considering,

first, what the court may do by injunction against the defendant companies and against the engineers, under the averment of the bill that the defendant companies threaten to refuse to interchange freight with complainant because of the refusal of their engineers to handle it.

The office of a preliminary injunction is to preserve the status quo until, upon final hearing, the court may grant full relief. Generally this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from. In such a case courts of equity issue mandatory writs before the case is heard on its merits. *Robinson v. Lord Byron*, 1 Brown, Ch. 588; *Lane v. Newdigate*, 10 Ves. 192; *Hervey v. Smith*, 1 Kay & J. 392; *Beadel v. Perry*, L. R. 3 Eq. 465; *London & N. W. Ry. Co. v. Lancashire & Y. Ry. Co.*, L. R. 4 Eq. 174; *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Broome v. Telephone Co.*, 42 N. J. Eq. 141, 7 Atl. Rep. 851.

Now, the normal condition—the status quo—between connecting common carriers under the interstate commerce law is a continuous passage of freight backward and forward between them, which each carrier has a right to enjoy without interruption, exactly as riparian owners have a right to the continuous flow of the stream without obstruction. Since Lord Thurlow's time the preliminary mandatory injunction has been used to remove obstructions and keep clear the stream. *Robinson v. Lord Byron*, 1 Brown, Ch. 588; *Lane v. Newdigate*, 10 Ves. 192. So an obstruction to the flow of interstate freight must be preliminarily enjoined, even though it requires a mandatory injunction. The quasi public nature of the duty to be performed by the common carriers and the irreparable character of the injury likely to result are ample grounds for this. The interstate commerce law recognizes the necessity for such a remedy, for in summary equity proceedings at the instance of the interstate commerce commission, provided by section 16, as amended in 1889, express power to issue injunctions, mandatory or otherwise, to prevent violations of the orders of the commission, is given to circuit courts. In addition to that, a remedy by mandamus in the district and circuit courts is given to an interested person to compel compliance by the common carrier with the provisions of the act. As this latter proceeding is denominated "cumulative" in the statute, it does not prevent the remedy by injunction, nor would it, in any event, because the inadequacy of the legal remedy which justifies equitable intervention by injunction is only the inadequacy of a recovery in damages by action at law. *Attorney General v. Mid Kent Ry. Co.*, L. R. 3 Ch. App. 100.

As against the defendant companies the complainant is, therefore, clearly entitled to a preliminary mandatory injunction to compel them, pending the hearing, to discharge the duties imposed by the interstate commerce law, and to exchange with complainant interstate freight. This was expressly decided by Judge Love of the Iowa district in a well-considered opinion in the case

of Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. Rep. 481. And in analogous cases, where it has been sought to enforce the common-law obligation of a common carrier, the preliminary mandatory injunction has frequently issued. Thus, in the case of Coe v. Railroad Co., 3 Fed. Rep. 775, Judge Baxter issued a preliminary mandatory injunction to compel the defendant railroad company to deliver and receive cattle at a particular cattle yard. See, also, Chicago & A. Ry. Co. v. New York, L. E. & W. Ry. Co., 24 Fed. Rep. 516; Wolverhampton & W. Ry. Co. v. London & N. W. Ry. Co., L. R. 16 Eq. 433; Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co., 15 Fed. Rep. 650; Scofield v. Railway Co., 43 Ohio St. 571, 3 N. E. Rep. 907.

If a preliminary mandatory injunction may issue against the defendant companies to prevent irreparable injury, it may certainly issue against their officers, agents, employes, and servants. This is the usual form of the writ of injunction to prevent a trespass, a nuisance, waste, or other inequitable act. Mr. Kerr says, in his work on Injunctions, (1st Ed., p. 559:)

"Though an injunction restraining the act complained of is claimed against the defendant alone, the order will, if necessary, be extended to his servants, workmen, and agents; and it is of course to insert these words."

Fost. Fed. Pr. (1st Ed.) 234; 2 Daniell, Ch. Pr. (5th Amer. Ed.) 1673; Seton, Decrees, (4th Ed.) 173; Lord Wellesley v. Earl of Mornington, 11 Beav. 180; Hodson v. Coppard, 29 Beav. 4; Mexican Ore Co. v. Guadalupe Min. Co., 47 Fed. Rep. 351, 356.

The necessity for inserting the words in the injunction issued against the defendant companies in the present case was made apparent by the averment of the bill that they had threatened to refuse to handle complainant's freight because of the unwillingness of their engineers to handle it. Mandatory, as well as prohibitory, injunctions have frequently been made to run against the defendant, his agents, servants, and workmen. In Smith v. Smith, L. R. 20 Eq. 500, Sir George Jessel, M. R., issued a mandatory injunction requiring the defendant to take down a wall which obstructed the light, and that injunction ran against the defendant, his contractors, builders, agents, and workmen. See Seton, Decrees, (Heard's 1st Amer. Ed. from 4th Eng. Ed.) 89. A similar mandatory decree was entered against the defendant, his servants, etc., for permitting an obstruction of the flow of water in a stream to continue on his lands. Seton, Decrees, 103; Ivimey v. Stocker, L. R. 1 Ch. App. 396.

This form of injunction against a corporation is generally necessary in order to enable the court to enforce its writ. A corporation acts only through its officers and employes, and it is through them only that its action can be restrained or compelled. While doing the work of the company, the employe is the company, and, having notice of a mandate from a court of competent jurisdiction as to how that work must be done, he must in his work obey the mandate. Especially is this true with respect to employes of common carrier corporations subject to the interstate commerce law.

They are fully identified with their employer in the discharge of its public functions. When doing the work of the corporation, they are made criminally liable for disobeying the commands of the law to the corporation. Nor is it an objection to granting complainant this equitable relief directly against the servants of defendant companies that the latter will be bound under the mandate of the court to discharge servants refusing to obey the law and the order of the court. The complainant is not required to await this action on the part of the defendant companies, or to suffer the delay which a refusal by the servants may entail. Such a refusal will be no defense to the defendant companies, (*Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co.*, 34 Fed. Rep. 481,) but this is far from saying that the court may not, in complainant's interest, direct its process at once against all assuming to act for defendant companies in their business. Nor is the mandatory injunction against the engineers an enforced specific performance of personal service. It is only an order restraining them, if they assume to do the work of the defendant companies, from doing it in a way which will violate not only the rights of the complainant, but also the order of the court made against their employers to preserve those rights.

They may avoid obedience to the injunction by actually ceasing to be employes of the company; otherwise the injunction would be, in effect, an order on them to remain in the service of the company, and no such order was ever, so far as the authorities show, issued by a court of equity. It is true that, if they quit the service of the company in execution of rule 12, in order to procure or compel defendant companies to injure the complainant company, they are doing an unlawful act, rendering themselves liable in damages to the complainant if any injury is thereby inflicted, and that they may be incurring a criminal penalty, as already explained, but, no matter how inadequate the remedy at law, the arm of a court of equity cannot be extended by mandatory injunction to compel the enforcement of personal service as against either the employer or the employed. *Stocker v. Brockelbank*, 3 Macn. & G. 250; *Johnson v. Railroad Co.*, 3 De Gex, M. & G. 914; *Pickering v. Bishop of Ely*, 2 Younge & C. Ch. 249; *Lumley v. Wagner*, 1 De Gex, M. & G. 604. The reason is obvious. It would be impracticable to enforce the relation of master and servant against the will of either. Especially is this true in the case of railway engineers, where nothing but the most painstaking and devoted attention on the part of the employe will secure a proper discharge of his responsible duties; and it would even seem to be against public policy to expose the lives of the traveling public and the property of the shipping public to the danger which might arise from the enforced and unwilling performance of so delicate a service.

We finally reach the question whether Arthur can be enjoined from ordering the engineers to carry out rule 12. That he intends to enforce the rule, if not enjoined, is not denied. If, as we have seen, the injury intended is of such a character that the court may issue its mandatory injunction against the engineers to prevent them from inflicting it, Arthur may certainly be restrained by prohibitory

Injunction from ordering them to inflict it. Arthur's order, if issued, will be obeyed, because the penalty of disobedience is expulsion from the brotherhood. The many engineers who serve the defendant companies will refuse to handle the complainant's freight. The defendant companies will probably be coerced thereby to refuse complainant's freight, for the bill avers that they have threatened to do so. The interstate business of complainant will be interrupted and interfered with, at every hour of the day, and at every point within a radius of many miles, and all because of Arthur's order. The injury will be irreparable, and a judgment for damages at law will be wholly inadequate. The authorities leave no doubt that in such a case an injunction will issue against the stranger who thus intermeddles, and harasses complainant's business. In *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. Rep. 307, the officers of a trade union were enjoined by the supreme judicial court of Massachusetts from displaying in front of plaintiff's premises a banner announcing a strike, and requesting workmen to stay away. This was said to cause an injury of such a continuing character as to make it a nuisance. So, in *Spinning Co. v. Riley*, L. R. 6 Eq. 551, a case presenting facts exactly like those in *Sherry v. Perkins*, an injunction was allowed. In *Casey v. Typographical Union*, 45 Fed. Rep. 135, Judge Sage granted an injunction against the members of a typographical union who had instituted a boycott against a newspaper, and who were attempting to drive away business from it by threatening its subscribers and advertisers to boycott them in case they continued their patronage. In *Emack v. Kane*, 34 Fed. Rep. 47, Judge Blodgett granted an injunction against persons who, by threatening infringement suits, without any intention of bringing them, were attempting to interfere with plaintiff's enjoyment of his lawful patent. And in *Coeur D'Alene Consol. & Min. Co. v. Miners' Union*, 51 Fed. Rep. 260, Judge Beatty enjoined the members of a union from intimidating plaintiff's workmen, and thereby preventing them from continuing in its employ. Arthur's proposed invasion of complainant's rights, in the means to be employed, and the character of the injury intended, is quite like the wrongs enjoined in the cases just cited. It would seem from the foregoing authorities that we may enjoin Arthur from directing the engineers to quit work, for the purpose of coercing the defendant companies to violate the law and complainant's rights. Though we cannot enjoin the engineers from unlawfully quitting, it does not follow that we may not enjoin Arthur from ordering them to do so. An injunction in this form, however, has not been asked, and we need not decide the question.

The rule that equity will not enjoin a crime has here no application. The authorities where the rule is thus stated are cases where the injury about to be caused was to the public alone, and where the only proper remedy, therefore, was by criminal proceedings. When an irreparable and continuing unlawful injury is threatened to private property and business rights, equity will generally enjoin on behalf of the person whose rights are to be invaded, even though an indictment on behalf of the public will also lie. See the cases cited in section 20 of High on Injunctions.

We have thus far considered the right of the complainant to an injunction in an independent suit against Arthur. But the case, as presented to this court, is far stronger. Here a mandatory writ was actually issued against the defendant railroad companies and their employes, restraining them from refusing to interchange with complainant interstate freight. Subsequently Arthur was made a defendant by amendment to the bill, which advised the court that he, as the chief of an unlawful conspiracy to injure the complainant by destroying its interstate business, had just issued, or was about to issue, an order to the engineers in the employ of the defendant companies not to handle complainant's freight, and that, if issued, Arthur's order was more likely to be obeyed than the injunction of the court then in force. Is it possible that, in such a case, a court of equity must remit the complainant to an action at law for the injuries which Arthur's unlawful order will certainly cause, and that the court must await in silence the defeat of its own injunction? The putting of the question answers it. It is the duty of the court promptly to prevent, at all hazards, the probable obstruction to its main injunction, by auxiliary injunctive process, and, if such obstruction has actually been interposed, to remove it by the same means. On this ground the court was fully justified in restraining Arthur, as it did, from continuing in force any order he might have issued in conflict with the previous order of the court. This was mandatory, but it was necessary to secure the enforcement of the court's previous order, and to preserve the status quo. Had the order of Arthur, then in force, been allowed to continue, future equitable relief would have been unavailing. A rescission of the order could work injury to no one. Mandatory injunctions issue under such circumstances. Mr. High states the rule as follows, in his work on Injunctions, (section 2:)

"And when there is a willful and unlawful invasion of plaintiff's right, against his protest and remonstrance, the injury being a continuing one, a mandatory injunction may issue in the first instance."

See *Robinson v. Lord Byron*, 1 Brown, Ch. 588; *Hervey v. Smith*, 1 Kay & J. 392; *Lane v. Newdigate*, 10 Ves. 192; *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Broome v. Telegraph Co.*, 42 N. J. Eq. 141, 7 Atl. Rep. 851; *Beadel v. Perry*, L. R. 3 Eq. 465; *London & N. Ry. Co. v. Lancashire & Y. Ry. Co.*, L. R. 4 Eq. 174.

Arthur says that, when he sent out his telegraphic instructions to the members of the brotherhood on March 16th, he had no knowledge of the injunction of this court against defendant companies and their employes issued on the 11th. This is surprising, in view of the interest he had in the subject and the wide publicity given to the injunction. His knowledge of the injunction would be quite material in a proceeding against him for contempt, or in a criminal prosecution of him for conspiring to defeat the administration of justice in the United States courts, (*Pettibone v. U. S.*, *ubi supra*;) but it was not material here. The fact that his order actually nullified the order of the court, and was continuing to do so, was enough to justify the court in compelling him to rescind it.

The temporary injunction will be allowed, as prayed for.

TOLEDO, A. A. & N. M. RY. CO. v. PENNSYLVANIA CO. et al.

(Circuit Court, N. D. Ohio, W. D. March 25, 1893.)

No. 1,139.

1. FEDERAL COURTS—JURISDICTION—INTERSTATE COMMERCE ACT.

A suit in equity to enforce by injunction the third section of the interstate commerce act, and praying that certain railroad companies be restrained from refusing to afford equal facilities to the complainant, a connecting railroad, in the exchange of interstate traffic, involves a federal question which is sufficient to give a federal court jurisdiction of the whole cause, though remedies of a similar nature may exist under state statutes or the common law. *Osborn v. Bank*, 9 Wheat. 738, followed.

2. INJUNCTION—DENIAL OF EQUAL FACILITIES TO CONNECTING RAILROAD.

Where a labor organization has declared a boycott against a railroad, and connecting roads are therefore refusing, or seem about to refuse, to afford equal facilities to the boycotted road, in violation of section 3 of the interstate commerce act, they may be compelled to do so by mandatory injunction, since the case is urgent, the rights of the parties free from reasonable doubt, and the duty sought to be enforced is imposed by law. *Coe v. Railroad Co.*, 3 Fed. Rep. 775, followed.

3. SAME—BINDING ON EMPLOYEES.

A mandatory injunction restraining a railroad company from refusing equal facilities to a connecting line in violation of section 3 of the interstate commerce act, is binding upon all officers and employees of the respondent having proper notice thereof, whether they are made parties or not.

4. EQUITY—NEW REMEDIES.

A court of equity has power to contrive new remedies and issue unprecedented orders to enforce rights secured by federal legislation, provided no illegal burdens are imposed thereby. *Joy v. St. Louis*, 11 Sup. Ct. Rep. 243, 188 U. S. 1, followed.

5. MASTER AND SERVANT—RAILWAY EMPLOYEES—IMPLIED OBLIGATIONS—QUITTING SERVICE.

Railway employees accept their places under the implied condition that they will not quit their employer's service under circumstances rendering such conduct a peril to the lives and property committed to its care, or in such a manner as to subject it to legal penalties or forfeitures; and although, in ordinary circumstances, the employer must rely upon his action at law for a breach of the condition, a court of equity has power to restrain employees from acts of violence and intimidation, and from enforcing rules of labor unions which result in irremediable injuries to their employers and the public, such as those requiring an arbitrary strike without cause, merely to enforce a boycott against a connecting line.

6. INJUNCTION AGAINST RAILWAY—VIOLATION BY EMPLOYEE—CONTEMPT—EVIDENCE.

An engineer of a railroad company which has been enjoined from refusing to haul the cars of a boycotted connecting line, of which injunction he has notice although he has not been made a party thereto, and who, while on his run, refuses to attach such a car to his train, and declares that he quits his employment, but nevertheless remains with his engine at that point for five hours, until he receives a telegram from his labor union to haul the car, and who thereafter continues in his employment, is guilty of contempt for violating the injunction, although engineers who refuse to haul such cars in obedience to a rule of the labor union, and in good faith quit their employment before starting on their run, may not be in contempt.

In Equity. Bill by the Toledo, Ann Arbor & North Michigan Railway Company against Albert G. Blair, Jacob S. Morris, the

Pennsylvania Company, the Lake Shore & Michigan Southern Railway Company, and others, to enjoin respondents from refusing to extend to complainant the same equal facilities as to others for the exchange of interstate traffic. The injunction was issued, served upon the Lake Shore & Michigan Southern Railway Company, and brought to the notice of its employes by publication. Heard on application by said company for an order attaching Clark, Case, Rutger, and Lennon, its employes, for contempt in violating the injunction. Granted as to Lennon.

Statement by RICKS, District Judge:

The original bill was filed March 11, 1893, and the mandatory injunction set out in the opinion of the court was made on the same day. On the 18th of March, upon an affidavit filed by the superintendent of the Michigan division of the Lake Shore & Michigan Southern Railroad, the material allegations of which are set forth in the opinion of the court, a rule was entered requiring certain named engineers and firemen, who were employed by that company, and in said affidavit charged with knowingly violating the orders of the court, to appear and show cause why they should not be attached for contempt. Pending the service of this order upon the accused, it was represented to the court by counsel and officials of the several defendant railroads that there was great excitement and anxiety among the employes of the railroads involved as to the duties expected from them under the mandatory orders made, and it was therefore suggested that some statement from the court as to the scope and purpose of said order would not only be very acceptable, but wholesome and beneficial, and might result in preventing the strike from spreading. Accordingly, when the accused were brought into court, and before they were released upon their own recognizance to appear from day to day, and abide the further orders of the court, the following admonition was given to them:

"Admonition to the Accused.

"The order of the court was made in this case after due consideration, with full knowledge of its scope and possible consequences, and with the purpose to enforce it in its letter and spirit without unnecessary hardship, but with such promptness and vigor as might become necessary to give full protection to all concerned. You are now before the court under an order based upon affidavits to show cause why you should not be attached for contempt for refusing to obey the order of the court, a copy of which has been duly brought to your attention. The court proposes to give you full opportunity to employ counsel, take advice, and make all proper defenses. You are to have your day in court, and be fully heard. But I desire now, at this stage of the proceedings, to suggest to you that you should not overlook the nature and importance of your employment. You are engaged in a service of a public character, and the public are interested not only in the way in which you perform your duties while you continue in that service, but are quite as much interested in the time and circumstances under which you quit that employment. You cannot always choose your own time and place for terminating these relations. If you were permitted to do so, you might quit your work at a time and place, and under circumstances, which would involve irreparable damage to your employers, and jeopardize the lives of the traveling public. Your employers owe a high duty to the public, which they are compelled to perform under severe penalties for every neglect, and they have in turn a higher claim upon you and your service than that due from the ordinary employe. This court does not assume the power to compel you to continue your service to your employers against your will, but it does undertake to compel you to perform your whole duty while such relations continue; and does further claim, for the purpose of ascertaining whether its orders have been violated, the right to determine when your relations to your employer legally terminated, and when your obligations to observe this order

ceased. So that it may, in the mean time, be important for you to reflect and consider whether you can safely continue in your employer's service with the purpose to quit it at a moment when some duty may be required of you which is in violation of some supposed promise or obligation you owe another, not your employer. That time for leaving your post of duty might come under circumstances when you would by such act unintentionally imperil the safety of lives intrusted to your employers, and do their business vast and irreparable damage. It might, too, unintentionally involve you in a conflict with the court through obstructing its process and interfering with its mandates. I therefore suggest to you, and to all others who are in similar employment, that there ought not to be any strained construction made of the provisions of the court's order. The only safe way to obviate trouble is to quit the service of your employer, if you do not intend to observe the orders of the court as made, and which are binding upon you while that service continues. This you have a right to do; but if you continue in that employment, this court will expect you to do your full duty to your employer and to the public, and to observe the orders which have been made in this case. The high character which the public justly give to the engineers and firemen who serve on our great railways has been earned by innumerable proofs of the most loyal service to employers, and the most heroic and faithful devotion to duties of great peril. The court has the right, therefore, to expect from such men a willing observance of the laws of the land, and due respect for such orders and processes as it may be called upon to make in this case, in the fulfillment of its duties to the public and the parties invoking its jurisdiction."

The hearing of the testimony on the motion for contempt was begun on Tuesday, March 21st, and continued from day to day. Argument of counsel was heard, and the decision of the court was announced on Monday, April 3d. The following is a full and correct copy of the opinion.

Geo. C. Greene and Emory D. Potter, Jr., for Lake Shore & M. S. Ry. Co.

Alexander L. Smith, for complainant.

E. W. Tolerton, for Pennsylvania Co.

Frank Hurd and Jas. H. Southard, for the accused.

RICKS, District Judge, (after stating the facts.) This suit was instituted by the Toledo, Ann Arbor & North Michigan Railway Company, to compel the Lake Shore & Michigan Southern Railroad, the Pennsylvania Company, and other defendants, to receive from it and deliver to it freight and cars destined from one state to another, commonly known as "interstate freight," which it avers the defendants have refused to do since March 11, 1893, because complainant has employed as locomotive engineers in its service men who are not members of the Brotherhood of Locomotive Engineers. The bill further avers that the defendants continue to afford to other railroads full and free facilities for interchange of traffic, thereby illegally discriminating against it. The bill was drawn to enforce the third section of the interstate commerce act, which provides—

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The common carriers subject to the provisions of that act are defined by the statute to be "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States or the District of Columbia to any other state or territory of the United States. * * *"

The subject-matter of this litigation is, therefore, the construction and enforcement of an act of congress, and the court acquires jurisdiction because of the federal question involved. That such question is involved I think too plain for serious controversy. It is sufficient to constitute a case for cognizance by a federal court if it involves but a single ingredient or question dependent on the constitution or a law or a treaty of the United States, although it may at the same time involve any other questions that depend on the general principles of law. Chief Justice Marshall, in *Osborn v. Bank*, 9 Wheat. 738, considered this point, and came to the following conclusion:

"We think, then, that when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of congress to give circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it."

Remedies of a similar nature might undoubtedly be invoked under statutes and the common law, but the act in question affords the broadest and most effective relief, and the jurisdiction is therefore safely grounded upon that law.

Upon the filing of this bill on the 11th day of March, a mandatory injunction was allowed, directed to the defendants, their agents, officers, servants, and employes, and it was therein ordered—

"That the said defendants, Albert G. Blair, Jacob S. Morris, the Pennsylvania Company, the Wheeling & Lake Erie Railway Company, the Lake Shore & Michigan Southern Railway Company, the Michigan Central Railroad Company, the Cincinnati, Hamilton & Dayton Railroad Company, the Columbus, Hocking Valley & Toledo Railway Company, the Toledo & Ohio Central Railway Company, the Cincinnati, Jackson & Mackinaw Railway Company, and each of them, and their officers, agents, servants, and employes, be, and they are hereby, enjoined and restrained from refusing to offer and extend to said the Toledo, Ann Arbor & North Michigan Railway Company the same equal facilities for interchange of traffic on interstate business between said railway companies as are enjoyed by other railway companies, and from refusing to receive from said the Toledo, Ann Arbor & North Michigan Railway Company cars billed from points in one state to points in another state, which may be offered to said defendant companies by the complainant; and from refusing to deliver in like manner to said complainant cars which may be billed over complainant's line from points in one state to points in other states. Ordered that a writ of injunction be issued out of and under the seal of this court as prayed for in the bill of complaint, to remain in force until the further order of the court herein."

The application for this order was made to me at chambers, in Cleveland, late on Saturday night, March 11th. The situation set out in the bill disclosed an emergency in which prompt action was

necessary. I had granted a similar mandatory order in 1891 on a bill for an injunction filed in this court by the Wheeling & Lake Erie Railroad, and it was enforced with beneficent results as against its engineers, firemen, and train men, who had refused to handle interstate commerce freight loaded on cars consigned to various ports on Lakes Superior and Michigan. The bill in this case clearly entitled the complainant to relief as against the defendant railroads, who were threatening to refuse to receive or deliver interstate freight.

The section of the interstate commerce law above quoted made it mandatory upon connecting railroads to receive and deliver passengers and freight, and to afford equal facilities for the interchange of traffic. Corporations can act only through their officers, agents, and servants, so that the mandatory provisions of the law which apply to the corporation apply with equal force to its officers and employees.

It has been urged by counsel for the accused that they should have been made parties defendants, should have been served with notice of the application for an injunction, and that notice of the allowance of the order should have been given to them the same as to the defendant railroads, in order to now authorize the court to find that they had such notice as to hold them for contempt. I do not concede this proposition. As has just been stated, a corporation can act only through its officers and employees, and a duty imposed by law, or by an order of a court of competent jurisdiction, upon a corporation, applies to the officers and employees of that corporation, and takes effect as to them so soon as they are in fact properly notified of the nature and scope of the law or order. Writs of injunction, of whatever nature they may be, when directed to a corporation, always run against it and its agents, servants, employees, etc. The order now before us was so allowed, and it was so issued. It would very much embarrass the courts in administering the law if counsel are right in this contention. The difficulties would almost be insuperable if it were necessary to make all the several thousand employees of the defendant railroads parties before the orders and processes of the court become effective as to them. They belong to the instrumental force of their respective corporations, and in that respect are a part of them. It is therefore sufficient, I think, if in fact they are served with full and proper notice of the orders and processes of the court to make them binding upon them. It is not necessary to make them parties.

The authority of the court to issue such an order has been questioned, but it rests on well-established principles. In *Beadel v. Perry*, L. R. 3 Eq. 465, a mandatory injunction was granted on motion by Sir John Stuart, V. C. In giving judgment in that case, he said:

"Reference has been made to a supposed rule of court that mandatory injunctions cannot properly be made except at the hearing of the cause. I never heard of such a rule. Lord Cottenham was, so far as I know, the first judge who proceeded by way of mandatory injunction, and he took great care to see that the party applying was entitled to relief in that shape."

In *Coe v. Railroad Co.*, 3 Fed. Rep. 775, when application was made to Judge Baxter, of the United States circuit court, at Nashville, Tenn., for a mandatory injunction restraining the defendant from discriminating against the complainants' business in handling live stock, and especially from inhibiting persons from consigning live stock to complainants' yards, that learned judge said:

"Ought a mandatory order to issue upon this preliminary application? Clearly not, unless the urgency of the case demands it, and the rights of the parties are free from reasonable doubt. The duty which complainant seeks by this suit to enforce is imposed and defined by the law,—a duty of which the court has judicial knowledge. The injunction compelling its performance pending this controversy can do the defendant no harm, whereas a suspension of the accommodations would work inevitable and irreparable mischief to the complainants. The injunction prayed for will therefore be issued."

In the case now under consideration the duty which the complainant seeks to have enforced is defined by the law, and the rights of the parties are free from doubt, so that it seemed a proper case for the order to issue, and it was therefore allowed.

This order was served upon the several defendants, and the Lake Shore & Michigan Southern Railroad, through its general superintendent, Mr. Canniff, made publication of the order in such way as to bring it to the attention of its employees, and particularly to those of its engineers driving engines on the Detroit division, where the interchange of cars with the Ann Arbor road was frequent. On the 18th of March an affidavit made by the superintendent of the Michigan division of the Lake Shore & Michigan Southern Railroad was filed, alleging that certain of its employees, while in the service of said company, and with full notice and knowledge of the injunction theretofore made, had refused to obey the orders of the court, and upon that affidavit an application was made by said company for an attachment to issue against the employees so named, "as being in contempt of the restraining order of the court." The court declined to make the order in the form applied for, but directed one to be entered requiring the engineers and firemen named to appear in court forthwith, and show cause why they should not be attached for contempt. This is the usual and well-established practice in this district, as numerous precedents in the last 10 years will show.

It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief. Mr. Justice Brewer, sitting in the circuit court for Nebraska, said:

"I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand."

Mr. Justice Blatchford, speaking for the supreme court in *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. Rep. 243, said:

"* * * It one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation."

The spirit of these decisions has controlled this court in its action in this case.

Before proceeding to pass upon the evidence as to whether the men now before the court under charges for contempt are guilty or not, it may be profitable to consider the general principles of law applicable to the duties with which the accused were charged by the orders issued to them and to their employers. They were in the employ of the defendant the Lake Shore & Michigan Southern Railroad at the time the orders in this case were made, compelling it to receive from the Ann Arbor road all interstate freight it might tender. The testimony shows that the terms of this order were made known to the employees generally, and that they were thoroughly advised of its scope and mandatory provisions. That their employer was obligated, both under the general provisions of the interstate commerce law and under this order of the court, to receive and haul all interstate freight, must have been known to them. They must also be held to have known that the penalties of the law were severe in case their employer violated either the law or the order of the court. Holding to that employer, so engaged in this great public undertaking, the relation they did, they owed to him and to the public a higher duty than though their service had been due to a private person. They entered its service with full knowledge of the exacting duties it owed to the public. They knew that if it failed to comply with the laws in any respect severe penalties and losses would follow for such neglect. An implied obligation was therefore assumed, by the employees upon accepting service from it under such conditions that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable losses and injuries and excessive damages by any acts of omission on their part. One of these implied conditions on their behalf was that they would not leave its service or refuse to perform their duties under circumstances when such neglect on their part would imperil lives committed to its care, or the destruction of property involving irreparable loss and injury, or visit upon it severe penalties. In ordinary conditions as between employer and employe, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. The remedy for breach of contract may follow to the employer, but the employe has it in his power to arbitrarily terminate the relations, and abide the consequences. But these relative rights and powers may become quite different in the case of the employees of a great public corporation, charged by the law with certain great trusts and duties to the public. An engineer and fireman, who start from Toledo with a train of cars filled with passengers destined for Cleve-

land, begin that journey under contract to drive their engine and draw the cars to the destination agreed upon. Will it be claimed that this engineer and fireman could quit their employment when the train is part way on its route, and abandon it at some point where the lives of the passengers would be imperiled, and the safety of the property jeopardized? The simple statement of the proposition carries its own condemnation with it. The very nature of their service, involving as it does the custody of human life, and the safety of millions of property, imposes upon them obligations and duties commensurate with the character of the trusts committed to them. They represent a class of skilled laborers, limited in number, whose places cannot always be supplied. The engineers on the Lake Shore & Michigan Southern Railroad operate steam engines moving over its different divisions 2,500 cars of freight per day. These cars carry supplies and material, upon the delivery of which the labor of tens of thousands of mechanics is dependent. They transport the products of factories whose output must be speedily carried away to keep their employes in labor. The suspension of work on the line of such a vast railroad, by the arbitrary action of the body of its engineers and firemen, would paralyze the business of the entire country, entailing losses, and bringing disaster to thousands of unoffending citizens. Contracts would be broken, perishable property destroyed, the traveling public embarrassed, injuries sustained, too many and too vast to be enumerated. All these evil results would follow to the public because of the arbitrary action of a few hundred men, who, without any grievance of their own, without any dispute with their own employer as to wages or hours of service, as appears from the evidence in this case, quit their employment to aid men, it may be, on some road of minor importance, who have a difference with their employer which they fail to settle by ordinary methods. If such ruin to the business of employers, and such disasters to thousands of the business public, who are helpless and innocent, is the result of conspiracy, combination, intimidation, or unlawful acts of organizations of employes, the courts have the power to grant partial relief, at least by restraining employes from committing acts of violence or intimidation, or from enforcing rules and regulations of organizations which result in irremediable injuries to their employers and to the public. It is not necessary, for the purposes of this case, to undertake to define with greater certainty the exact relief which such cases may properly invoke; but that the necessities growing out of the vast and rapidly multiplying interests following our extending railway business make new and correspondingly efficient measures for relief essential is evident, and the courts, in the exercise of their equity jurisdiction, must meet the emergencies, as far as possible, within the limits of existing laws, until needed additional legislation can be secured.

The evidence in this case shows in a strong light the unreasonableness of some of the rules and regulations under which employes consent to be governed in their own labor organizations. It appears from the evidence that under the terms of their employment the Lake

v.54f.no.5—48

Shore & Michigan Southern Railway, though empowered to suspend or discharge its engineers, must thereafter grant them a fair and impartial hearing within a reasonable time, and, if found blameless, they must be paid such wages as they would have earned during the time of suspension or discharge. But the engineers, on their part, by their action in this case, claim the right to quit the company's service without a moment's notice, and without cause. Every engineer and fireman conceded on the witness stand that he was perfectly satisfied with his wages, perfectly satisfied with his hours of labor, and with his employer in every respect, and would be glad to continue in the company's employ; but admitted that he had quit the service arbitrarily, and without notice, because of the boycott against the Ann Arbor road. While denying that there had been any understanding or agreement, or any rule or notice by which all had arbitrarily left the company's service, the evidence shows such a uniform line of action, such a unanimity in the manner of quitting, and in the reasons assigned, as to convince me that there was a common design and a common purpose in what they did. Each one of them admitted that when he was asked if he would continue in the company's employ and obey the order of the court if the boycotted cars or freight were taken out of his trains, he had agreed to do so. This clearly shows that they were controlled in their acts, not by any grievance they had against their own employer, but by a rule or order, which has since been brought into court, and which my associate, Judge Taft, will deal with in his opinion. 54 Fed. Rep. 730.

Now, let us apply these general principles of equity, which are consistent with every rule of natural law and justice, to the facts of this case, so far as they affect those now charged with contempt of court. The evidence shows that, according to the rules and custom of the company, the engineers were paid \$3.75 for a run of 100 miles, and were paid for overwork. The time for computing compensation began at the hour they were called to leave the yard, and ended when they gave up their engines in the yard, and they were entitled to pay for that time, even though their engines did not move a wheel. Their service was therefore due to the company from the hour when their compensation began. The period of service continued during the time usually occupied in making the run for which they were called. During that period they were constantly subject to the orders of the company, and by custom and usage the relation of employer and employe was in force for that time. This is the most limited period that can be claimed for their term of service under the evidence before me. On the afternoon and night of the 17th of March a train of cars was made up in the yards of the Lake Shore & M.S. road at Air Line Junction, destined for Detroit. About 6 o'clock P. M., Engineer Clark and Fireman Thompson were called to make the run. They prepared their engine, ran it into the yard, and backed down to within a half car length of the train, and, before coupling it, learned that the first seven cars were billed for Alexis, and intended for the Ann Arbor road. Thereupon Clark took his clothes from his box, announced to an officer of the company that he would quit its service, and, proceeding to the office, turned over his

book of rules to the officer in charge. A call was then sent out for Engineer Case and Fireman Kessler. They brought their engine to the train, coupled it, and, on learning from the conductor that seven cars were to be delivered at Alexis, Case said he would quit the service, and did so. A call was then sent out for Engineer Rutger and Fireman James, and their engine was brought out and coupled to the train. When Rutger learned that Alexis cars were to be delivered, he quit his employment, and left the yard, having turned over his book of rules. A call was then sent out for Engineer Conley and Fireman Westgate, whose engine was in the same way coupled to the train. Conley declined to haul the Alexis cars, and quit the company's employment. He offered to run the train out if the obnoxious cars were removed. It is unnecessary to state the evidence more in detail. The proof is clear that all of these engineers and firemen fully understood the order of the court, and knew that if they continued in the company's service they would be compelled to obey it. Rather than do that, they quit their employment. Had they the right to do so under the circumstances surrounding them? The train which they refused to haul was safely stored in the company's yard. No special injury resulted from their refusal to continue in the service. No lives were imperiled, and no property jeopardized by their act. These facts clearly present extreme cases, where a court of equity is asked to enforce the performance of contracts for personal service. The engineers were all bound, by their terms of employment, to haul that train to Detroit. They had been regularly called for service, and entered upon it, and were in law obligated to continue in that service for the period of 12 hours, which covered their run. They have broken their contract, and their employer has its remedy at law, inadequate though it be.

But this court recognizes to its fullest extent the large measure of personal liberty permitted to employes, and, while it feels they have violated their contract of service, it disclaims any power to compel them to continue that service against their will, under the facts of this case. The insuperable difficulties attending an attempt to enforce the performance of contracts for continuous personal service have heretofore deterred courts of equity from undertaking to grant relief in such cases. But in the varying circumstances under which the employer's rights to such relief are presented it often happens that adequate protection is possible by restraining the employes from refraining to do acts which they have combined and conspired to do, and the inhibiting of which secures the relief to which the employer is clearly entitled. By such modes of procedure courts of equity are often able to afford protection where they could not do it by attempting to enforce specific performance. But it is urged that, while the court might not have had the power to compel performance of service in these cases, it has power to punish for contempt those who refused to obey its orders. But if the court could not compel the employe to perform by continuing in service, it would not be a contempt of court on the employe's part to exercise the right to quit the service. If the employe quits in good faith, unconditionally and absolutely, under such circumstances

as are now under consideration, he is exercising a personal right which cannot be denied him. But so long as he continues in the service, so long as he undertakes to perform the duties of engineer or fireman or conductor, so long the power of the court to compel him to discharge all the duties of his position is unquestionable, and will be exercised. As hereinbefore intimated, the duties of an employe of a public corporation are such that he cannot always choose his own time for quitting that service, and so long as he undertakes to perform and continues his employment the mandatory orders of the court to compel all lawful service can reach him and be enforced. The circumstances when this freedom to quit the service continues and when it terminates it is not now necessary to determine, but there certainly are times and conditions when such right must be denied.

The cases cited by counsel in which public officers have not been permitted to resign to avoid the mandatory orders of a court do not apply here. A different principle is there involved. In most cases the tenure of office continues until a successor is chosen and qualifies. The officer chosen and exercising the functions of his office owes a duty to the public, and is charged with an obligation to perform certain acts which he ought not to be permitted to evade by resignation. The rule of law that holds such a person, even against his will, to his post of duty, to protect the public against an omission to perform a duty which is necessary for its good, and perhaps for the continuous and safe operation of the government in some of its forms, cannot be justly applied to an employe laboring, perhaps, only under an implied contract, who sustains quite a different relation both to the public and his employer.

It is our duty to deal with the facts of these cases as they are presented. The parties now charged with contempt must be tried on those facts as they have been made to appear; and, having fully considered them, I conclude that Engineers Clark, Case, Rutger, and Conley, and their firemen as named, were not guilty of violating the orders of the court while in the service of their employer, as alleged in the affidavit charging them with contempt, but quit the service of the Lake Shore & Michigan Southern Railroad under circumstances when they had a right to do so, and that they are not, therefore, in contempt of court because of such conduct, and they will be discharged. In reaching this conclusion I have treated these cases as criminal in their character, and given the accused the benefit of the reasonable doubt, especially as to the extent to which they had conspired to act concertedly in quitting the service in a way to injure their employer and aid in enforcing a boycott. An act, when done by an individual in the exercise of a right, may be lawful, but when done by a number conspiring to injure or improperly influence another may be unlawful. One or more employes may lawfully quit their employer's service at will; but a combination of a number of them to do so for the purpose of injuring the public and oppressing employes by unjustly subjecting them to the power of the confederates for extortion or for mischief is criminal. We do not, therefore, here determine that a conspiracy entered

into by the employes of one railroad to boycott another railroad may not exist under such circumstances of aggravation as to make it entirely proper for a court of equity, in dealing with such conspiracy, to prevent an employe from quitting the service in which he is engaged solely as a means of carrying out his part in such conspiracy, and for no other purpose than to aid in enforcing such boycott.

But the conduct of Engineer Lennon presents quite a different case. He was on his run from Detroit to Air Line Junction with a train of 45 cars. He reached Alexis station at 10:07 A. M., and was there ordered to take an empty car from the Ann Arbor "Y" for Air Line Junction. This was one of the boycotted cars. He refused to switch the car into the train, and held it there, against positive orders, from 10:07 A. M. to 3:15 P. M., and then proceeded on his run, after receiving a dispatch from the chairman of the grievance committee which read as follows: "You can come along and handle Ann Arbor cars." That message meant that the boycott had been raised. Though Lennon had been twice ordered by telegraph by the officers of the road to come on with his train, he refused to do it, but promptly moved it when he got permission to do so from one who had no official relation to the company, and no right to interfere with the movement of its trains. When he received the order at Alexis to take the Ann Arbor car, he refused, and said, "I quit." He afterwards agreed with the superintendent of the Detroit division to take his train to its destination, if the order to take the boycotted car was countermanded. He remained with his engine, and brought his train to Air Line Junction. When he arrived at that point, as the termination of his run, he says in his testimony that "the caller told me when I registered, 'You get 134.' I said, 'All right, I'll be up.' It was his duty to give me such notice." Though he claims to have quit at Alexis about 10 o'clock in the morning, he brought his train to its destination, and, when told what his next run would be, gave no notice of having quit, or of intending to quit. This is satisfactory evidence that he did not quit in good faith in the morning, but intended to continue in the company's service, and that his conduct was a trick and device to avoid obeying the order of the court. He admitted having seen the court's order, when confronted with it at Alexis. It was shown to him in printed form, easily to be read and understood. Chilcote, the agent at Alexis, and Keegan, the brakeman on Lennon's train, both swear positively to this important fact. From his own admissions he had sufficient knowledge of its nature to at least put him upon inquiry as to its exact scope and effect. He knew it related to his duties as engineer under the very conditions then confronting him, and, if he had been anxious to do his duty and respect the orders of the court, he had an exceptionally good opportunity to read and fully consider it during the five hours he was holding that train at Alexis against the positive orders of his superior officers. But he failed to so further inform himself, and persisted in his defiance both of the rules of his employer and of the injunction of the court during all the hours mentioned. I cannot conceive of any principle of law

under which such conduct can be justified. An engineer cannot be permitted to pretend to quit the service of his company in the manner stated, with his train on the main track, 10 miles from his destination, and for the evident purpose of evading an order of court which was equally in force against employer and employee. If such an abandonment of service could be excused in law, it would leave this great corporation, operating 1,500 miles of railway, and moving several hundred trains of cars per day, at the mercy of its employees, and subject the public, with its multitude of interests and rights, to irremediable injuries and losses. Upon the facts of the case made against Engineer James Lennon, I find that he did not quit the service of the company in fact, and did not intend to do so, and that his pretense to do so was a trick to evade the order of the court. Being in the service of the company when he refused to switch the Ann Arbor car into the train at Alexis, and having then full knowledge of the terms and meaning of the order of the court, that order was then in full force, and commanded him to do the very thing he refused to do. He therefore deliberately and knowingly violated the mandate of the court, and was guilty of contempt. I accept the protestations of Mr. Lennon, made under oath, that he did not intend to disobey the orders of the court, and did not believe he was violating the laws of the United States. He is a member of the Brotherhood of Locomotive Engineers, and supposed that while acting under its rules he was not arraying himself against the laws of his country. This suit has afforded the court an opportunity for declaring the laws applicable to such emergencies, and the public interests have been thereby subserved. This does not, therefore, seem to me to be the occasion when it would be wholesome or wise to administer an exemplary punishment. The object of the court is to uphold and vindicate the laws, without, under these circumstances, showing a disposition to oppress or punish those who have evidently been misled. With these views of my duty, an order will be entered that the accused, James Lennon, stands adjudged as guilty of contempt, and pay a fine of \$50, and the costs of this proceeding, upon payment of which he will be discharged from the further orders of the court.

The orders made in this case as to all the connecting roads and their employees who have continued in the service are still in full force, and it is but just to all concerned that the court should say, that the laws and orders having now been fully interpreted and made public, any violations thereof that may hereafter occur will be dealt with in a spirit and purpose quite different from those which have controlled us in this case.

FARMERS' LOAN & TRUST CO. v. TOLEDO & S. H. R. CO. et al

(Circuit Court of Appeals, Sixth Circuit. February 14, 1893.)

No. 49.

1. RAILROAD COMPANIES—SALE OF ROAD—RIGHTS OF STOCKHOLDERS—RES JUDICATA—WAIVER.

A railroad corporation, under authority of the Michigan statutes. (How. St. § 3403,) sold all its property and franchises to another corporation, and the purchaser mortgaged the same to secure an issue of bonds. A minority stockholder in the seller, having dissented from the sale, brought suit against both corporations to set it aside, which resulted in a decree upholding the sale, but providing that such stockholder, on tendering his stock to the purchasing company, should have a right to receive an equal number of shares in the purchaser, or to have an execution against the same for the value of his stock. He elected to take the latter course, and asked for the declaration of a lien prior to the mortgage, but this was denied. In a subsequent suit to foreclose the mortgage, he intervened, claiming an equitable lien prior thereto for the value of his stock. *Held*, that the effect of the former decree was to convert him from a stockholder in the selling corporation to a judgment creditor of the purchasing corporation, and that he had no lien as claimed. Jackson, J., was of the opinion that the former proceeding was a waiver by the stockholder of any right he had to assert a lien. Taft, J., was of the opinion that the question of a lien was *res judicata*.

2. SAME—VALIDITY—CONSIDERATION.

Under the provisions of How. St. Mich. § 3403, for the sale of the property and franchises of one railroad company to another when authorized by a vote of two thirds of the stockholders, such a sale by a corporation organized after the enactment of the law is valid, and concludes a dissenting stockholder, although the terms of the sale provide for the payment in stock of the purchasing company. Taft, J., dissenting.

3. SAME—BONDS—*LIS PENDENS*.

A bona fide holder of negotiable corporation bonds is not subject to the general doctrine of *lis pendens*, and this applies even if they were purchased during the pendency of the suit in which its issue was finally declared invalid.

4. SAME—AUTHORITY TO PLEDGE BONDS.

A railroad company, by proper resolution under the provisions of How. St. Mich. § 3352, authorizing it, *inter alia*, to issue and dispose of bonds, etc., for the purpose of borrowing money, may pledge its bonds for money borrowed.

5. PLEDGE—SALE—PURCHASE BY PLEDGEE.

Where a pledgee of bonds makes a sale under and within the terms of the pledge, and purchases the pledge himself, such purchase is not, *per se*, void, but only voidable at the instance, and upon the objection, of the pledgor, or one in privity with him. Third parties and strangers have no right to question the sale or purchase, and in such a case the pledgee may recover the full value of the bonds, irrespective of the amount for which they were pledged.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

In Equity. Suit by the Farmers' Loan & Trust Company against the Toledo & South Haven Railroad Company for foreclosure of a mortgage. Charles F. Young intervened, and claimed a lien upon the mortgaged property superior to that of the plaintiff. 43 Fed. Rep. 223. The circuit court sustained Young's claim, and allowed his lien. Plaintiff appeals. Reversed.

Charles H. Campbell, Henry Russel, and Henry M. Campbell, for appellant.

Dallas Boudeman and John W. Adams, for appellees.

Before JACKSON and TAFT, Circuit Judges, and HAMMOND, District Judge.

JACKSON, Circuit Judge. The appellant, as trustee or mortgagee under a trust deed or mortgage made and executed October 27, 1886, by the Toledo & South Haven Railroad Company, to secure the payment of its first mortgage coupon bonds, bearing 6 per cent. interest, to the amount of \$216,000, of even date, brought this suit, at the instance and upon the demand of the holder of \$210,000 of said bonds, to foreclose said mortgage; the mortgagor having made such default in the payment of the interest, warrants, or coupons on said bonds as entitled the holder of a majority thereof, under the terms of the trust deed, to declare the principal of the bonds to be due and payable, etc. The defendant railroad company was duly served, but made no defense to the suit. The appellee Charles F. Young intervened as a defendant, by leave of the court. He attacked the validity of the mortgage and bonds secured thereby, and claimed an equitable interest and incumbrance in, to, and upon the mortgaged property, to the extent of \$3,500, with interest from December 28, 1889, which was prior and superior to the lien of said mortgage. The circuit court sustained the validity of the mortgage, and of the bonds issued by the railroad company, directed a sale of the rights, properties, etc., covered by the mortgage, and decreed that said Young was entitled to priority of payment out of the proceeds thereof to the extent of his said claim for \$3,500, and interest thereon. It was further adjudged that the First National Bank, as the holder of 210 of said railroad bonds, was not entitled to the full amount of same, and interest, but only to its debt, for which said bonds were originally pledged as collateral, as hereinafter explained. The complainant has appealed from so much of said decree as awards Young this priority of payment, and denies the right of said national bank to recover the principal and interest of the 210 bonds it holds. In both of these respects it is claimed that the decree below was erroneous.

The claim of said Young, which was given preference of satisfaction out of the proceeds of the mortgaged property, grew out of the following transactions and proceedings: The Paw Paw Railroad Company, a Michigan corporation, organized under the general laws of said state, extended from the village of Lawton to Paw Paw,—a distance of four miles. Its capital stock consisted of 750 shares of \$100 each. The Toledo & South Haven Railroad Company, another Michigan corporation, extended from Lawton to South Haven, as completed,—a distance of 36 miles. In 1878 the Paw Paw Railroad Company leased its roadbed, etc., to the Toledo & South Haven Railroad Company at a rental of 8 per cent. on \$30,000, or 40 per cent. of the par value of the stock in the lessor company. While this lease was in force the two companies, with a view to their consolidation, entered into a written contract with the appellee Young,

bearing date June 21, 1884, by which he undertook, for a specified consideration, to dispose of the securities of the Toledo & South Haven Railroad Company, the proceeds of which were in part to be used and employed in purchasing the interests of parties in the Paw Paw Company for the benefit of the Toledo & South Haven Railroad Company, in order to effect the desired and contemplated merger of the two companies. In August following this contract was partially modified in respect to his compensation for what he might accomplish, and he was thereafter in the employ of said companies, to aid in the accomplishment of the general result contemplated, viz. that of uniting the two corporations into one. It appears that only 730 shares of the capital stock of the Paw Paw Railroad Company were actually issued, leaving 20 shares not issued, and that several of the holders of said issued shares were also stockholders in the Toledo & South Haven Railroad Company. Of the outstanding stock in the Paw Paw Company, 75 shares were, in August, 1875, issued to one George W. Longwell, the certificate for which, numbered 114, recited upon its face that said shares were "transferable only on the books of said company, by the holder thereof, in person or by attorney, on surrender of this certificate." Said Longwell, by written indorsement on said certificate under date of April 3, 1884, transferred and assigned said 75 shares to J. Riley Bang, who in February, 1886, transferred and assigned the certificate and shares to Thomas Welch, and said Welch on September 6, 1886, by a similar indorsement on the same certificate, transferred and assigned said 75 shares to the appellee Young. Neither of said transfers appears to have been registered on the stock book of the company, nor was the company notified by Young of the transfer thereof made by Welch to him. On September 9, 1886, three days after Young's acquisition of said certificate, a meeting of the stockholders of the Paw Paw Railroad Company was held, at which a resolution was passed, accepting a proposition of the Toledo & South Haven Railroad Company, that day made, for the purchase of the property and franchises of the former company. The proposition to purchase was duly authorized by the stockholders of the Toledo & South Haven Railroad Company, and the consideration offered and accepted was the full-paid stock of the purchasing company to an amount equal to the outstanding stock of the Paw Paw Company, which was to procure its stock to be transferred to the former, and in exchange therefor give to the stockholders of the latter an equal amount of the paid-up stock of the purchasing company. "It appearing to be for the manifest interest of this company [the Paw Paw Railroad Company] to make such sale at the price and on those terms," the stockholders formally accepted the proposition to buy, and authorized the directors of the company to consummate the sale. At the meeting which authorized this sale, 655 shares of the 730 shares outstanding were represented, and voted unanimously for the sale. The minutes of the meeting show, as "not represented, Thos. Welch, holding 75 shares." It appears that neither said Welch nor defendant Young had any formal notice of said meeting, which was not attended by either of them. Under and in pursuance of said resolution, its directors on the same day, September

9, 1886, by deed duly executed, conveyed and transferred all the property, rights, and franchises of the Paw Paw Railroad Company to the Toledo & South Haven Railroad Company. This deed, which was properly acknowledged and filed for record on the day of its execution, recited that, at the meeting of the stockholders which authorized it, "all the stockholders, except 75 shares, of said party of the first part, were present in person or by proxy," and duly sanctioned and directed the sale and conveyance. The purchasing company turned over to the vendor company 730 shares of its paid-up capital stock, as the consideration agreed to be paid for the property, etc., conveyed. In pursuance of authority duly conferred by the stockholders, the Toledo & South Haven Railroad Company, on October 27, 1886, executed the trust deed to complainant upon its property, etc., including that purchased from the Paw Paw Company, to secure the payment of its 216 first mortgage bonds. In January, 1887, before the bonds of said railroad company thus secured had been actually negotiated, but while held by the complainant as trustee in New York, the intervening defendant, Young, filed his bill in the circuit court for Van Buren county, Mich., against the Toledo & South Haven Railroad Company, the Paw Paw Railroad Company, and the complainant herein, setting forth his ownership of said 75 shares in the Paw Paw Company; that he had no notice of the meeting of its stockholders held on September 9, 1886; that he was unwilling to accept the stock of the purchasing company for his stock in the vendor company; and alleging that the proceedings resulting in the sale of the Paw Paw Company's property, etc., to the Toledo & South Haven Railroad Company, were, under the general facts already stated, illegal and void; that the mortgage made by the purchasing company to the trustee communicated no valid title to or right in the property, etc., attempted to be sold and conveyed by the Paw Paw Company, which he claimed was a completed railroad, and therefore had no authority or power, under the laws of Michigan, to make said sale, etc., and prayed that the sale might be declared void, as contrary to his rights; that the deed of trust executed to secure the bonds of the vendee company might also be declared void, and the negotiations of said bonds be restrained; and that the Toledo & South Haven Railroad Company be decreed to reconvey to the Paw Paw Railroad Company the property, etc., which the latter attempted to sell and convey to the former. The two railroad companies were duly served with process. The Toledo & South Haven Railroad Company alone appeared and made defense. The Farmers' Loan & Trust Company did not appear, and was not served, otherwise than by publication. It had no actual notice of the proceeding. The circuit court of Van Buren county rendered a decree in Young's favor, from which the Toledo & South Haven Railroad Company appealed to the supreme court of the state, which reversed the decree of the court below. By reference to the opinion of said supreme court, (*Young v. Railroad Co.*, 76 Mich. 485-497, 43 N. W. Rep. 632,) it will be seen that said court held that the Paw Paw Railroad Company was an uncompleted road, within the true meaning of section 3403, How. St.; that under said section it had the authority to make the sale of its property

and franchises to the Toledo & South Haven Railroad Company, and that the proceedings already referred to, which are fully set out in said opinion, showed and established a legal sale of the Paw Paw Railroad to the Toledo & South Haven Railroad Company. It was further held by said supreme court that said Young's relations to the two contracting companies, and his knowledge of their contemplated union, was such that he was not in a position to disturb the transaction, and that the most that he "could claim, under the circumstances, in equity and justice, against the company, would be what the defendant [the Toledo & South Haven Railroad Company] offered to pay him, stated in the answer to complainant's bill, viz. the fair value of the 75 shares of stock at the time the Toledo & South Haven Company purchased the Paw Paw Railroad." Chief Justice Sherwood, speaking for the court, further states:

"I can discover no fraud, or any attempt to defraud the complainant, on the part of the company [the Toledo & South Haven Railroad Company] answering the bill; but all the circumstances, I think, quite clearly show a want of good faith in the demands made by the complainant upon the Toledo & South Haven Railroad Company."

It was further held by the court that, inasmuch as he had never, in a legal way, consented to the mode of payment provided by the terms of sale and purchase, "equity and justice require that he should transfer to said company his 75 shares upon receiving or being tendered the value of the same at the time the company made its purchase," which value was ascertained and fixed at \$3,500, and allowed him, or, in lieu thereof, gave him the liberty of electing to surrender his shares, and take an equal number or amount of stock in the Toledo & South Haven Railroad Company. Before the decree of the supreme court was settled and entered in accordance with this opinion, Young, through his attorneys, applied to said court to have a lien declared and adjudged in his favor upon the railroad and other property of the defendant company for said sum of \$3,500. In his affidavit filed in support of said application, he refers to the fact that the said company had in its answer offered to pay him what his stock was worth, which the court had fixed at \$3,500; that the company had, since the commencement of the suit, assigned and disposed of all or the greater part of said \$216,000 worth of bonds, as he was informed and believed; that such transfer was invalid, etc., and that, if the same was "allowed to stand, and have precedence over defendant's claim in this cause, that his said claim will be valueless," etc. The supreme court did not, however, by its decree, allow him the lien applied for. In said decree it is recited that, "said Young having elected not to take and accept stock in the corporation of the said Toledo & South Haven Railroad Company, it is further ordered and adjudged that upon being tendered by said corporation the sum of \$3,500, within 30 days from the entry of the decree, said Charles F. Young shall assign his said stock to the Toledo & South Haven Railroad Company." The tender of the \$3,500 was not made by the railroad company, and thereafter Young gave said company written notice that upon a designated day he would present his motion to said supreme court,

asking for the issuance of an execution in his favor against the Toledo & South Haven Railroad Company for said sum of \$3,500. This motion he supported by affidavit of having made tender of said 75 shares of stock to the representatives of the company, with the offer to assign and transfer the stock upon payment of the \$3,500, which was not complied with. Upon the hearing of said motion the supreme court entered the following judgment:

"It is hereby ordered, adjudged, and decreed, as supplemental to said former decree, that the defendant do pay to said complainant the sum of \$3,500 within 30 days after complainant shall have tendered to said defendant a written assignment of said 75 shares of stock, duly executed, so as to pass the title to said stock to said defendant; and in default of such payment for 30 days after said tender of said stock duly assigned, as aforesaid, the complainant, upon filing due proof of such tender with the clerk of this court, has leave to issue execution against defendant for the collection of said sum of \$3,500, provided said assignment of stock shall be tendered to said defendant within 30 days from the date of this decretal order."

Within the time allowed, the said Young made the required tender of the stock to the railroad company, and demanded payment of the \$3,500, which the said company failed to pay within the time allowed; and thereafter said Young, having made proof before the clerk of said court of said facts, applied for, and caused to be issued to the sheriff of Van Buren county, an execution in his favor against the goods, chattels, real estate, and property of the Toledo & South Haven Railroad Company, to enforce the collection of said sum of \$3,500, which execution was by said sheriff levied upon the property of said company on June 16, 1890, after the present bill had been filed, and after a receiver had been appointed. Being unable to proceed with his execution, Young thereupon intervened in the foreclosure proceeding as a defendant, and in his answer sets up substantially the same claims which he asserted in his suit in the state court, and seeks to invalidate the sale of the Paw Paw Railroad to the Toledo & South Haven Railroad Company, and the mortgage made by the latter, upon substantially the same grounds relied on in the state suit. By his answer he practically attempts to relitigate with the complainant all the questions involved and settled by the decision of the Michigan supreme court.

The court below, while properly conceding that complainant was entitled to the benefit of the state decision, and that Young was thereby concluded from attacking the sale by the Paw Paw Company to the Toledo & South Haven Company, and the mortgage made by the latter to the complainant, which was declared valid, reached the conclusion that the effect of the decree of the state supreme court was that Young remained a stockholder in the Paw Paw Railroad Company, with all his rights as such, until the value of his 75 shares, as fixed, was actually paid; that the payment of such valuation, and his transfer and surrender of his stock to the Toledo & South Haven Railroad Company were to be concurrent acts, and that, inasmuch as such payment had not been made, the court could not rightfully sell the property covered by the mortgage sought to be foreclosed "without providing that the amount due to the defendant Young for the share he contributed to its value shall

be first paid." The decree accordingly directed that he should be first paid out of the proceeds of the entire mortgaged property. The priority thus given said Young is manifestly erroneous. Upon the theory that, notwithstanding the supreme court's decree, he remained a stockholder in the Paw Paw Company, what right had Young, as such stockholder, to priority of payment out of the railroad and property of the Toledo & South Haven Company covered by the mortgage, and which had not been purchased or acquired from the Paw Paw Railroad Company? He certainly had none. If he is regarded as a judgment creditor of the Toledo & South Haven Railroad Company under the decree of the Michigan supreme court, it is equally clear that he is not entitled, as such, to priority over the mortgage previously made and duly recorded, as against bona fide holders of the bonds secured by said mortgage. The lower court seems to have construed the original and supplemental decree of the supreme court as having simply, or in effect, found and fixed the value of the 75 shares, and then given Young the election to accept that valuation for the same, if paid by the Toledo & South Haven Railroad Company, or to take an equal amount of stock in the last-named company.

We do not think that this is the proper construction to be placed upon the supplemental decree, when read and considered in the light of the court's opinion. The defendant railroad had in its answer offered to pay Young the value of his 75 shares. But for this offer he had no right to a personal judgment against that company. The opinion declared that the value of his stock was all that he was equitably entitled to, as against said defendant, and fixed said value at \$3,500. By the original decree, Young, having made his election not to take an equal amount of stock in defendant's corporation, was required, upon being tendered said sum within 30 days by the company, to assign and transfer the stock. Under this decree the defendant was to be the actor in performing the condition or prerequisite of acquiring the right to the stock. It, however, failed to make tender of the amount, and Young, having himself tendered a transfer of the stock, and demanded payment of its ascertained value from the agents of the railroad company, then moved the court for execution against it for said sum of \$3,500. No such execution could have been awarded, under the terms of the decree as it then stood. In order to grant his application for execution, it was necessary to render a new decree; and the court thereupon "ordered, adjudged, and decreed, as supplemental to said former decree, that the defendant do pay to said complainant the sum of \$3,500 within 30 days after said complainant shall have tendered to said defendant a written assignment of said 75 shares of stock," and further provided that, in default of such payment for 30 days after such tender, the complainant, upon filing proof thereof with the clerk of the court, "has leave to issue execution against defendant for the collection of said sum of \$3,500. Young made the required tender of the stock. The defendant did not pay the amount within 30 days thereafter. Young filed proof of those facts with the clerk of the court, and applied for and obtained an execution against the

defendant for the collection of the sum which the latter was ordered, adjudged, and decreed to pay him on the conditions he had complied with, and the execution was actually levied by the sheriff to whom it was issued. If this does not, in legal effect and operation, amount to an absolute personal judgment against the railroad company for the value of said stock, voluntarily and intentionally taken by Young, it is difficult to understand what can be regarded as such a judgment. How can Young, after taking a personal decree of this character against a defendant who was not his debtor, otherwise than by having offered to buy and pay for his stock at valuation, and after making a tender of the specific shares to the defendant as a prerequisite to the obtaining of such judgment, be still treated as a continuing stockholder in the Paw Paw Railroad Company? He certainly made his election of remedies in taking the personal judgment against the defendant, even regarding the latter as a wrongdoer; and his tender of the specific shares in order to obtain such personal judgment for the value thereof operated to pass the title to the stock to the defendant, or place Young thereafter in the position of a trustee or bailee of the stock for the Toledo & South Haven Railroad Company. If he desired or intended to retain the beneficial ownership of the 75 shares of stock, with such rights and remedies as were incidental to such ownership, he should not have tendered a transfer thereof, and taken a personal judgment for its value. After pursuing this course, he cannot, upon well-settled principles, be allowed to subsequently pursue remedies inconsistent with that previously taken. *May v. Le Claire*, 11 Wall. 217; *Lamb v. Lathrop*, 13 Wend. 97, 98; *Hooker v. Hubbard*, 97 Mass. 177; *Goss v. Mather*, 46 N. Y. 689; *Sanger v. Wood*, 3 Johns. Ch. 416-421; *Foundry Co. v. Hersee*, 103 N. Y. 25, 9 N. E. Rep. 487; *Conrow v. Little*, 115 N. Y. 387, 22 N. E. Rep. 346; *Sloan v. Holcomb*, 29 Mich. 161; *Pom. Rem.* (2d Ed.) §§ 567-569; and 2 *Herm. Estop.* § 1045.

It is not claimed by Young, in his answer herein, that he did not make said election with a full knowledge of all the facts now possessed and relied upon by him. We are of the opinion that said state suit, and decree of the supreme court therein, which Young made a part of his answer, and introduced in evidence, operated to convert him from a stockholder in the Paw Paw Company to a judgment creditor of the Toledo & South Haven Railroad Company, with rights and lien subordinate to those of the trustees and beneficiaries under the mortgage made and executed October 27, 1886, by the Toledo & South Haven Railroad Company. But suppose it be conceded that the legal effect of the state suit, and the decree of the Michigan supreme court therein, did not establish the validity of the sale by the Paw Paw Railroad Company to the Toledo & South Haven Railroad Company, and that, notwithstanding said proceedings and decrees, Young continued to be the beneficial owner of the 75 shares of stock in the Paw Paw Company. Upon what principle can it be maintained that his rights or interests as such stockholder entitle him to priority of payment even out of the proceeds of that corporation's property for the fixed value of his stock.

as against the complainant herein, and the bona fide holders of mortgage bonds whom it represents? It cannot be questioned that the supreme court of Michigan reversed the decree of the Van Buren circuit court, holding that the sale and mortgage were void. It is equally clear that said supreme court declared, as is clearly shown in this case, that the sale of the Paw Paw Railroad to the Toledo & South Haven was duly authorized by two thirds of the stockholders of the vendor company, (it appearing that, of the 730 shares outstanding, there were present at the stockholders' meeting which assented to and directed the sale 655 shares, which sanctioned the same unanimously,) as required by the law of Michigan (How. St. § 3403) in force when the corporation was organized, and when the transactions in question took place. Said section expressly empowered the Paw Paw Railroad Company to make the sale, "provided, that, at a general or special meeting duly called for that purpose, the stockholders carrying [owning] two thirds ($\frac{2}{3}$) of the stock of said company shall consent thereto."

It was also found by the supreme court of Michigan—and there is nothing in the present case, in the shape of newly-discovered evidence or otherwise, to change our opinion as to the correctness of that finding—that there was no fraud, or any attempt to defraud Young, on the part of the purchasing company. Now the question is whether a minority and nonassenting stockholder in a railroad company, which has lawfully sold and conveyed its road and franchises to another railroad company, is entitled to have the value of his stock paid out of the property so conveyed, as against the mortgagee of the purchasing company. In other words, when corporate property and franchises have been transferred and conveyed to another corporation, under charter power or legislative authority in existence when the corporation is organized, and the purchasing corporation has mortgaged the property thus acquired to secure its negotiable bonds, which pass into the hands of bona fide holders, can a single or minority stockholder in the vendor corporation, who did not assent to such sale, assert a right to or interest in the corporate property so conveyed, paramount and superior to that of such mortgage, and the bonds thereby secured? Could Young, in the present case, have restrained, before its consummation, the sale and conveyance which more than two thirds of his costockholders had sanctioned and assented to? Clearly not. It is settled that equity will enjoin a corporation and its officers, at the suit of a single stockholder, from entering into contracts or engaging in transactions which are in violation of law or the charter power of the company, or which involves a breach of trust injuriously affecting the rights of the complaining stockholder. "When the majority of the shareholders are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of other shareholders, and which can only be restrained by the aid of a court of equity," an injunction will be issued at the instance of a single stockholder. *Hawes v. Oakland*, 104 U. S. 460. Generally speaking, single or minority stockholders may restrain their associates or the corporation from the doing of ultra vires acts. It is

not necessary to go into the authorities on this subject, for the reason that the sale in question was authorized by a statute in existence when the vendor corporation was organized, and there was no illegal or ultra vires action on the part of the Paw Paw Railroad Company, or of its shareholders, in assenting to or in making the sale. If Young had been only a subscriber for 75 shares of the capital stock of the Paw Paw Railroad Company, it admits of little or no question that after the sale of its property, assets, and franchises to the Toledo & South Haven Railroad Company, under the Michigan statute, even against his objection, the latter company could have compelled him to pay for such shares. *Nugent v. Supervisors*, 19 Wall. 241-253, which established the principle that subscribers to the capital stock of corporations, and subsequent holders of such stock, must be regarded as having, in the very contract of subscription, assented to what was provided for or contemplated by either the charter itself, or the general law of the state under which the corporation is organized. The principle is illustrated and applied in the case of *Railroad Co. v. Dudley*, 14 N. Y. 337, etc. See, also, *New Buffalo v. Iron Co.*, 105 U. S. 73, and *Chickaming v. Carpenter*, 106 U. S. 663, 1 Sup. Ct. Rep. 620. The fundamental principle applicable to such artificial bodies, created for the public good, and affected with a quasi public trust and duty, is that the majority of the stockholders, in the absence of express provision of law to the contrary, can regulate and control the lawful exercise of the powers conferred on a corporation by its charter, or the general law of the state in existence when the corporation is organized. In the creating or organization of corporations, there is ordinarily no contract between the state and the stockholders therein, any further than they are represented by the artificial body which the act of incorporation, whether by special or general law, calls into being. The corporation is not to be confounded with the stockholder. Each stockholder is bound to know that, within the scope of the corporate powers conferred by the charter, or by general law in force when the corporation is organized, he and his interests are subject to the control of the majority or other designated number of his costockholders. The individual stockholder takes or acquires his stock subject to the implied condition and understanding that what the charter or general law in existence when the corporation is organized permits and authorizes may take place, without or against his assent, if sanctioned by the prescribed majority of his associates. In respect to acts and transactions thus previously authorized, each stockholder is represented by the corporation and his costockholders. This is one of the implied terms of his contract of subscription with the corporation. These general propositions are admirably stated more at large by Bigelow, C. J., in the case of *Durfee v. Railroad Co.*, 5 Allen, 240-248.

It is a sound principle, and established by the authorities, that the requisite or prescribed majority in interest in common property of indivisible nature, consecrated to public use, may, within the limits of legislative power previously conferred, so use or dispose of that property as to advance the private interests of such majority,

and secure the public welfare. The cases of *Town of Middletown v. Boston, etc., R. Co.*, 53 Conn. 351, 5 Atl. Rep. 706, and *Durfee v. Railroad Co.*, supra, furnish illustrations of the general rule and its application. The principle has been extended even to the case of the rights and interests of dissenting minority bondholders in *Railroad Co. v. Gebhard*, 109 U. S. 534-537, 3 Sup. Ct. Rep. 363, and *Gates v. Railroad Co.*, 53 Conn. 333-335, 5 Atl. Rep. 695. In this case the Paw Paw Railroad Company had the right, by the law of Michigan, (section 3403, How. St.) to make the sale of its railroad and franchises by and with the assent of two thirds of its stockholders. That assent having been duly given, the sale was made, and passed to the purchasing company, not only the legal title to the property conveyed, but the equitable interest and proportionate share therein of each and every stockholder in the vendor company; and, such transfer having been made in the exercise of lawful authority, the court cannot regard the effect of the sale as wrongful, or, in any correct and legal sense, as fraudulent.

The argument in behalf of Young's claim to priority of payment for the value of his stock involves the assertion or proposition that the sale, although valid as to the corporation, was invalid and void in respect to the proportionate interest in the corporate property represented by his 75 shares, because he never assented to the transaction. This contention is fallacious and untenable. Such a sale cannot be treated as legal and valid so far as the corporation and the interests it represents is concerned, and at the same time void as to a nonassenting stockholder. If valid as to the corporation, it must be equally valid as to Young, who has become a member of the Paw Paw Railroad Company under the implied agreement and understanding that the corporation, with the assent of two thirds of its shareholders, could make a valid sale and transfer of its property and franchises. There is nothing in the objection urged on behalf of the appellee, Young, that the trustee and holders of the bonds secured by the mortgage had actual or constructive notice, from the face of the conveyance to the mortgagor, and from the recital of the instruments, that 75 shares in the Paw Paw Company were not represented at the stockholders' meeting which authorized the sale. The recitals of the deed and mortgage showed that more than two thirds of the stockholders of the vendor company were present and assenting. This, with the provision of the law that such majority could confer the requisite authority for the sale, was all that the trustees and holders of the bonds were required to notice. Nor was there anything in the recital to show who the holder of said 75 shares was, or that he was, or would be, an objector to the sale.

By the law of Michigan, shares of stock in incorporated companies are personal property. Young, so far as it appears, had never notified the Paw Paw Company, or the stockholders and directors thereof, that he had the original Longwell certificate No. 114, for 75 shares, nor had he demanded any registration of the transfer thereof to himself on the books of the company, although the certificate, upon its face, recited that the stock was "transferable only on the books of said company, by the holders thereof, in person or by attorney, on sur-

render of this certificate." While the transfer on the back of the certificate invested him with the equitable ownership of the 75 shares, and entitled him to demand the registration thereof, his title as between himself and the corporation, remained inchoate until such demand was made, or until the transfer was recorded upon the corporate books. It is not alleged in Young's intervening answer, nor is it shown, that the meeting of the Paw Paw stockholders on September 9, 1886, at which the sale was authorized, was not regularly called, by giving proper notice to the shareholders of record, but only that he did not have notice of the meeting, and that he was not present, and had never assented to the action then taken. Not being a stockholder of record, and it not appearing that the corporation or its officers had any knowledge of his being the holder of the original Longwell certificate of 75 shares, he was not in a position to claim notice of said meeting, nor can he properly complain of the failure to receive the same. It is questionable whether, as a holder of the shares by mere transfer indorsed on the original certificate, which was in the nature of a nonnegotiable chose in action, (*Dewing v. Perdicaries*, 96 U. S. 196,) he would have been entitled to a vote, or could have voted, at said meeting, (1 *Beach, Priv. Corp.* § 66c, and cases cited in note 3; also 2 *Beach, Priv. Corp.* § 634c, and notes thereto.)

But Young's absence from the stockholders' meeting places him in no better or more favorable position than if he had been present, and voted against the resolution to sell; for his minority objection could not have obstructed or defeated the right of the other stockholders, owning two thirds and over of the capital stock, from giving a lawful assent to the sale, which, when executed in pursuance thereof, operated to transfer the property and franchises of the vendor company to the purchasing company as fully and as completely as if Young had himself expressly consented thereto. The sale, being sanctioned by the requisite majority of stockholders, and made by the corporation, as provided and authorized by the general law of the state under which the company was organized, invested the purchasing company with as perfect a title to the property and franchises as was vested in or held by the vendor corporation, and operated to make the purchasing corporation the legal successor of the vendor corporation. It would be paradoxical to hold that such a sale was valid as to the corporation, and invalid as to one of its stockholders who objected thereto, and whose assent was not necessary to give validity to the transaction. It would be equally inconsistent to hold that such a sale, made under and in pursuance of statutory authority in force at the organization of the corporation and at the date of the transaction, should be treated as only binding upon the corporation and the stockholders assenting thereto, and invalid as to a dissenting shareholder whose consent was not a prerequisite to its validity. Counsel for the appellee Young have treated this case as if the question before the court was whether said appellee could be made to accept stock in the purchasing company for his shares in the Paw Paw Company, or be required to surrender his stock in the latter until he was paid for the same. That is not the question involved in this suit, nor was it the

question involved in the state suit. The Toledo & South Haven Railroad Company, having acquired a valid title to the property and franchises of the Paw Paw Railroad Company for a valuable consideration paid therefor, was under no legal duty or obligation to pay said Young the value of his stock in the latter company; and if it had not, in its answer in the state suit, submitted, or offered to do so, upon no principle of law, known to us, could Young have obtained a decree of that court against such purchasers. If, notwithstanding that decree, he is still to be treated as a holder of said 75 shares, either in his own right or as security for the payment of the \$3,500 which the Toledo & South Haven Railroad Company was adjudged to pay him therefor, upon what principle can he be given a priority of satisfaction out of the property which the Toledo & South Haven Railroad Company has lawfully acquired from the Paw Paw Railroad Company, and mortgaged to secure bonds duly issued, which have passed into the hands of bona fide holders without notice of his rights? The question involved in this suit is whether his equity, regarding him either as a judgment creditor of the Toledo & South Haven Railroad Company, or as a stockholder of the Paw Paw Railroad Company, is superior to the rights of the appellant, and the holders of bonds whom it represents, under the mortgage of the Toledo & South Haven Railroad Company, made and executed after it had lawfully acquired the title to the Paw Paw Company's property and franchises covered by said mortgage. The mortgagee holds the same valid title which the Toledo & South Haven Railroad Company acquired by its purchase. Young's rights as a subsequent judgment creditor of the mortgagor are clearly subordinate to that mortgage, and the lien of the bondholders thereunder. As a stockholder in the Paw Paw Company, or in the corporation which legally succeeded to the former's franchises and property, Young cannot either disturb the sale, or follow the property, and assert rights therein superior to those of the mortgagee.

We are not called upon, in this case, to determine whether Young, if not bound to accept his proportion of the consideration received by the Paw Paw Company for the transfer of its property and franchises, could have proceeded against said corporation and his associate shareholders to recover the value of his stock. Without deciding the point, we are inclined to the opinion that a minority stockholder in cases like the present, where the corporate sale is valid and honest, must look to his own company and coshareholders for such relief as he may be entitled to.

We do not mean to question the proposition that a court of equity will, at the suit of a minority, restrain the majority from appropriating to themselves the assets of the corporation, or from obtaining advantages not shared in by the minority. *Mason v. Mining Co.*, 133 U. S. 50, 10 Sup. Ct. Rep. 224, furnishes an illustration of this principle. There the majority of stockholders, upon the dissolution of the corporation, or the expiration of its charter, attempted to appropriate its property and assets at a greatly inadequate valuation. The minority successfully resisted such attempt. The principle of that decision is not involved in the present case, where the interests and

rights of each and every stockholder in the transaction were placed upon the same footing, and where the question to be determined is whether, after a valid sale of corporate property, a dissenting stockholder can either attack the sale, or follow the property in the hands of the lawful vendee corporation, and assert rights therein superior to the mortgage creditors of the latter.

There is nothing in the point urged by counsel for appellee Young, that parties taking the bonds of the Toledo & South Haven Railroad Company, secured by the mortgage of October 27, 1886, after the commencement of his suit in the state court, and after an injunction restraining the mortgagor from negotiating said bonds, cannot be considered as bona fide holders thereof. These bonds were negotiated in the state of New York, and were taken by parties who had neither actual nor constructive notice of Young's suit. Aside from this, it is settled that a bona fide holder of negotiable corporate bonds is not subject to the general doctrine of *lis pendens*. This exception holds even though the paper was purchased during the pendency of a suit in which its issue was finally declared invalid, the purchaser not being affected with notice thereof. *Lexington v. Butler*, 14 Wall. 283; *Warren Co. v. Marcy*, 97 U. S. 96; *Douglass v. Pike Co.*, 101 U. S. 687; 2 Beach, Priv. Corp. § 666c.

On the second question presented by the appeal, it appears from the record that Frederick F. Woodward, of New York, is the bona fide holder and owner of six of said series of bonds, numbered from 1 to 6, inclusive, which were duly negotiated and sold before maturity, for value received, by or for the mortgagor railroad company. The remaining 210 bonds of said issue were originally, in 1887, pledged by the said Toledo & South Haven Railroad Company to the First National Bank of New York city as collateral security for a large loan made by said bank to the railroad company at the date of the hypothecation. By the terms of the pledge the bank was authorized to sell said collateral, without notice, at public or private sale, in case of nonpayment of the loan at maturity; and it was furthermore "understood and agreed [between the parties] that, upon any sale of any or all of the within collateral, the First National Bank of New York may become the purchaser thereof, and hold the same thereafter in its own right, absolutely, free from any claim of ours." This was one of the terms of the note and pledge executed by the Toledo & South Haven Railroad Company. Said railroad company made default in paying the loan after the same had been increased and renewed, and, being for a long while thereafter in default, the bank, under date of June 24, 1889, gave the company due and formal written notice that unless its note evidencing the loan and its indebtedness was paid on or before December 30, 1889, it would sell said 210 first mortgage bonds held as collateral at public auction on January 3, 1890, at 12 o'clock noon at a designated place in the city of New York, as authorized by the terms of the railroad company's note and pledge, and apply the proceeds towards the payment of said company's indebtedness.

The railroad company failed to make such payment, and on the day designated, and at the place and time indicated, in said notice,

said bonds were sold at public auction, the sale having been also advertised in one or more of the daily newspapers of New York city, and were purchased by said bank at and for the sum of \$20,000, which amount it credited on the railroad company's note. This sale of said bonds, and the purchase thereof by the bank, has not been called in question by the Toledo & South Haven Railroad Company, nor does said railroad company, in the present proceeding, in any way controvert or dispute the bank's title to and ownership of said bonds. The intervening defendant, Young, who is neither a stockholder in, nor has any direct connection with, the Toledo & South Haven Railroad Company, claimed in the court below, and has urged here, that under the provisions of section 3352, How. St. Mich., and the resolution of the stockholders authorizing the issuance of said bonds, there could be no lawful pledge of the same, but only a direct sale thereof by the officers of the company. Section 3352 of the Michigan Statutes, (1 How. St.,) so far as relates to the question, provides that "all companies organized under this act shall have power, from time to time, to borrow such sums of money as may be necessary for completing, finishing, equipping, or operating their road, or any part thereof, or for paying any indebtedness necessarily incurred for completing, finishing, or operating their road, or any part thereof, and to issue and dispose of their bonds or obligations for any amount necessarily borrowed for such purpose, and for such sums and for such rate of interest, not exceeding 10 per cent., as they may deem advisable, and to mortgage their corporate property and franchises, and income thereof, or any part thereof, to secure the payment of any debt, contracted; * * * and said company may sell their bonds or obligation either within or without the state, and at such place and prices as they may deem proper." The stockholders' resolution authorizing the issuance of bonds in this case directs the managing body of the company "to borrow such sums of money as they may think necessary for completing, equipping, and operating its road, * * * and to issue and dispose of the bonds of the company for any amount borrowed for such purpose, for such sums and for such rates of interest, not exceeding 7 per cent., as they may deem advisable, and to mortgage the corporate property and franchises, and the income thereof, to secure the same, and to sell such bonds on the best terms they may be able to obtain for the same." It admits of little or no question that under said section 3352, and said resolution, there was ample authority to pledge the bonds as collateral for the money borrowed of the First National Bank of New York. Under the New York statute, from which section 3352 of the Michigan law is evidently taken, it is settled that under authority to borrow money, and "to issue and dispose" of bonds in connection therewith, there is the right to pledge such securities as collateral for the sums borrowed. *Duncomb v. Railroad Co.*, 84 N. Y. 190. So in *Beecher v. Mill Co.*, 45 Mich. 103, 7 N. W. Rep. 695, where bonds of a corporation were issued on the understanding that they were to be sold for cash, but were in fact pledged to a creditor as collateral to corporate notes held by him, it seems to have been held by the court that the objection that such disposition of the bonds was

unlawful could only be taken by the corporation or its stockholders; that it was not open to strangers, or even to a purchaser of the equity of redemption at execution. Without going into a review of the decisions, we are of the opinion that the weight of modern authority, as well as sound principle, establishes the general rule that, in respect to negotiable securities, authority to sell carries with it authority to pledge. *Platt v. Railroad Co.*, 99 U. S. 48, and *Leo v. Railway Co.*, 17 Fed. Rep. 275. While the court below did not entertain this objection on the part of the intervener, Young, it nevertheless held the position of the First National Bank of New York was not substantially changed with reference to the 210 bonds by selling them under the pledge, and buying them in, and that the amount for which the complainant was entitled to have a decree of foreclosure, as against the railroad company, was the actual amount of the bank's loan remaining unpaid, with interest, which was ascertained and fixed at \$211,124.69, with interest at 6 per cent. from January 22, 1892. The face of the 210 bonds, with the unpaid coupons thereto attached, is largely in excess of the amount allowed in favor of the said bank. The sale and purchase of these bonds by the bank under and within the terms of the railroad company's note and pledge of the collateral was not per se void. It was at most only voidable, at the instance, and upon reasonable objection, on the part of the corporation or its stockholders. Third parties or strangers have no right to question or challenge the bank's title to the bonds on the ground either of inadequacy of the price paid for the same, or for the reason that it occupied such a quasi trust relation to the pledgor as to disqualify it from purchasing at a sale made for its own benefit. The securities having been regularly issued and hypothecated as collateral for a debt the company was authorized to contract, and thereafter lawfully sold under the terms of the pledge, upon proper notice, even the maker of the paper could not impeach the purchaser's title thereto, and the right to recover the amount thereof, without setting up and establishing fraud or breach of trust causing injury. Such an objection, by way of impeachment of the purchaser's title to the pledged security, is manifestly personal, or, in cases like the present, is confined to the corporation or its stockholders. Young's relation to the railroad company was not such as entitled him to question the bank's title to the bonds, or complainant's right, as the legal representative of the bondholders, to foreclose for the full amount thereof. We think the court below was in error in not allowing the decree of foreclosure to go for the full amount of 210 bonds and unpaid coupons thereto attached. Our conclusion upon the whole is that the decree of the lower court is erroneous in the two particulars above referred to, and assigned as error by the appellant; and said decree is in said two respects reversed, and the cause is remanded to the circuit court, from whence it came to this court, with directions to enter a new decree in conformity with this opinion. The costs of the appeal will be taxed against the appellee, Charles F. Young.

TAFT, Circuit Judge, (concurring.) I concur in the result reached in the foregoing opinion, but I cannot concur in the grounds stated therefor. In the court below, Young, as an intervener, sought to have declared in his favor a lien in the nature of a vendor's lien on the property of the Paw Paw Railroad Company, which had passed by sale to the Toledo & South Haven Railroad Company, and a consequent priority in the distribution of the funds arising from the foreclosure sale in this case. In the supreme court of Michigan, Young had prayed the same relief against the same companies that are parties to this record on the same grounds; and the supreme court denied his prayer, and gave him only a judgment and execution against the Toledo & South Haven Railroad Company for the value of his stock, without any lien. The decree and judgment of the Michigan supreme court are *res adjudicata*, therefore, between Young and the railroad company, on the question of his right to a lien on its property. The complainant below, the Farmers' Loan & Trust Company, is privy in right to the railroad company in respect of the property on which it holds the mortgage; so that, whether it was really a party to the proceeding in the state court or not, it may avail itself of the adjudication as an estoppel against Young. If Young was not entitled to a lien in the state court, he is clearly not entitled to priority in distribution in the case at bar. This, it seems to me, satisfactorily disposes of Young's contention at the bar, and requires us to reverse the decree of the court, in so far as it orders the payment of Young's judgment before that of the mortgage bonds.

It would seem, also, that Young had no right to intervene in this foreclosure proceeding against the objection of the complainant, because his claim grew out of a transaction which was anterior to the passing of the title to the defendant company being foreclosed, and which was claimed to give him a lien superior to that title.

The opinion of the senior circuit judge, however, denies Young's right on grounds wholly independent of former adjudication, and on propositions of general equity jurisprudence in which I find myself unable to concur.

Under the statute of Michigan permitting the sale of an uncompleted railroad by its stockholders to another road, the words of which are quoted in the foregoing opinion, there is no power in two thirds in interest of the stockholders to bind one third to a sale for any consideration but money or money credit. We have already held in this court, in the case of *Perin v. Megibben*, 53 Fed. Rep. 86, that a statutory power to sell does not include a power to exchange for shares of stock in a corporation. Nor do I understand the supreme court of Michigan to hold, in the case of *Young v. Railroad Co.*, 76 Mich. 485, 43 N. W. Rep. 632, that it is within the power of two thirds of the stockholders, under this statute, to bind a minority to a sale for anything but money, for Chief Justice Sherwood says in the opinion, (page 497, 76 Mich., and page 636, 43 N. W. Rep.):

"The plaintiff appears in a court of equity to seek and enforce what he conceives to be his equitable rights, and in so doing he must submit to what is right and just; and, in my judgment, his counsel at the circuit, in submitting the case to the learned circuit judge, was not far out of the way when he

stated to the court the claim of his client should be satisfied with the payment of such amount as the stock he held was worth; and while he cannot be held to the mode of payment provided by the terms of purchase by the Toledo & South Haven Railroad Company, because of his consent never having been obtained thereto in any legal way, equity and justice required that he should transfer to said company his seventy-five shares of stock upon receiving or being tendered the value of the same, at the time the company made its purchase, in money."

This holding of the court was obviously based on the fact that Young was equitably bound, by the contract of his vendors, known to him when he bought, to transfer the stock to the Toledo & South Haven Railroad Company, and was therefore deprived of the right which he otherwise would have had, as a minority stockholder, to prevent the consummation of a sale which did not contemplate money, or a money credit, as its consideration. There is no doubt whatever of the proposition argued in the foregoing opinion,—that a minority stockholder is bound by the acts of the majority so long as that majority acts within its charter powers,—nor is there any doubt that neither the majority nor the entire body of stockholders of the corporation can do a corporate act which its charter forbids; but there are corporate acts which are not within the charter power of the majority of the stockholders, and yet which are not beyond the power of the corporation. They are acts of the corporation, which the state, as the grantor of the corporate franchise, has no interest to invalidate, provided all the stockholders consent thereto. They are acts which, if done by a majority only, infringe upon the charter rights of the minority. In this case the power to sell for money was conferred by statute upon two thirds of the stockholders of the uncompleted road. The sale could not be for stock in another company, against the objection of the minority stockholders. No such power was vested by the statute in the two-thirds majority. If, however, the minority consented, the state, the grantor of the corporate franchise, had no interest in objecting to the transaction as beyond the corporate power of the company. Every Paw Paw stockholder consented to the sale for stock in the Toledo & South Haven Railroad Company except Young, who owned 75 shares. He or his vendors had agreed to sell his stock to the purchasing company for money, in order that the sale of the Paw Paw Company might go through. In equity, therefore, he could not object to the sale, provided that he was paid the money value of his stock. It would seem reasonable, and in accord with equitable principles, that the validity of the sale of the Paw Paw road should be conditioned on Young's receiving the money value for his stock, and that, on failure of the Toledo & South Haven Railroad Company to pay the purchasing price, he should have a lien on the property conveyed, in which his stock represented an interest. The supreme court of Michigan, however, was of the opinion that equity did not require that a lien should be reserved to pay the purchase price. As *res adjudicata*, and perhaps as a decision of a state supreme court upon a question of state law, we are obliged to follow the decision of that court in the case at bar. But as a question of general equity jurisprudence, which is the aspect in which the questions are discussed in the opinion of the

senior circuit judge, I am unable to concur in the propositions there laid down.

I see no objection to reserving a lien on the corporate property for the purchase price of shares of stock, where those shares represent a right to object to the sale of the property for anything but money. It is quite true that the shares do not generally represent a tenancy in common in the property itself, but only a voice in the control of the property, a share in the profits to be derived from the use of the property, and a share in the assets of the company on dissolution, after the payment of debts. But the sale here was of the property of the Paw Paw Corporation, the consideration to be divided among the stockholders on the very theory that a share of stock represented an aliquot interest in the property sold. The circumstances seem to me to clearly justify a court of equity in reserving something akin to a vendor's lien in the property sold, to secure the right of a dissenting stockholder to get his part of the consideration in money.

The mortgagee had full and actual notice, from the recitals in the title deeds of its mortgagor, that the consideration for the sale of the Paw Paw road was not money, but stock, and that the owner of the 75 shares of the Paw Paw Company had not consented to the sale. If the construction given above of the Michigan statute is correct, then the mortgagee was charged with notice that the sale was illegal, against the owner of the 75 shares, and was therefore put on inquiry and notice as to his right to a lien for the value of his stock.

Nor do I concur in the reasoning of the court, that the issuing of an execution upon a judgment for the money value of the thing sold is a waiver of the vendor's lien in the thing sold. There is nothing inconsistent, under such circumstances, in an execution and the enforcement of a lien. The cases cited in the majority opinion have, it seems to me, but little application. They are cases where a man is compelled to elect whether he will sue for the price of an article sold, or set aside the sale as fraudulent, and recover the thing in specie. They none of them present a case in equity where the circumstances give to the vendors the right to recover the price of the thing sold, with a lien for that price on the thing sold. In such a case the recovery of the money, and the enforcement of the lien, are not inconsistent remedies, and the pursuit of the one is no waiver of the other.

I concur in both the reasoning and conclusions of the court with respect to the rights of the First National Bank of New York city in the bonds held by it, and have nothing to add thereto.

HAMMOND, J. I concur in the result reached by the other judges of the court, but not altogether in the reasoning of either of the opinions which they have given. Apart from the statute of Michigan authorizing railroad companies, under certain conditions, to do that which was done in this case, and apart from the effect of the adjudications of the state courts of Michigan upon the rights of the parties to this controversy, I should have no doubt of Young's right to

a decree,—not, indeed, to enforce any lien of the judgment he has obtained, either perforce of the judgment itself, or of any lien akin to the vendor's lien, nor yet to recover the money value of his shares of stock,—but a decree to charge the plaintiff here, who can, in my opinion, not at all occupy the attitude of an innocent purchaser for value, without notice, as a trustee of his corporate property, and responsible to account, as such, either for its value, or upon a sale for distribution among the corporate owners,—the one or the other, according to circumstances. The Toledo & South Haven Railroad Company could claim to discharge itself from this obligation of accounting only by the performance of its undertaking to pay the \$3,500, however, on the facts of this case, that undertaking may have arisen. Not having performed it, there could be no holding of Young to it, and shunting him off to the position of a simple contract creditor; but on such failure he would be remitted to his right of an accounting for his share of the corporate property, into whosoever hands it may have come, and a sale for its distribution, or else the payment of its value, otherwise ascertained, in legal-tender money, and in nothing else, if he insisted on his right to money.

I do not think that any corporation can go out of business, and sell its properties and franchises in entirety, (outside of sales made in the ordinary course of business,) and bind a minority of the stockholders, by the will of the majority, to such a sale, upon any principle of the public welfare or like consideration; certainly, not to compel the minority, on such a sale, to take chips and whetstones for their shares of stock,—that is to say, anything else than money. Moreover, I doubt seriously the power of the state, by legislation, to compel the minority to so surrender their property. I do not deny that the majority of the stockholders, in order to preserve for themselves and the minority the advantage of a sale en bloc, rather than a resort to a winding up and accounting among each other for their respective shares of the corporate property, and to prevent the destruction of the corporate franchises by a winding-up, might, under some conditions have, in a court of equity, the right to compel the dissentients to an ascertainment of the value of their shares in some other way than by a sale for distribution, and that ordinarily the market value of the shares might be resorted to as a measure of that value, and that upon such ascertainment the court might compel the dissentients to surrender their shares upon the payment, in legal-tender money, of this value; and, what the court could compel, the stockholders, without compulsion, could do by agreement inter sese. But this power could not be enlarged into any compulsion of assent to a scheme of alienation of the corporate property which left the minority nothing but stocks in new enterprises, or other modes of compensation, for their shares in the corporate property. Ordinarily, in the absence of special powers conferred in the charter or otherwise, by law, the stockholders have, not as tenants in common or joint tenants, perhaps, but as corporate owners or as corporate tenants, if you please, the right to a distribution of the corporate property whenever the company ceases to operate its franchises, and goes out of business, for any cause, whether that of a sale to others,

or for some other reason; and those who wish to acquire the property without a necessity for this distribution have a ready method of acquiring all the stock itself, and this seems, rightly and justly, the only method; and it cannot be that the majority can substitute other property for that of the corporation, such as stock in another corporation, or the like, and force the minority to accept this substitute as a fund for distribution, rather than to claim their interest in the corporate property, or the money fund it would bring at a sale for distribution. This view brings the result already suggested, that Young would have had the right to a sale of the Paw Paw property—not the consolidated property of the Toledo & South Haven Company—for distribution, and he and the Toledo & South Haven Company, either as direct holders of the shares of the majority stockholders, or as holders of those shares substituted in equity to the rights of their vendors, and not at all as purchasers of the property, be it remembered, would have divided the proceeds of this sale according to the respective shares of each, as represented by their holdings of the stock; Young taking his share, be it more or less than the \$3,500 which was promised, but never paid, as a consideration for the transfer of his stock, but which, not having been paid, he could not have been compelled to transfer, and, being still the holder, he would, at the distribution, take his share as stockholder, just as they would, and there would be no question of vendor and purchaser. The plaintiff could have occupied no better attitude than the Toledo & South Haven Company; for in this view it would have been impossible to hold the position of innocent purchaser for value, without notice, since Young's right of distribution inhered in the very nature of the property itself, to say nothing of other facts to put the plaintiff on notice of Young's rights, as shown by this record. Indeed, this view brings out the equities of the parties quite disembarrassed from the sale of the property to the Toledo & South Haven Company, which sale, while it may not have been void in toto, either as to Young or any one else, could have operated only subject to his equity of distribution; the plaintiff becoming, in the end, a trustee for him, and chargeable as such, and not otherwise.

But, unfortunately for Young, he did not, and cannot, occupy this favorable attitude as to his stock. I agree with Mr. Circuit Judge JACKSON, that the statute of Michigan in force at the time Young or his vendor subscribed for the stock became as much a part of the charter of his company as if that statute had been written in it, and by that statute the company was authorized to do that which it did in effecting a sale of the property. He held his stock subject to this statutory power of the stockholders to dispose of the property in the way they attempted to do; and whatever disadvantage there may have been, or injustice, to the minority dissentient, arises out of the statute, and is an infirmity inhering in such property, to which shareholders must submit. It is the kind of company he joined by his subscription. It is not necessary to examine closely the questions made as to the alleged irregularities in this sale. My brother judges agree, for reasons they give, that Young's intervening petition cannot

be granted; and whatever I might think of these irregularities would be, under the circumstances, quite unimportant. But it is proper to remark that these irregularities are not such as to avoid the sale, either wholly or in part, as to Young, so as to let in what I shall call his "equity of distribution," already commented on by me. The sale was accomplished under a statutory power, and the title transferred. Out of these irregularities there could grow or be created no lien of any kind upon the property, either as a whole, or as to Young's share, akin to the vendor's lien, or of any other nature known to the law; for the law of corporations contains no principle of a lien upon the property of the corporation sold under a statutory power, the statute not providing for the lien. If the stock was sold, that was personal property. If the franchises were sold, that was personal property. If the road, structures, and equipments were sold, that might be real estate. But the technical equitable vendor's lien could hardly apply, as to that, on such a sale. But, if it did, then it would only secure the purchase money, and not the distributive share of a dissentient stockholder, arising out of what I have called the "equity of distribution." If it be conceded that under the Michigan statute the dissentient stockholder is still entitled to the money value of his shares, yet the statute provides no lien for that value, the contract of sale by the trustees provides none, and it does not follow that the sale is void for want of such provisions, nor that any lien arises, ipso facto, out of the sale. It is the ordinary case of one selling his land or other property without the precaution of reserving a lien or taking a mortgage to secure the price. Perhaps a timely application to a court of equity by Young would have controlled the majority of the stockholders in the exercise of their statutory power, so as to compel them to exercise that power reasonably, and not to part with the property, or the title to it, until, by the terms of the sale, some reasonable security had been provided for the minority stockholders, as to the payment for their shares; but none such was made, or, if any of his attempts to protect himself could be taken as such, they were not effectual, and the title, having passed, has come into the hands of the plaintiffs, under circumstances which make their position as holders of the legal title such that they stand on an equality with Young in a court of equity. Their equities would be equal to his, and, having the legal title, they would not be compelled to part with it, unless, at least, he should first offer to make them whole by returning the consideration they paid for the property. He let the title to his property pass into the hands of the Toledo & South Haven Railroad Company, irregularly, it may be; but none the less it did pass, and the possession along with it. Now, whatever notice they had, or might have had by inquiry, of the irregularities, these not being such as to make the sale void, Young could not avoid it, as against the plaintiff, paying a fair consideration for it, except upon some superior equity to theirs, and in such a case the legal title turns the scale in plaintiff's favor. Moreover, Young affirmed the sale by taking his judgment against the Toledo

& South Haven Railroad Company for his share of the price, instead of proceeding to compel the stockholders to put into the terms of sale some security for his share. I say, again, he is in the position of one improvidently selling his property without providing a security for the price, and it is too late for us to provide one for him. His trustees of the statutory power have, in spite of his struggles, injuriously managed the sale, and the responsibility is theirs, perhaps. Nevertheless, he is bound by their act in the premises, and we can give him no relief.

The state courts of Michigan reached substantially and practically the same result, by denying to him any lien, and confining him to a personal judgment against the Toledo & South Haven Railroad Company, either upon the theory of an undertaking by that company in the original purchase to pay him the money value of his stock, or upon their offer in their answer to do that thing, as Mr. Circuit Judge JACKSON thinks. Perhaps, the supreme court of Michigan did not intend to establish that the statutory power of the majority stockholders might be exercised so as to compel the dissentients to share in whatever other fund than money was the price of the property, and were of the opinion that even under the statute a dissentient could claim a money value for his share, as Mr. Circuit Judge TAFT thinks; but, after all, it comes to this: a money value was provided for Young, and he has a judgment for it. But the trouble is that neither in the negotiations for the sale, nor in the contract of sale, was any security provided by the trustees of the power of sale for that money value; and, without such provision by them, he can acquire none, upon any principle or theory that occurs to me, or has been suggested by any one. Outside the statutory power, none would exist, in my opinion, to thus cut him out of his equity of distribution. Inside the statute, he has been lost, as many another has been lost, by the desertion of the trustees of the power of sale from their trust in its relation to a dissentient stockholder, and, if he has any remedy, it is against them, personally, for their mismanagement of the trust, and not against the holder of the legal title for a valuable consideration, paid or agreed to be paid, to the trustees upon an effectual, though it may be irregular, exercise of their power.

McCLASKEY et al. v. BARR et al.

(Circuit Court, W. D. Ohio, S. D. April 4, 1893.)

No. 3,984.

1. WITNESS—CREDIBILITY.

The testimony of a witness 77 years of age, as to an event in his boyhood of a nature to be vividly impressed upon his mind, is not discredited by the fact that his statements as to certain other events were confused, and somewhat contradictory, upon a long cross-examination, and his memory at fault as to dates.

2. EVIDENCE—INSCRIPTION ON TOMBSTONE—DATE OF DEATH.

An inscription on a tombstone, if sufficiently authenticated as genuine, and received as such by the family, is admissible, but not always credible, evidence of the date of death.

3. **WILLS—CONSTRUCTION—AFTER-ACQUIRED PROPERTY—OHIO LAW.**

Under the Ohio statute of wills of January 25, 1818, (2 Chase, St. 929,) and the act of March 23, 1840, (Swan, St. 992,) incorporated in a modified form into Rev. St. §§ 5914, 5969, a will making a general devise of all the testator's real estate speaks from the time of the testator's death, and passes after-acquired property, unless the contrary intention appears.

4. **SAME.**

A testator 82 years old—a widower, and childless—devised, "all and singular," his real estate to sons of his nephew, who had lived with and cared for him, and bequeathed his personal property to their sisters. *Held*, that his intent was to devise all after-acquired property, and that real property which came to him thereafter by a will, and from an estate of which he was ignorant when his own will was made, passed to his devisees.

5. **SAME—PROBATE AND RECORD.**

By the law of Ohio, since the year 1808, a will is not effectual to pass real estate unless it be probated, if domestic, or recorded, if foreign. 47 Fed. Rep. 154, 160, affirmed.

6. **SAME—DESTRUCTION OF RECORDS—EVIDENCE.**

The testimony of the clerk of a probate court, the record having been destroyed, that a certain will was admitted to record, should, in the absence of directly contradictory evidence, have greater weight than the omission of any record or statement of such entry in an unofficial local legal journal, published daily, and on which members of the bar generally relied as a trustworthy chronicle of orders, entries, and judgments.

7. **SAME—ORDER TO RECORD.**

Where the record of a will has been ordered, and every act done, except the writing of the record, the instrument should be considered as recorded. 47 Fed. Rep. 154, affirmed.

8. **SAME—OHIO LAW—COURT OF COMMON PLEAS—JURISDICTION.**

Under 1 Rev. St. Ohio, p. 141, § 535, providing for the certification of matters in which the probate judge is interested to the court of common pleas, and for the return of all papers to the probate court, upon the final decision of the questions involved in the proceedings, the court of common pleas, after having once heard a case, and certified the papers back to the probate court with an order that the disputed will be admitted to record, has no jurisdiction to set aside the order and recall the papers; the effect of such order being to make the will effectual to pass title, whether there had been any prior orders admitting it to record or not.

In Equity. On hearing upon the answer of Heberger's heirs to the cross bill of Samuel Barr et al.

For statement of the original case, see 47 Fed. Rep. 154.

H. T. Fay, for complainant.

Samuel T. Crawford, for cross complainant.

R. R. Harrison, Stephens, Lincoln & Smith, and Bateman & Harper, for respondents.

Before JACKSON, Circuit Judge, and SAGE, District Judge.

SAGE, District Judge. The defendants Michael Heberger et al., sole heirs at law of Francis Heberger, deceased, were brought into this cause as parties and coparceners after the interlocutory decree for partition was entered. They present to the court, for consideration de novo, the following questions, involving the rights of devisees under the will of Robert Barr, deceased:

1. When did the testator, Robert Barr, die? Mary Jane Barr—to whom the real estate, partition whereof is sought, descended from.

William Barr, Sr. — died November 27, 1821, and the estate then vested in the surviving brothers and sisters of William Barr, Sr., subject to the life estate, under his will, of Maria Barr. If the death of Robert Barr, who was a brother of William Barr, Sr., occurred prior to the death of Mary Jane Barr, his devisees, whatever may be the decision of other questions arising under his will, would not be entitled to any interest in said premises. The will of Robert Barr is dated February 16, 1821. It was proven before the register of Westmoreland county, Pa., October 21, 1822, by Samuel Morehead, one of the attesting witnesses, who also made affidavit that he saw Charles Baird, the other attesting witness, "who is since dead," sign it. Isaac Persching, born in Westmoreland county in 1800, testifies that he had no acquaintance with an old gentleman by the name of Barr, who lived on the Millwood Coal farm, but that he heard of his death, and that it occurred about a year after the death of Maj. Wilson, whose funeral witness attended, and that occurred in 1821. He testified, also, that the Barr to whom he referred was buried at Salem church, and that at the time of his death he resided with the Barr family out on the Coal farm, where Samuel Barr and his brother and sisters resided, and where a Barr family had lived since 1805,—the only family of that name in Derry township, although prior to that date there were two other Barr families living at other localities in that township. The witness testifies that, although his first acquaintance with any of the Barr family began in 1844, he went to the Barr farm to get peaches when he was only 5 years old, and that when he was 14 or 15 years old he heard of old Mr. Barr. Robert Barr's testimony is that he was born July 6, 1807, in Derry township, Westmoreland county, Pa., and that he knew his great-uncle, Robert Barr, the testator, from his earliest childhood, and lived in the next house, only about three feet from the house where his great-uncle lived, until the time of his death, which occurred in September, 1822. It appears, however, that he had, three or four years before giving his deposition, made an affidavit in which he stated that the date of Robert Barr's death was September, 1821, and later, in his cross-examination, testified that he died in 1852, instead of 1822, and that he fixed the date from having seen a certified copy of the will. He was 77 years of age when he gave his deposition, and his testimony as to dates, in addition to being inferential, is so uncertain and varied that it must be disregarded. But he details one circumstance with the clearness and exactness which often characterizes the statements of those advanced in years in reference to events of their early life, and that is that the will was probated, and admitted to record; that he was present when the executor took it from the house; that he saw his eldest sister get it; that he saw it, and saw her hand it to the executor at the gate, but was not present in court when it was admitted to probate. His testimony on this point is, further, that the will was sealed up,—he did not know by whom; that it was sealed up the first time he ever saw it, and indorsed as the will of Robert Barr,

and that it could not have been over one month after the death of Robert Barr that the will was taken out of his house, and given to the executor; that it was at the first term of the orphans' court after his death. It is not strange, nor does it discredit him, that the witness, seven years past three score and ten, was, in the course of a cross-examination drawn out to 502 questions, confused and contradictory, and that his memory was at fault as to dates, which do not so much impress themselves upon the young. Nor is it strange that the incident of his boyhood, of the delivery of the will to the executor, so coupled in his mind with the then recent death of his great-uncle as to be of special significance in fixing the time, should abide in his memory in his old age.

Samuel Barr, born in Derry township in 1811, and resident there all his life, testifies that Robert Barr died in 1822 or 1823. The inscription on his tombstone states September 15, 1823, as the date of his death. The question in dispute relates only to the date. As to the inscription on the tombstone, it falls within the general rule that monumental inscriptions, if sufficiently authenticated as genuine, and as having been received as such by the family, are regarded as admissible, but not always as credible, evidence. *Pow. Ev.* (3d Ed.) pp. 147, 150; *Davies v. Lowndes*, 6 Man. & G. 527. In *Haslam v. Cron*, 19 W. R. 969, Bacon, V. C., states the rule thus:

"In the case of tombstones, no doubt the publicity of the inscription gives a sort of authenticity to it, and, if it remains uncontradicted for a great many years, it would, in the absence of every other fact in the case, be taken to be true; but you cannot put it higher than that."

It appears from the record that Robert Barr was the owner of 104 acres, on which he lived and died, and that his will, devising it to his nephews, was proven on the 21st day of October, 1822. It does not appear that that probate has ever been challenged. Putting aside the inscription on his tombstone of the date of his death, as manifestly erroneous,—as it is conceded to be by counsel on all sides,—and adding to the other evidence cited, in substance, above, the presumption, strongly corroborated by, and corroborative of, the evidence of the witness Robert Barr, that the probate of a will devising a landed estate to collateral kinsmen would not have been long delayed after the testator's death, our conclusion is that it is established by a clear preponderance of the evidence that Robert Barr died in 1822, probably in September.

2. Did his will, even if it be found to have been admitted to record according to law in Hamilton county, Ohio, pass any interest or estate in the lands sought to be partitioned herein? It was executed on the 16th day of February, 1821. The following is a copy:

"In the name of God, amen. I, Robert Barr, of the township of Derry, in the county of Westmoreland, and state of Pennsylvania, being in a tolerable state of health, and of sound mind and memory, yet calling to mind the mortality of my body, and that it is appointed for all men once to die, do this sixteenth day of February, in the year of our Lord one thousand eight hundred and twenty-one, make, ordain, and leave this as my last will and testament, which is as follows, viz.:

"First, and above all, I will and bequeath my soul to God, who gave it, and my body to dust, from whence it came, to be decently interred at the discretion of my executor. And as touching what worldly things God, in his providence, has been pleased to bestow upon me, I do hereby will and dispose of them in manner following, viz.:

"To John, Robert, and Samuel Barr, children and heirs at law of my nephew William Barr, deceased, I will and bequeath, all and singular, my real estate; and to John I will and bequeath my armchair and table and table-cloth and pots. And all my other movable property I will and bequeath to Martha and Jane Barr, children of the aforesaid William Barr, to be equally divided between them."

So far as this relates to or affects realty in Ohio, it was necessary that it should be executed in accordance with, and it must be construed by, the laws of that state. The statute of wills, of January 25, 1816, (2 Chase, St. 929,) was then in force. The first section empowered every adult person, of sound mind, to devise, by last will and testament, in writing, "all the estate, right, title, and interest in possession, reversion, or remainder, which he or she hath, or at the time of his or her death shall have, of, in, or to lands, tenements, hereditaments, annuities, or rents charged upon or issuing out of them; also, all goods and chattels,"—"so as such last will and testament be signed by the testator, or some person for him or her, in his or her presence, and by his or her direction, and at the same time be attested by two or more credible disinterested witnesses subscribing their names in his or her presence."

The language of this section is identical with that of the first section of the wills and administration acts of February 18, 1808, (1 Chase, 571,) and February 10, 1810, (1 Chase, 680.) The act of January 25, 1816, cited above as the act in force when Robert Barr's will was executed, was repealed by the act of February 11, 1824, defining the duties of executors and administrators, (2 Chase, 1308,) and on the 26th of February, 1824, an act relating to wills was passed, which empowered any person having any estate in any lands, tenements, or hereditaments to give or devise the same to any person by last will and testament, (2 Chase, 1305.) This provision limited the power of a testator to devise real estate to that which he had at the date of the will. It continued to be the law until the act of March 23, 1840, (Swan, St. 992,) the first section of which gives to any person of full age, and sound mind and memory, the power to give and devise any interest which he or she may have in any lands, tenements, or any annuity or rents charged upon or issuing out of the same; and section 48 provides that any estate, right, or interest in lands or personal estate, or other property acquired by the testator after the making of his will, shall pass thereby in like manner as if held or possessed at the time of making the will, if such shall clearly and manifestly appear by the will to have been the intention of the testator. This remained in force until the adoption of the Revised Statutes, which modified it only in form, as follows:

"Sec. 5914. Any person of full age, and of sound mind and memory, and not under any restraint, having any property, personal or real, or any interest therein, may give and bequeath the same to any person by last will and testament lawfully executed."

"Sec. 5969. Any estate, right, or interest in lands or personal estate, or other property acquired by the testator after the making of his will, shall pass thereby in like manner as if held or passed at the time of making the will, if such shall clearly and manifestly appear by the will to have been the intention of the testator."

These sections are now the law.

From this review it appears that from 1805 to 1824 the statute law of Ohio was as at the date of Robert Barr's will; that from 1824 to 1840 there was no provision for disposing by will of lands subsequently acquired; and that since 1840 after-acquired lands pass by will, if it clearly and manifestly appear by the will that such was the testator's intention. The provision of the first section of the act of January 25, 1816, as to after-acquired property, in force when the will of Robert Barr was executed, was taken, word for word, from the Virginia statute of wills of the 1st of January, 1787, which was under consideration in the court of appeals of that state in *Allen v. Harrison*, (decided at the October term, 1802,) 3 Call, 251. The testator, in that case, devised to his son John and his heirs all his lands in the counties of Surry and Sussex, and to his son William all his lands in the counties of New Kent, Southhampton, and Nansemond, and in James City. He also gave a plantation on the three creeks to his son John, and his plantation called the "Fort Quarter" to his son William. "All the rest and residue" of his estate, "of what nature or kind soever," he gave to his said two sons, to be equally divided between them. It was held that after-acquired real estate did not pass by the will. Pendleton, P., in his opinion, said:

"If the legislature had intended to abolish, wholly, the distinction in England, they would certainly have declared that every testator should be considered as speaking in his will, at the time of his death, as well respecting his real as his personal estate, and thus have put an end to all controversy about it, instead of which, they have only varied the rule as to lands, *sub modo*; that is, by giving testators a power which they may exercise or not, at their will and pleasure, to dispose of their after-purchased lands; meaning, as it appears to me, to meet the desire in *Bockenham's Case*, [Gilb. Dev. 138,] where a man shall devise all the lands which he shall have at his death, but not further interfering with the rule."

In *Bockenham's Case*, there was a devise of all the lands the testator then had, or should have at his death; but after-acquired real estate was, under the English rule, excluded from the operation of the will. *Smith v. Edrington*, 8 Cranch, 66, was a case arising under the same statute. The testator expressed his desire that all his just debts should be paid by his executors, who were authorized to dispose of and convey his property, so far as might be necessary for that purpose, and then followed this provision:

"Should my son William P. Edrington, to whom I bequeath the whole of my property, after the payment of my debts and provisions above made, die under the age of twenty-one years, I then give," etc.

The testator then made certain pecuniary bequests in the event of his son's so dying, and concluded by disposing of the then residue of his property. The supreme court held that after-acquired property did not pass under the will. Justice Washington, announ-

cing the opinion, said, after quoting the provision of the statute, that it was necessary that the intention to make a disposition of after-purchased lands should clearly appear upon the face of the will; that the presumption was that the testator meant to confine his devises to land to which he was then entitled, and this presumption could only be overruled by words clearly showing a contrary intention. He held, further, that in that will were no expressions which indicated an intention to devise, or in any manner to charge, lands which the testator might afterwards acquire; that it did not appear that he contemplated, when he made his will, the purchase of any land, and the words "estate" and "property," to be found in it, might be fully satisfied by applying them to the personal property of which he was possessed. The statute of Virginia, above cited, was adopted in Kentucky, and in *Warner's Ex'rs v. Swearingen*, 6 Dana, 195, the court of appeals of Kentucky held that, *prima facie*, the testator contemplated only such interests as he owned when he published his will, but that, if he manifested an intention to devise what interests he might own at his death, then, and only then, his will should be understood as speaking at his death as to land, as well as any other property, but that such an intention would not be presumed, but must be disclosed by the actual import of the provisions of the will. In the will before the court in that case the testator directed the division, among persons named, of the "residue of the estate," which the court held did not evince any reference to lands subsequently acquired. In *Dennis v. Warder*, 3 B. Mon. 173, the testator declared his purpose to dispose by will of such estate as it had pleased God to bless him with. The court held that the will passed only such real estate as the testator owned at the date of its publication, and that it indicated no intention to devise all the estate he might own at his death. In *Marshall's Heirs v. Porter*, 10 B. Mon. 2, the court held that the mere fact that the testator, by his will, made a general disposition of his land, or of all his estate, would not authorize a deduction that he intended to include real estate afterwards acquired. In that case the testator declared his purpose to dispose by will of such "worldly estate as it hath pleased the Almighty to bless him with."

The statute of Ohio now in force, relating to wills, was adopted from a statute of Massachusetts. It differs from the statute of 1816 only in the express provision that the intention to pass subsequently acquired real or personal estate must clearly and manifestly appear by the will itself. That provision, however, only incorporated into the statute a rule of construction which would have been applied, as indicated by the opinion of Justice Washington in *Smith v. Edrington*, in the absence of the express provision. But we will now refer to the cases in Massachusetts. In *Blaney v. Blaney*, 1 Cush. 116, the court was of opinion that, since the enactment of the statute, testators could devise after-acquired lands by clearly manifesting by their wills their intention so to do. The court said that, on inspecting the will under which the plaintiff claimed, they could not doubt the testator's intention to give him all the property not disposed of by the will, and that he manifestly had in mind the

subsequent acquisition of real estate, as indicated by a provision for his widow in lieu of dower in the real estate of which he might "die seised;" and, after devising and bequeathing to plaintiff all the rest, residue, and remainder of his said property and effects, of every description, real, personal, and mixed, not before disposed of, authorized his executor to sell and dispose of any or all the real estate not specifically devised, of which he might "die seised." This case, therefore, recognizes that the intent to include after-acquired property in the operation of the will must appear upon the face of the will.

In *Brimmer v. Sohler*, 1 Cush. 133, after sundry legacies, the testatrix devised and bequeathed a moiety of all the residue of the estate to her sister for life, and all the residue of the estate to her brothers, in case they both survived her, otherwise to the brother who should survive her. The court said that the arrangements made by the testatrix were therefore prospective, looking forward to an event which might not happen until many years after her decease. In this connection the court referred to the concluding paragraphs as specially significant, calling attention to the fact that the estate was given to the brothers in case they should both survive the testatrix; "otherwise, my will is that the brother who shall survive me shall take the whole and entire of my estate," which the court said was language as comprehensive and emphatic as could well be used, and clearly intended to embrace the residue of all the estate which the testatrix should leave at the time of her death; and that, in contemplating the event of survivorship, the mind of the testatrix was carried forward to a state of things which would exist at the period of her decease, and that it was with a reference to that period that the disposition of her whole property was made. It was the opinion of the court upon these considerations that the testatrix did not intend to die intestate as to any part of the estate which she might leave, and that the after-acquired real estate did pass by her will to the surviving devisee.

In *Prescott v. Prescott*, 7 Metc. (Mass.) 141, the court said that the provisions which is adopted in section 5969 of the Revised Statutes of Ohio seemed to remove the distinction between real and personal estate, "so that now all legacies and devises passed to the residuary legatee." That, however, was obiter, for the court proceeded to say that the point was not material in the case, as the testator, after the making of his will, and before the making of the codicil, had sold his real estate, and it was not stated that he had died seised of any real estate.

The court, in *Cushing v. Aylwin*, 12 Metc. (Mass.) 169, had before it a will which was made prior to the Revised Statutes, and the land demanded was purchased by the testatrix afterwards. It was held that the provision of the statute applied as well to wills made before as to those made after the statute, when the will had not before that time taken effect by the death of the testator. The will bequeathed to William C. Aylwin and Charles C. Payne, and the survivor of them, his executors and administrators, all testatrix's property, including certain trust property, in trust, with power to

the executors to invest from time to time, and to alter, change, and reinvest the same, and to pay over the income as specified in the will. The court said: "We think it is generally true that when a will purports to dispose of the testator's whole estate or property the intention is to dispose of all the estate or property of which the testator may be the owner at the time of his death; and that such intent would be inferred, unless something in the will should be opposed to such an inference." And the court found that there was nothing opposed to such an inference in the will in that case; that it was manifestly the intention of the testatrix to give her whole property to her nephew and his children, and that he should have only the income; and that at his death the property should be divided among his children, and for this purpose the property was given to trustees. "It was manifest, therefore," added the court, "that the testatrix did not intend to die intestate as to any part of her property."

In *Winchester v. Forster*, 3 Cush. 366, the testator declared in his will his wish to secure for the use of his wife the dwelling house which they then occupied, and to furnish an income adequate to all her wants. He therefore provided that if he was not the owner of that house at the time of his decease it should be purchased at a price not beyond a limit fixed, and that his wife should hold and enjoy it for or during her natural life. If that house could not be obtained within the limit, then he directed that any other in the city of Boston, which should be selected by his wife, and which could be bought at or below the limit, should be purchased, and that his wife should hold the same for life. He also gave to her all the household furniture, silver plate, and family stores, and the net income of one third of his personal estate during her life or widowhood. After providing a legacy for his brother and his daughter, he gave at the decease or intermarriage of his wife the income of that part of his estate which he appropriated to her use unto his daughter for her life, and in case her husband survived her he was to have the income during his life. He also gave the income and produce of all the residue of his estate to his daughter and her husband for life, and provided that her child or children who should survive the parents should take and have, share and share alike, of his estate, real, personal, and mixed, subject to the provision made for their grandmother, testator's wife, should she then be living. Finally he provided that if his daughter should die without issue surviving her, or, leaving issue, such issue should die in minority and unmarried, all his estate, real, personal, and mixed, should go to such person or persons as would then be his heirs at law in case he had died intestate and without issue. Chief Justice Shaw, in pronouncing the opinion of the court, said that in one respect the will disclosed a clear intention to pass after-acquired estate. That was by the provision relating to the house in which the testator then lived, and the directions that it should be purchased for the use of his wife, and held by her for life. But he announced that the more decisive consideration was that it appeared by the whole scheme and tenor of the will that the testator

intended to make a full and entire disposition of his whole property, real and personal, and therefore the court was of opinion that it did "manifestly appear to have been the intention of the testator to make a testamentary disposition of all the estate he should leave at the time of his decease, and that the after-acquired estate did pass by the will." It is to be noted that there was in that case no express declaration of any such intention, nor was there in *Cushing v. Aylwin*.

Wait v. Belding, 24 Pick. 129, decides questions arising under a will executed in 1797, before the Revised Statutes, which devised to the testator's two sons, designated, and their heirs, "the whole" of his "lands and buildings lying and being in the town of Hatfield." By a codicil dated May 2, 1812, he gave to the same sons, without adding "and to their heirs," lands not enumerated in the original will, but purchased since then in the town of Hatfield or elsewhere, and declared that his will and meaning was that his codicil should be annexed to and made part of his will to all intents and purposes. After the execution of the will, but before the execution of the codicil, the testator purchased the premises which were demanded in the suit by a third son. The question was whether the two sons took, under the original will, in connection with the codicil, an estate in fee or for life only in the premises demanded, the rule of law recognized in Massachusetts being that in a devise of real estate without limiting it to the devisee and his heirs, a life estate only is devised, unless it appears elsewhere in the will that the testator intended to give the estate in fee. Chief Justice Shaw, on page 136, says:

"In general, a will looks to the future. It has no operation, either on real or personal property, till the death of the testator. General words, therefore, may as well include what the testator expects to acquire, as what he then actually holds. The term 'all my property' may as well include all which may be his at his decease as all which is his at the date of the will, and will be construed to be so intended, unless there are words in the description which limit and restrain it. We are then brought back to the particular description, 'the whole of my lands and buildings lying and being in the town of Hatfield.' There are certainly no words, and nothing in the will, showing an intent to limit it to the lands and buildings then held by him. No such intent can be presumed."

And on page 137 he says that, if the will had been made after the Revised Statutes, there seemed to be no doubt that the after-acquired estate would have passed by the devise, the description being general, of all lands in Hatfield, without limitation as to the time of acquisition, and, if that description was sufficient to include all real estate in Hatfield, the after-acquired premises would have passed but for the rule of law then in force restraining the operation of all devises to real estate held by the testator at the date of the devise. These statements are apart from the decision of the point involved in the case, but they are of importance as showing what was understood to be the law with regard to the construction of the intent of the testator to be derived from a devise of all his estate within a certain town, or of all his estate.

We have in the above-cited cases two lines, in contrary directions,

of decisions upon statutes of the same import; the decisions in Virginia and in Kentucky holding that a devise of the whole estate, or of the entire estate, or of all the lands of the testator, or of all the lands "which it hath pleased God to give" to the testator, does not indicate an intention that the will shall include after-acquired property; while the decisions in Massachusetts are that a devise of "all my property," or of all the estate, will be construed to be intended to include all which might be the testator's at his decease, unless there are words in the description which limit and restrain it. The decision in *Smith v. Edrington* by the supreme court, hereinbefore cited, would be authoritative and decisive but for the consideration that it rests upon the construction by the court of a Virginia statute which was also a rule of property, and the construction of which by the court of appeals of Virginia was a rule of decision for the federal courts. Which line of decisions, then, shall this court follow? Before deciding, we must look into the decisions by the supreme court of Ohio for what light they may throw upon the question, for the will of Robert Barr, as has hereinbefore been stated, so far as it relates to or affects the title to lands in Ohio, must be construed according to the law of Ohio.

The first case is *Lessee of Smith v. Jones*, 4 Ohio, 116, decided at the December term, 1829. The defendants claimed under a will dated July 25, 1811, and gave in evidence that the testator, Smith, was in possession of the lot involved in the suit, which was in ejectment, under a verbal contract of purchase, and commenced improvements upon it prior to the date of the will. On the 9th of September, 1811,—some six weeks after the date of the will,—the testator entered into a written agreement with the owner for the purchase of the lot, in completion of which a deed was made on the 26th of May, 1812. The court below instructed the jury that if they were satisfied from the proof that the testator was in possession under a verbal contract of purchase at the time of making the will, the devise was operative, and the defendant entitled to a verdict. The jury so found, and the case was before the supreme court on assignments of error in the instructions. In the course of the decision, which sustained the instruction, the court said that it was a prominent feature of English law to favor the heir and prevent disinheritance, and that that had introduced the fixed principle that at the inception of the will a man must be seised of the estate devised. But the court went on to say that the difference in circumstances had in Ohio led to a difference in legislation, and that cases might arise "in which our courts may with great propriety depart in their judicial decisions from those of England upon questions arising out of wills. The laws of the various states show that it is the general policy of the government that estates should not accumulate in families, or succeed in perpetuity. This is universally supposed to be the most effectual way to guard from degeneracy and destruction our free and equal institutions." After holding that a devise in general words will carry the estate both in law and equity, and that when an equity existed at the time of publishing the will, and before the testator's death it was carried

into grant, the equitable and legal estate could not be parted, but the latter attached to the former, so as to vest a complete estate in the devisee, the court confirmed the judgment below. This case is important as indicating that the English rules of decision upon questions arising out of wills were not regarded as binding upon the courts of Ohio.

Allen v. Little, 5 Ohio, 66, was not a will case, but it decided that under the statute of Ohio a married woman could make a will devising real estate held in her own right. The argument to the contrary was that the several statutes of Ohio were not materially variant from the statute of wills of Henry VIII., and that under that statute it was held that a married woman could not make a valid will. The opinion of the court was by Judge Hitchcock, one of the strongest, if not the strongest, of the old judges. After referring to the fact that at common law real estate could not pass by will, and that all the decisions made by English courts upon the statutes of wills enacted in the reign of Henry VIII. had been made with reference to those statutes, and were uniform in denying the right of *femes covert* to devise real estate, he says:

"English cases can be of no authority here, unless it be first shown that the statutes under which those cases were decided are similar to our own. It cannot, however, be matter of surprise that among the profession the opinion should prevail that even in our state a *feme covert* cannot make a will. We get our ideas from reading English law books, and the books of reports published in our sister states; and, without stopping to inquire what change has been made by our own local legislation, we adopt, as sound law, the principles there advanced."

Then he refers to decisions by courts of other states, and, passing to an historical review of the legislation in Ohio, and to the consideration of the statute then in force, which included "every female person aged eighteen years and upward, being of sound mind," among those who might devise real estate, he asks what is meant by the phrase "Every female person aged eighteen years and upward," and then proceeds as follows:

"I do not ask those alone who have derived their ideas of the propriety of any law by reading English books, or who would enlarge or restrain a statute of Ohio, so as to make it compare with a statute upon the same subject, although with different phraseology, enacted in New England, New York, Massachusetts, Pennsylvania, or any other state in the Union, but I ask any man of ordinary common sense, who desires to arrive at a correct understanding of a statute, by giving to the words used by the legislature their ordinary and appropriate meaning. The law is made, not for the benefit of this or that profession or class of men, but for the community at large; and every statute should receive such construction as is consistent with the common sense of that community."

The court, in *Kerwhaker v. Railroad Co.*, 3 Ohio St. 172, called attention to the fact that early in the history of Ohio the common law of England and the statutes of that country of a general nature in aid of common law, passed prior to the fourth year of King James I., were adopted by legislative enactment; but that act was repealed on the 2d of January, 1806, since which time, the common law of England has had no force in Ohio derived from legislative adoption. The court proceeded to say that common law has con-

tinued to be recognized as the rule of decision in our courts in the absence of legislative enactments, so far as its rules and principles appeared to be based on sound reason, and applicable to our condition and circumstances, and therefore it has no force in Ohio, except so far as it derives authority from judicial recognition in the practice and course of adjudication in our courts, and this extends no further than it illustrates and explains the rules of right and justice as applicable to the circumstances and institutions of the people of the state; and the court accordingly held that the rule of the common law requiring the owners of domestic animals to keep them on their own lands or within inclosures had never been in force in Ohio. The statute making the common law of England and all the statutes of a general nature in aid of the common law prior to the fourth year of the reign of King James I. the rule of decision was adopted by the governor and judges of the territory northwest of the Ohio river, and published July 14, 1795, to take effect October 1, 1795. 1 Chase, 190. It was a contested question, upon which the judges in *Thompson's Lessee v. Gibson*, 2 Ohio, 340, were equally divided, whether the adoption had any binding force. The fifth section of the ordinance of 1787 for the government of the territory northwest of the River Ohio required that the adopted law should be a law of one of the original states, and the law in question was not, either at the time of its first enactment or at the time of its adoption by the governor and judges, a law of an original state. Its first enactment was in May, 1776, by the legislature of the colony of Virginia, and, when adopted by the governor and judges, it had ceased to be a law of that state, having been repealed, so far as it enforced the English statutes, by the act of December 27, 1792, (Tate, Dig. 21, 89.) It was argued that, if the Virginia law was not in force, the governor and judges had no authority to adopt it. "Their authority was to adopt laws,—not the dead forms of statutes, from which the vital energy had departed." 1 Chase, 190, note. The argument on the other hand was that no great weight was due to the circumstances that the Virginia law was first enacted by the colonial legislature, and that, since the repeal was only so far as the law enforced the English statute, the adoption was good *pro tanto*, and was effectual to make the common law of England a rule of decision in the territory.

In *Sergeant v. Steinberger*, 2 Ohio, 306, the supreme court held, remarking that it had been more than once decided by the supreme court on the circuit, that estates in joint tenancy did not exist in Ohio, and such has ever since been recognized as the law. The court said that the reasons which gave rise to that description of estate in England never existed here; that the *jus accrescendi* was not found in principles of natural justice, nor in any reasons of policy applicable to our society or institutions, but, on the contrary, was adverse to the understanding, habits, and feelings of the people.

In *Helfenstine v. Garrard*, 7 Ohio, 275, the court was united in opinion that the statute of uses, if ever in force in Ohio, became so by the statute of 1795 or 1805, and was repealed by the statute of 1806, above cited, which was before the date of the patent for

lands involved in that case. Judge Lane, pronouncing the opinion, said that after a political organization, and the administration of justice by courts within the state of Ohio for the period of 48 years, the court found no traces of authority of the statute of uses at that time as a rule of property, and that our system of conveying, although it had grown out of the English system, did not depend upon the statute of uses, but had taken its form and derived its authority from our own statutes and local usages. It is plainly apparent that the court was not inclined to recognize that the statute had ever been in force in Ohio.

The will in *Reynolds v. Shirley*, 7 Ohio, 323, was executed on the 18th of December, 1824, which was while the wills act of 1824 was in force. It contained a devise by Abiathar Shirley to his wife of certain specific real estate, and added this general clause, "all my other freehold estate whatsoever." The real estate in controversy was acquired after the execution of the will. Shirley died in 1834. In his last illness, sitting on his bed, with his will in his hand, he said to the witness, who testified that he was there in response to Shirley's request: "This is my will. It was signed and witnessed in 1824, and I have called you to witness it as my last will and testament." Thereupon, by Shirley's request, the witness indorsed on the will the following certificate: "This is to certify that the within is, as therein declared, my last will and testament, acknowledged before those whose names are heretofore subscribed this 23rd August, 1834;" and it was read to Shirley, who said that his name was already to the will, and requested the witness and another person who was present to sign it, and they did so. The witness testified that Shirley was of sound mind at that time. It was argued for the plaintiffs that the republication of a will must be in writing, executed with all the solemnities required in the execution of the original will. The court, however, was satisfied that there was a complete re-execution of the will, and that the will thus republished spoke as to and disposed of the real estate owned by the testator in 1834.

The decision in *Pruden v. Pruden*, 14 Ohio St. 251, was announced by Judge Ranney. The petition was filed to obtain a construction of the will of the testator. After providing for the payment of his debts and funeral expenses, and giving two small legacies to charitable uses, he gave and devised to his wife, in case she should survive him, all his moneys, credits, personal and real estate, and property, for her benefit and support during the term of her natural life. In the event of his wife not surviving him, his whole estate, real and personal, was to descend as directed by law, and as if the will had not been made. In case his wife should survive him, all his estate and property, real and personal, above devised, that at his wife's decease should remain, was to go to his heirs, and their legal heirs, forever. He further directed his executor to sell, in his discretion, a 40-acre tract described in the will, and to collect the amount due him from his son Charles. He authorized his executor, whenever his wife should desire it, to sell the house in which he lived and the lot on which it was built, and pay over all

the moneys realized from the sale of his real and personal estate to his wife. On behalf of the heirs it was claimed that the fund arising from the sale was not disposed of by the will. In overruling that claim the court referred to the provision in the statute of wills that after-acquired property shall pass "if such shall clearly and manifestly appear by the will to have been the intention of the testator." Judge Ranney then says:

"For the reasons given in *Lessee of Smith v. Jones*, 4 Ohio, 121, a will should probably be construed with somewhat more liberality here, upon a question of this character, than has been customary in the English courts. It very seldom happens that a man who goes to the trouble of making a will intends to die intestate as to any of the property that he may own at the time of his death; and when it clearly appears that the testator intends all the property he owns at his death to be used and applied for specified purposes, and the changes between the will and his death have simply consisted in converting it from one description of property into another, there can be no danger of interfering with his intentions by holding it all subservient to the accomplishments of such purposes. Indeed, every line of this will looks to his death, and the situation of his property at that time, as the starting point in his dispositions. It is then that his debts are to be paid, and it is then that his wife is to take, either for life or otherwise, all the residue of his 'personal and real estate, and property,' of every description; or, if she is not then living, that it is all to go to his heirs, as though the 'will has not been made.'"

As strongly indicating the disposition of the supreme court of Ohio to discard English rules for the construction of wills not in harmony with the changed conditions and circumstances in Ohio, the case of *Parish's Heirs v. Ferris*, 6 Ohio St. 563, may be referred to, where the court held that if A. "die without issue," or "without heirs," or "without children," then the devise should be to B. in fee. The words "if he die without issue" or words of similar import are to be interpreted contrary to the English rule, and according to their popular and natural meaning; that is, as referring to the time of the death of A., unless the contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purposes. To emphasize the departure, the court said it might have reached the same conclusion without impeaching the old English rule of interpretation, but that they were unwilling to make an exception by which they would sanction the English construction of the words under consideration, and at the same time make the case before them an exception to a rule which they said never had been recognized, and that the uniform course of the decisions of the courts of this state had been to so construe wills as to carry into effect the intention of the testator, while to adopt the English rule would clearly defeat that intention. The court cite *Daniel v. Thompson*, 14 B. Mon. 562, where the English rule was rejected as one unknown to the community, contrary to the natural sense and common use of words, and founded upon lands and estates inapplicable to titles in Kentucky; and they quote the language of Justice Hitchcock:

"I must be permitted to say that these rules, in most cases, are applicable, not for the purpose of ascertaining, but of defeating, the intention of the devisor; and I presume no such statute [referring to the statute of entailments] would have been passed had it not been supposed that these antiquated rules of construction were too much regarded by our courts."

Parish's Heirs v. Ferris was affirmed in *Niles v. Gray*, 12 Ohio St., where, on page 327, will be found quite as vigorous a repudiation of English rules of construction which had been discarded by statute in England; as the statutes of Henry VIII., relating to wills, upon which the authorities in Virginia and Kentucky cited above in this opinion really rest, have also been discarded.

In *Gillen v. Kimball*, 34 Ohio St. 360, Judge Boynton, announcing the opinion of the court, says:

"Where a will is executed, making a disposition of property of the testator, both real and personal, a presumption arises that he intended thereby to dispose of his whole estate, unless the contrary appears."

There is not in the Ohio Reports a single case in which the precise question before us for decision was passed upon or even presented. This fact of itself warrants the inference that, by the common understanding of the people and the lawyers of the state from the beginning, a devise, in general terms, as "all the estate," or by any other general terms, has been sufficient to pass after-acquired lands. We do find that since 1806 the common law of England has had no force in Ohio derived from legislative adoption, and has been recognized by the courts no further than it illustrates and explains the rules of right and justice as applicable to the circumstances and institutions of the people of the state. We find, too, that as early as 1831 the supreme court, declaring that the common law rule to the contrary had no force, decided that a married woman might dispose of her property by will as if she were a feme sole; and that repeatedly the same court has said that in reference to after-acquired realty, a will should be construed more liberally than has been customary in the English courts; for, as a very able judge expressed it, "it very seldom happens that a man who goes to the trouble of making a will intends to die intestate as to any of the property that he may own at the time of his death." We find, further, that the same court has put the stamp of its special disapproval upon the English rule of construction of "dying without issue" and expressions of like import, and has said that where a will makes a disposition of property, both real and personal, the presumption is that the testator intended thereby to dispose of his whole estate, unless the contrary appears,—a presumption expressly approved by the supreme court of the United States in *Given v. Hilton*, 95 U. S. 594, quoting from *Vernon v. Vernon*, 53 N. Y. 351, that the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may reasonably be given. Thus we see that the trend of the decisions by the highest court of the state of Ohio is away from English statutes and rules and authorities as to the interpretation and construction of wills, and in favor of a construction more liberal, and more in harmony with the institutions and government of the state and the circumstances of its people. Turning to Virginia, we see that in *Harrison v. Allen*, *supra*, the act of which the Ohio statute of wills of 1816 is a copy is treated as only a modification of the English statutes of wills, which were until then fully in force in that state, and that the same view

is expressed in *Smith v. Edrington*, *supra*; while in *Browne v. Turberville*, 2 Call, 404, it is declared that "in Virginia all agree that the common law of England is the general law of the land, where it is not taken away by the statute of the state." In Massachusetts the English statutes of wills never were recognized, after colonial times, as in force.

Right here attention may be called to the fact that even the English courts have not questioned that where a testator devised all his real estate he intended to include all he might have at his death. That was always understood to be the effect of a bequest of all the testator's personal estate, and in *Wind v. Jekyl*, 1 P. Wms. 575, Lord Macclesfield observed that "the intention of the party must have been the same as to both" his real and personal estate. Under the old law, where a testator made a general gift of his real and personal estate, he was considered as meaning to dispose of both "to the full extent of his capacity," but in regard to the real estate the will was read as a gift of what belonged to him at the date of its execution, not because it did not evidence an intention to devise after-acquired estate, but because he was incapable of devising what did not belong to him at the date of his will. 1 Jarm. Wills, *326. It would seem to follow logically that if the power to devise after-acquired realty was conferred by statute, provided such intent was manifest from the will, a general devise would, of itself, sufficiently evidence the intent. Accordingly, in *Hayes on Conveyancing*, (5th Ed., p. 591,) the opinion is expressed that a general devise of real estate would carry after-acquired lands "almost of course from the extension of the disposing power to all the real estate belonging to the testator at his decease."

We are not inclined to follow the decisions of Virginia, nor those of Kentucky, which are in the same direction. The decisions by the supreme court of Massachusetts are more in the line of those of the supreme court of Ohio. Under the statute of Ohio in force at the date of Robert Barr's will the question turns upon the intention of the testator. Chief Justice Robertson, in *Walton's Heirs v. Walton's Ex'x*, 7 J. J. Marsh. 58, said that, under the Kentucky statute, (which, as has been hereinbefore stated, was an adoption of the statute of Virginia from which the Ohio statute was copied,) whether after-acquired lands could pass by the will or descend to the heirs was a question of intention to be solved by a proper construction of the whole will; and that, if from the will itself it appeared more reasonable to infer an intention that after-acquired land should pass by it than that it should remain undevise, then it would pass. If the contrary intention should seem more reasonable, the land would descend. In *Starling v. Price*, 16 Ohio St. 31, the court said that the intention was to be gathered, "not necessarily alone from the phraseology of the particular clause to be construed, but from the whole will, including the codicils, if any, and all these, viewed in the light cast upon them by the relations and circumstances of the testator, of his estate, and of the objects of his bounty;" and that, "in searching for such intention, courts ought not to permit themselves to be enslaved by mere technical rules of

construction." The same rule is stated in *Banning v. Banning*, 12 Ohio St. 456, where the court say also: "It is a rule of judicial policy in England to lean in favor of the heir as against the devisee; but such is not the policy in Ohio." To the same effect see *Moore v. Beckwith*, 14 Ohio St. 132, and *Thompson v. Thompson*, 4 Ohio St. 351, where Judge Thurman said that "of all the instruments that need the benefit of a liberal construction—a construction that prefers substance to mere form—wills need it most."

Now let us take up the will of Robert Barr, and in the light of the above rules of construction, taking into account also "the relations and circumstances of the testator, of his estate, and of the objects of his bounty," determine whether it was his intention by his will to dispose of all the estate he might have at the time of his death, or only of the estate he then had. He was in his eighty-third year, a widower, and childless. Calling to mind, at the outset in his will, the mortality of his body, and that it is appointed for all men once to die, he proceeds to "ordain and leave" his last will and testament. "First and above all," he commits his soul to God, who gave it, and his body to the dust, from whence it came. "As touching what worldly things God, in his providence, has been pleased to bestow upon me," he wills and disposes of them as follows: To John, Robert, and Samuel Barr, children and heirs at law of his nephew, William Barr, who with their sisters had lived with and cared for him up to the time of his death, he gives "all and singular" his real estate. To John he gives his armchair and table and tablecloth and pots. All his other movable property he gives to Martha and Jane Barr, the sisters of John, Robert, and Samuel, who also lived with him and cared for him until his death. Looking to the language and the circumstances, we cannot doubt that he intended by that will to make an ultimate and final disposition of all the estate that he might have at the time of his death. But it is urged that he could not have intended to devise any interest in the lands involved in this suit, because, at the date of the execution of his will, Mary Jane Barr was yet alive, and no interest in those lands had vested in him. It may be assumed that he was wholly ignorant of the existence of either the will or the estate of William Barr, Sr., and that the idea of devising any interest in that estate never occurred to him; but the question is, did he intend by his will to dispose of all the estate of which he might die seised or possessed, or did he intend to die intestate as to any part of it? We think that the only proper construction is that he intended to make a final disposition of his entire estate which he might have at the time of his death. It is our opinion that when a testator devises "all and singular" his real estate, or makes a general devise by words of like import, his will, under the present law of Ohio or the law in force in 1816, speaks from the time of his death, unless the contrary intention appears in the will. This conclusion brings us to the third and last question to be considered.

3. Has an authenticated copy of the will of Robert Barr been admitted to record in the probate court of Hamilton county, as required by law? Upon the hearing, it was contended by counsel for Rob-

ert Barr that prior to the act of March 23, 1840, no such record was necessary. This proposition cannot be maintained, as clearly appears from sections 8 and 12 of the act of 1816. We adhere to the ruling made in this case (reported 47 Fed. Rep., at page 169) that the provisions of the present law have been substantially the law of Ohio since the year 1808.

At the former hearing the facts were not in dispute. Now it is denied that an order was made or entered admitting the copy of the will to record. Upon the testimony now before the court we find that the order was made in the latter part of January or early in February, 1884. S. T. Crawford prepared an order admitting the copy of the will to record. It was objected to as containing a finding that the will related to land in Hamilton county. Mr. Mannix prepared a short order, which was handed to Judge Matson, of the probate court; but it does not appear that it was entered. The testimony of William H. Sargent, clerk of the probate court, is that Judge Matson admitted the copy to record, and, objection being made to Mr. Crawford's draft of an order, Judge Matson authorized him (Sargent) to make the entry in the usual form. At first he stated that he could not remember putting the order on the minute book, having had, as he stated, 12 or 14 pages of minutes to make every day; but then he recalled that he had some conversation with Mr. Crawford in regard to the payment of costs, a matter with which, he testified, he would not have troubled himself if the record had been refused. Later in his deposition he testified that he used the "regular uniform entry." There is no evidence directly contradicting Sargent. It is shown that there is no record or statement in the Daily Law Bulletin of or about that date of the admission of a copy of said will to record, or of any action of the probate court thereon. The Law Bulletin was a daily publication of the transactions of the courts—including the probate court—of Hamilton county, Ohio. It was not the official paper of the courts, but was relied upon generally by members of the bar as an accurate and trustworthy chronicle of orders, entries, and judgments. There is other testimony of a negative character, but we are of opinion that the testimony of Sargent is entitled to the greater weight, partly under the rule of presumptions in favor of affirmative evidence, and partly because it makes the stronger impression upon our convictions. We conclude, therefore, that, although the copy itself of the will was not spread upon the record, it was in legal effect recorded, so as to make it effectual to pass the title to lands in Hamilton county. The reasons and authority for this conclusion are stated in *McClaskey v. Barr*, 47 Fed. Rep., at page 170. The case of *King v. Kenny*, there cited, is to be found in 4 Ohio Reports, instead of 4 Ohio State Reports, as there stated. The effect of the subsequent application to Judge Matson under section 5339b, Rev. St. Ohio, was considered in *McClaskey v. Barr*, 47 Fed. Rep., at page 170, and we are not disposed to reconsider it.

There is, however, another matter which it is necessary to look into. In September, 1887, a new application was made to the probate court by counsel for the heirs of the devisees of Robert

Barr to admit a copy of his will to record. To that a special plea was filed by the defendants in possession, setting up the prior application as a bar. The probate court declined to go into the merits of the application until the disposition of the special plea, which it heard and sustained. The case was then taken to the supreme court of the state, where the ruling upon the special plea was reversed, and the case remanded for further proceeding. Thereupon counsel for the Barr heirs obtained from Judge Ferris, of the probate court, who had at one time been an attorney in the proceeding to resist the recording of said copy of said will in said court, an order certifying the application to the common pleas court. Mr. Crawford, on the 29th of July, presented to Judge Evans, of that court, the order of certification, and an authenticated copy of the will of Robert Barr, with the original papers and the mandate of the court above. On the 30th of July, 1892, the court of common pleas found that the original will of Robert Barr was executed and proved in Pennsylvania according to the law of that state, and that it related to property in Hamilton county, and that it was duly authenticated; wherefore it was ordered that the copy of said will then presented should be admitted to record in the probate court, as provided by law in such cases; and that a certified copy of the entry should be made out, and, with all other papers and documents accompanying it, be transmitted to the probate court of Hamilton county, to enable that court to execute the order. On the 1st of August, 1892, a motion was filed in the court of common pleas to set aside the above entry, which in the mean time had been certified, and, with the papers, transmitted to the probate court. On the same day an entry was made by the court of common pleas staying the proceedings of July 30, 1892, and withholding the order then made to admit the record of the will of Robert Barr in the probate court, and ordering the papers to be returned with said order and with the copy of said will to the common pleas court, and withheld from entry and record in the probate court, to abide the further action of the court of common pleas. On the 5th of August the court of common pleas made an entry setting aside the order of July 30, 1892, and continuing the case to the October term, 1892. From that entry it appears that the papers had been returned to the common pleas court by the probate court before any action had been taken by that court in pursuance of the order of the common pleas court of August 1st; whereupon the court set aside the order of July 30th, and continued the case to the October term, 1892, for further proceedings. To all of this the counsel for the heirs of the devisees of Robert Barr excepted. The certification by the probate court to the common pleas court was under section 535 of the Revised Statutes of Ohio, which provides for such a certification in any matter in which the probate judge is interested as attorney or otherwise. The law requires that the probate judge—

"Certify the matters and proceedings to the court of common pleas, and he shall forthwith file with the clerk of the court of common pleas all original papers connected with the proceedings, and the same shall be proceeded in

and heard and determined by the court of common pleas, at chambers, by any judge thereof, or in open court, in the same manner as though that court had original jurisdiction of the subject-matter thereof; and upon the final decision of the questions involved in such proceedings, or on the final settlement of the estate in which the judge is interested as executor, administrator, or guardian, by the court of common pleas, or whenever the interest of the probate judge therein ceases, the clerk shall deliver all the original papers back to the probate court from which they came, and the clerk shall also make out an authenticated transcript of the orders, judgments, and proceedings of the court therein, and shall file the same in the probate court from which the papers came, and the judge thereof shall record the same in the ordinary records of similar business." See Rev. St. Ohio, p. 128.

This section gives to the court of common pleas, under the certificate of the probate judge, a limited and special jurisdiction to do precisely what is prescribed in the statute, and, when that is done, the jurisdiction of the common pleas court is at an end. The jurisdiction continues until the court acts and certifies its action back to the probate court. The moment that that certificate is made and the papers are transmitted back to the probate court, the jurisdiction of the common pleas court over the matter is terminated, and that court has no further authority or power. That certificate in this case was made by the court of common pleas on the 30th of July, 1892, whereby it sent back to the probate court its order admitting a copy of the will of Robert Barr to the records of that court. That order was not, and could not be, revoked by the subsequent proceedings in the common pleas court. Those proceedings were *coram non judice*. *Edmiston v. Edmiston*, 2 Ohio, 251; *Heirs of Ludlow v. Johnston*, 3 Ohio, 561. We are referred to *U. S. v. Gomez*, 23 How. 326, *Cannon v. U. S.*, 118 U. S. 355, 6 Sup. Ct. Rep. 1064, and *Peck v. Sanderson*, 18 How. 42, where mandates were ordered back from the lower court to which they had been sent. But that was in the exercise of a general appellate jurisdiction over the case. Here there was neither appellate nor general jurisdiction, but only a delegated limited authority, under a statute, to do a particular thing in a case, the jurisdiction over which, excepting as to the doing of that particular thing, was exclusively in the probate court. The effect of the order of July 30, 1892, and its transmission to the probate court, was to make the will of Robert Barr effectual to pass title to lands in Hamilton county, even if there had been no previous order admitting it to record. Let the proper entry be made, including the defendants in the decree for partition herein.

JACKSON, Circuit Judge, concurs in this opinion.

v.54f.no.5—51

CALDER et al. v. HENDERSON et al.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1893.)

No. 63.

1. REVENUE LAWS—SUGAR BOUNTY—RIGHTS OF SUGAR RAISERS.

The sugar bounty provided for by the act of October 1, 1890, is not a pure gratuity by the government, or a mere recompense for personal services, but is compensation offered for the purpose of stimulating production; and when a producer accepts the offer, and complies with the statute, there is a contract between him and the government.

2. SAME—VESTED RIGHTS—ASSIGNMENT FOR BENEFIT OF CREDITORS.

A claim for such bounty, earned by raising sugar, is a vested right, constituting property, which is subject to be sold on execution under the laws of Louisiana, and will therefore pass, under the insolvency laws, to the provisional syndics, when the owner makes a cession of his property for the benefit of creditors.

3. APPEAL—DECISION—MATTERS NOT APPEALED FROM.

On an appeal by defendants from a general decree against them, the plaintiffs cannot have reinstated an injunction which was dismissed by the trial court as to one of the parties, when they took no appeal therefrom.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Equity. Suit brought in the civil district court for the parish of Orleans by William Henderson and Leopold Loeb, provisional syndics of John Calder & Co. and David R. Calder, against John Calder & Co. and David R. Calder, to enjoin them from disposing of a claim against the United States for sugar bounties earned. Defendants removed the case to the United States circuit court, where judgment was rendered against them, from which judgment they appealed. Affirmed.

Statement by PARDEE, Circuit Judge:

John Calder & Co., and David R. Calder individually, on the 15th day of February, 1892, made a cession of their property under the insolvency laws of Louisiana, and William Henderson and Leopold Loeb were appointed provisional syndics. The insolvents filed a schedule of their assets and liabilities, upon which a memorandum was made of bounty allowance claimed to be the property of David R. Calder, which he was authorized by law to keep, as exempt from seizure under any process of court, and as not subject to be surrendered under the insolvent laws of the state. The provisional syndics brought this suit in the civil district court for the parish of Orleans, alleging the above facts, and further averring that the amount of bounty which David R. Calder is to collect from the national government is not stated upon the schedule; that the amount thereof exceeds the sum of \$40,000, and is due to said David R. Calder because of certain claims made by him under a license granted to him by the national government; that the firm of John Calder & Co. and David R. Calder, the insolvents, were actively engaged, for a number of years prior to their surrender, in commercial business in the city of New Orleans, and in the cultivation of sugar plantations; that they cultivated four different plantations, the property of John Calder & Co., to wit, the Alice C. and the Choupique, situated in the parish of St. Mary; the Aragon, in the parish of Terrebonne; and the Orange Grove, in the parish of Lafourche,—upon which plantations the sugar was produced for which the bounty claimed is due; that under the insolvent proceedings and surrender there passed to the creditors of said insolvents all the property, either movable or immovable, or other rights or claims, except that which the law authorizes insolvents to retain, and which property should come under the control of petitioners, as provi-

sional syndics; that the bounty allowance claimed by David R. Calder for sugar produced in the United States, under the act of congress, is an asset belonging to said insolvents, and is, by the operation of the insolvency laws of Louisiana, subject to the control of petitioners, as syndics, to be applied to the payment of the debts of said insolvents, and is not exempt, as between petitioners and said John Calder & Co. and David R. Calder, from the operation of the insolvent laws of the state. Complainants also averred that they had reason to fear that, if the said insolvents should obtain possession of said bounty, they would divert the same to the prejudice of their creditors; and upon the prayer of said syndics an injunction was granted, ex parte, prohibiting David R. Calder from disposing of the drafts received by him from the United States for such bounty allowance, and also prohibiting Andrew Hero, assistant treasurer of the United States, from paying such drafts pendente lite. The defendants moved the suit into the circuit court of the United States for the eastern district of Louisiana, as one arising under the laws of the United States. In the circuit court the petition of the syndics was by agreement treated as a bill in equity, and the defendants moved to dissolve the injunction, and also demurred to the bill. Upon a hearing the motion to dissolve the injunction was denied, except as to the assistant treasurer of the United States, as to whom it was granted, and the bill dismissed, and the demurrer of the defendants was overruled. The defendants electing to stand upon their demurrer, a final decree was made, adjudging that said bounty allowance formed a part of the assets of said insolvents, and passed, by their assignment, by operation of law, to their syndics, for the benefit of creditors; and said insolvents were enjoined from collecting or disposing of said drafts, or parting with their possession, except to said syndics. From this decree the defendants appealed to this court.

John D. Rouse and Wm. Grant, for appellants.

Henry L. Lazarus and Horace E. Upton, for appellees.

Before PARDEE and McCormick, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, (after stating the facts.) The assignment of errors covers substantially the merits of the case, and the case presents the question whether the claims of David R. Calder under the act of congress approved October 1, 1890, for allowance of bounty for the production of sugar earned on the plantations of John Calder & Co. in the year 1891, passed to the creditors of John Calder & Co. and David R. Calder individually, under the insolvent laws of Louisiana, by the cession of property made and accepted on the 15th day of February, 1892. Prior to 1890 the production of sugar was fostered by the government of the United States by a protective tariff, which imposed such duties upon imported sugar as practically enabled the producers in this country to obtain a price for the sugar produced by them, compensatory of the cost of production; it being well understood that, without the enhanced price resulting from the tariff, sugar in quantities could only be produced in the United States at a loss to the producer. In 1890 the government of the United States, without changing its policy in respect to sugar produced, changed the method of encouraging production by practically placing sugar upon the free list, and enacting the bounty system. The law granting the bounty, so far as it is material to this case, is as follows:

"231. That on and after July first, eighteen hundred and ninety-one, and until July first, nineteen hundred and five, there shall be paid, from any mon-

eyes in the treasury not otherwise appropriated, under the provisions of section three thousand six hundred and eighty-nine of the Revised Statutes, to the producer of sugar testing not less than ninety degrees by the polariscope, from beets, sorghum, or sugar cane grown within the United States, a bounty of two cents per pound, and upon such sugar testing less than ninety degrees by the polariscope, and not less than eighty degrees, a bounty of one and three fourths cents per pound, under such rules and regulations as the commissioners of internal revenue, with the approval of the secretary of the treasury, shall prescribe.

"232. The producer of said sugar, to be entitled to said bounty, shall have first filed, prior to July first of each year, with the commissioner of internal revenue, a notice of the place of production, with a general description of the machinery and methods to be employed by him, with an estimate of the amount of sugar proposed to be produced in the current or next ensuing year, including the number of maple trees to be tapped, and an application for a license to so produce, to be accompanied by a bond in a penalty and with sureties to be approved by the commissioner of internal revenue, conditioned that he will faithfully observe all rules and regulations that shall be prescribed for such manufacture and production of sugar." 26 St. at Large, p. 533.

It is to be noticed that the bounty offered by the statute is for sugar thereafter to be produced, and to those producers only who shall accept the provisions of the act, and comply with its terms, as to taking out a license, giving bond in penalty, etc. In our opinion, the "bounty," so called in the statute, is not a pure gratuity or donation by the government, but was intended to be, and is in fact, a standing offer of reward and compensation to sugar producers, to encourage and stimulate them in the otherwise losing business of producing sugar in the United States. It was intended to be, and is in fact, a guaranty of reimbursement to sugar producers accepting the terms of the statute, of part, at least, of the cost of production. When a producer of sugar accepts the offer, and complies with the statute, it would seem to be as much a contract as it is possible for any citizen to make with the government. All the elements of a contract are present,—the terms, the consideration, and the lawful object. It is true that the government can repeal the statute, and refuse to pay the bounty earned upon sugar that has been produced under the promise, and within the statute, but so could the government do with an admitted contract for any public work. The appellants contended in the circuit court, as in this court, that the bounty offered by the government of the United States was a pure gratuity, without consideration, revocable at pleasure, and, until payment of the same is actually made, is not property, but only a hope that may or may not be realized. The judge of the circuit court, in a very clear and well-reasoned opinion, discussed the case on this line, and, citing *Williams v. Heard*, 140 U. S. 529-531, 11 Sup. Ct. Rep. 885, held that sugar bounty earned was property. In the cases of *Comegys v. Vasse*, 1 Pet. 193, and in *Williams v. Heard*, supra, it was held that equitable claims against our own and foreign governments, not arising under any statute, and not allowed at the gate of bankruptcy, were expectancies coupled with an interest, and, as such, were property rights that passed under assignment in bankruptcy, under both the bankrupt laws of 1800 and of 1867. The claim of David R. Calder, who accepted the terms of the act for the year 1891, for sugar produced during that year, is a claim arising under a contract,—a just

claim,—and one that the government cannot avoid otherwise than by repudiation. It is more than a possibility coupled with an interest. It is an actuality, a vested interest, (see *People v. Board of State Auditors*, 9 Mich. 327,) and a right for which there is a remedy under existing statutes of the United States. The statute offering the bounty makes a standing appropriation to pay it, and it is the duty of the treasury officials to warrant for it; and if there is a dispute as to facts or amounts the court of claims has jurisdiction. See “An act to provide for bringing suits against the government of the United States,” (24 St. at Large, p. 505.) The law governing insolvency proceedings in Louisiana, so far as this case is concerned, is as follows:

“The debtor shall annex to his petition his schedule,—that is to say, a summary statement of his affairs, and the losses he may have experienced,—mentioning the names of his creditors, their places of residence, and the amount of their respective claims; and the schedule shall, besides, contain a statement of all his property, as well movable as immovable, and his rights and actions, (except those which hereinafter are secured to him,) together with a mention of the approximate value of the property by him assigned.” Section 1786, Rev. St.

“The debtor is not obliged to comprehend in his surrender any property that is not subject to be seized and sold on executions against him.” Section 1787, *Id.*

“The debtor is not obliged to comprehend in his surrender any property that is not subject to be seized and sold in execution against him, but, with this exception, all his property must be surrendered.” Article 2183, Rev. Civil Code.

“There are also rights which are merely personal, that cannot be made liable for the payment of debts, and therefore no contract respecting them comes within the provisions of this section. These are the rights of personal servitude; of use and habitation; of usufruct of the estate of the minor child; to the income of dotal property; to money due for the salary of an office, or wages, or recompense for personal services.” Article 1992, Rev. Civil Code.

The appellants contend that, under these statutes, Calder's claim for bounty for sugar produced in 1891 did not pass to his creditors, because, they say, said claim was not subject to be seized and sold on execution; it was not placed upon the schedule as surrendered by the insolvent, and the claim is one for personal services, and therefore specifically exempt under section 1787. The limitation contained in section 1787 clearly applies to property exempt from execution, and does not include property which, although not exempt from execution, there is a difficulty, legal or physical, in seizing under execution. As a matter of Louisiana law, the claim of Calder against the government is one subject to seizure on execution; and while the officers of the government cannot be garnished, nor funds in their hands attached, there is no difficulty whatever, under the Louisiana practice, in levying an execution upon the claim, and selling the same according to law. *La. Code Pr. art. 647*; *Flower v. Livingston*, 2 Mart. (N. S.) 615; *Harris v. Bank*, 5 La. Ann. 538; *Rightor v. Slidell*, 9 La. Ann. 606; *McDonald v. Insurance Co.*, 32 La. Ann. 596; *Levy v. Acklen*, 32 La. Ann. 545. In the case of *West v. His Creditors*, 8 Rob. (La.) 123, it was held by the supreme court of the state of Louisiana that the claim of

an insolvent against the Mexican government, represented by a certificate of indebtedness on the Mexican government, passed by a cession to the syndic. We quote from the opinion of the court as follows:

"The evidence shows most conclusively that this was a debt owing to West by the Mexican government, not only previous to the surrender of his property, in 1821, but to his application for a respite, in 1819. By refusing or neglecting to put it on his bilan at the latter period, or not surrendering it in 1821, when ordered, he has not acquired any right to it, nor can he, by putting the debt on his schedule when he went into bankruptcy, take it away from the syndic of the creditors, and deprive them of a fund out of which they are entitled to be paid. This debt was in fact as much given up as any other, in 1821. The books in which the entries were made, relating to it, were given up. Efforts were made to collect it, or get it recognized by the debtor. They were fruitless for a long time, but at last successful."

It is well settled, under the insolvent laws of Louisiana, that all the debts, rights, and property of an insolvent making a cession pass to his creditors by the surrender, whether placed on the schedule or not, and the syndic may sue to recover them. *West v. His Creditors*, supra; *Lawrence v. Guice*, 9 Rob. (La.) 219; *Dwight v. Simon*, 4 La. Ann. 499; *Bank v. Horn*, 17 How. 157; *Geillinger v. Phillippi*, 133 U. S. 246-255, 10 Sup. Ct. Rep. 266. In the recent case of *Butler v. Goreley*, 146 U. S. 303, 13 Sup. Ct. Rep. 84, the supreme court affirmed the doctrine of *Williams v. Heard*, supra, and further held that section 3477 of the Revised Statutes of the United States, which prohibits transfers or assignments of claims upon the United States until after the allowance, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof, and then provides that they shall be freely made and executed in the presence of two attesting witnesses, does not apply to assignments in insolvency, nor to other transfers by operation of law.

We are of opinion that the claim of Calder for bounty under the statute of the United States is a claim for reward and compensation, and ripened into a vested interest by compliance with the statute, and the actual production of sugar thereunder. While sugar may be, to some extent, produced by personal services, in the guise of labor, it is, in the main, produced by the cultivation of lands, and the use of expensive machinery; and it is a well-known fact that, under the present methods of raising sugar, capital and credit are both required to meet the necessary outlays for seed, labor, supplies, and machinery, and it would materially hamper the business if the proceeds of the crop, whether in bounty or otherwise, are not available to meet the demands of creditors who, it may be, have furnished the means which in reality produced the crop. It would therefore tend to defeat the acknowledged object of the statute to give it the narrow construction that the bounty offered for the production of sugar was intended as a mere recompense for personal services. *Case v. Taylor*, 23 La. Ann. 497, cited by appellants, does not appear to be applicable. In that case Taylor had leased from the state a public canal, binding himself to make certain improvements, pay over to the state certain rents, and

acquiring from the state the right to receive and collect the tolls. Conceding the correctness of the ruling,—and it was doubted at the time by some of the judges of the court,—it goes no further than to hold that the contract was not a lease, and that the compensation which might result to Taylor for operating the canal was in the nature of recompense for personal services. In the case in hand there is no public work to be operated, no agency for the government, but a simple contract, as we view it, to pay so much for sugar produced under certain circumstances.

As to the present question, the claim, although in the name of David R. Calder, as holding the license, is really for sugar produced on the plantations of John Calder & Co., cultivated by that firm, and it should not be restricted to a claim for recompense for the personal services of David R. Calder. We are of opinion, therefore, that none of the contentions of the appellants are well taken; and we hold that the claim of David R. Calder against the United States for bounty for sugar produced upon the plantations of John Calder & Co. during the year 1891 is property that passed by the cession in the insolvency proceedings to the syndics of John Calder & Co. and David R. Calder individually, as a fund to be applied to the payment of creditors. The application of appellees to amend the decree of the circuit court by reinstating the injunction against the assistant treasurer, on the authority of *Clark v. Clark*, 17 How. 315, as approved in *Phelps v. McDonald*, 99 U. S. 298, cannot be considered, as complainants did not appeal.

The decree appealed from is affirmed, with costs.

UNITED STATES v. WILLAMETTE VAL. & C. M. WAGON-ROAD
CO. et al.

(Circuit Court, D. Oregon. May 18, 1892.)

GRANT OF PUBLIC LANDS IN AID OF WAGON ROAD—SUIT TO ENFORCE FORFEITURE—LACHES—ESTOPPEL.

Congress granted certain lands to Oregon in 1866 to aid in the construction of a wagon road from Albany to the eastern boundary of the state. In 1874 congress enacted that, when the road is shown by the certificate of the governor of Oregon to have been constructed and completed, patents to the lands should issue. By 1871 such certificates had been made. In 1882, after complaint to the department of the interior that the road had not been constructed, and after reference of the matter to congress and its refusal to act, and after investigation by the department, the patents issue. The defendants Weill and Cahn claim to be purchasers of the land in good faith upon the strength of the governor's certificates, and further claim to have expended large sums of money on said lands after the issuance of the patents, and to have sold portions thereof with warranty; also to have fully rebuilt the road before the passage of the act of March, 1889, authorizing this suit to enforce forfeiture. *Held*, on exceptions to their answer setting forth these facts, (1) that the defense of laches is not applicable to the United States; (2) that the United States are estopped to enforce the forfeiture; (3) that, the grant being in present with condition subsequent, a construction of the road after the time limited in the grant, but before the assertion of a claim to a forfeiture, may be pleaded in defense of this suit.

In Equity. Suit by the United States against the Willamette Valley & Cascade Mountain Wagon-Road Company and others for the forfeiture of lands granted to respondents, and the cancellation of patents issued therefor. Respondents filed answers and pleas, and the bill was dismissed upon argument of the pleas. Complainant appealed, and this decision was reversed, and the cause remanded. 11 Sup. Ct. Rep. 988. Respondents thereupon answered on the merits. Heard on exceptions to the answer. Exceptions overruled.

A. H. Tanner and Franklin P. Mays, for the United States.
C. F. S. Wood, for defendants.

GILBERT, Circuit Judge. A bill was filed on behalf of the United States against the Willamette Valley & Cascade Mountain Wagon-Road Company and other defendants, setting forth the act of congress of July 5, 1866, which grants to the state of Oregon, to aid in the construction of a wagon road from Albany to the eastern boundary of the state, certain sections of the public lands situate along the line of said road, together with a right of way for the same, and confers upon the legislature power to dispose of the lands as the work progressed, upon the issuance of a certificate of the governor of the state to the secretary of the interior that any 10 miles of the same were completed; but provides that, if the road is not completed in five years, no further sales shall be made, but the land remaining unsold shall revert to the United States; and further provides that the road shall be constructed of such width, grades, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the state may prescribe, and that the road shall remain a public highway for the use of the government of the United States.

The bill alleges that the state of Oregon, by an act passed October 24, 1866, transferred to the corporation defendant all lands and rights so granted to the state by congress, for the purpose of aiding the corporation in constructing the road mentioned in the act. The bill further states that by an act of congress of July 15, 1870, a change was made in the route of the road, and that the corporation defendant thereupon, by supplemental articles of incorporation changed the line of its road to conform to the act of congress; that on the 11th day of May, 1868, the officers of the corporation fraudulently represented to the governor of Oregon that the road had been constructed as required by law for a distance of 180 miles from Albany, and thereby fraudulently procured a certificate to that effect from the governor; that on the 8th day of September, 1870, the 9th day of January, 1871, and the 24th day of June, 1871, further certificates were fraudulently procured, to the effect that the remainder of the road to the state line had been completed; but the bill alleges that the road never was constructed.

The bill further alleges that by act of congress of June, 1874, patents for the granted lands were authorized to be issued to the state of Oregon, or to any corporation to which its rights had been

transferred in all cases where the roads in aid of the construction of which said lands were granted are shown by the certificate of the governor of Oregon, as in said acts provided, to have been constructed and completed: "provided that this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind, except to provide for issuing patents for lands to which the state is already entitled."

The bill then avers that patents were issued on June 19, 1876, for 107,893.01 acres of the lands, and on October 30, 1882, for 440,856.72 acres. The prayer of the bill is that all of the lands granted to the state by the act of July 5, 1866, be decreed to be forfeited to the United States, and restored to the public domain, and that the certificates and patents be declared fraudulent and void.

To this bill the defendants Weill and Cahn first filed two pleas, with accompanying answers. The first plea set up that the patent of October, 1882, was issued after due examination by the secretary of the interior, and in pursuance of the act of June, 1874, and that said defendants, relying thereon, had paid taxes and other expenses on said lands, and had sold portions thereof with warranty of title, and that it would be inequitable for the United States to claim a forfeiture of the lands. The second plea averred that in 1871 these defendants, believing that the road had been fully completed, as certified by the governors of Oregon, made purchase of the lands in good faith, and paid therefor \$161,400. The pleas were set down for argument upon their sufficiency, and it was held upon the facts contained in the first plea that the claim of the government was a stale claim, and that lapse of time was a bar to the suit, and that the second plea was good, for that it showed that the defendants were bona fide purchasers, (42 Fed. Rep. 351;) and the bill was dismissed. Appeal was taken to the supreme court, and the decision of the circuit court was reversed; the supreme court holding that the defense of laches could not be made as against the government, and that the United States should have the opportunity to file replication, and put in issue the allegations of the pleas, (11 Sup. Ct. Rep. 988.) When the case was remanded to this court, the defendants Weill and Cahn, instead of relying upon the pleas, answered the bill upon its merits, and the case now comes before the court on exception to portions of the answer, for impertinence.

The first exception is to that portion of the answer which responds to the allegation of the bill that the defendant corporation, in constructing the wagon road, was bound to construct the same in the manner prescribed by an existing statute of the state of Oregon, enacted October 14, 1862. The points involved in this exception were ably discussed by Judge Sawyer in the case of *U. S. v. Dalles Military Road Co.*, 40 Fed. Rep. 114, in which he held that the act of congress of February 25, 1867, granting the lands to the state, and the act of the legislature of Oregon of October 20, 1868, transferring the grant to the defendant corporation, formed the entire statutory contract with the road company, and that in the method of constructing the road the company was entirely un-

affected by the act of the legislature of October 20, 1868. No doubt can be entertained of the correctness of that decision, and the first exception is denied.

The second exception is to the allegation in the answer that long before congress passed the act of March 2, 1889, authorizing this suit, the defendants had entirely rebuilt the road in a substantial manner. It is claimed on behalf of the complainant that a construction of the road by the defendants after the expiration of the time limited in the act therefor comes too late, and will not avoid the forfeiture. This question has also been decided in this court in the previous decisions of this case, (42 Fed. Rep. 351,) where Judge Deady, upon the authority of numerous decisions, held that the grant from the government was a grant in praesenti, with condition subsequent, and could only be defeated upon breach of such condition, the condition subsequent here being that the road be completed in the manner provided by the act within five years from the date thereof; and that, if this condition were not complied with, the United States might, by legislative enactment or judicial proceedings, have enforced the forfeiture; but that, until such action by the government, the title remains in the grantee. It is not claimed that any forfeiture was declared or sought prior to the passage of the act of March 2, 1889. If the road was constructed at any time before that date, the defendants should be allowed to show that fact, and the exception will be denied.

The remaining exceptions are taken to the defenses which are, in substance, as follows: That in 1878 complaint was made to the department of the interior that the road had not been built, and thereupon the commissioner of the general land office appointed an agent to report upon the same; that the agent reported that the complaint was true; that in 1880 the report, with the accompanying evidence, was laid before both houses of congress, and referred to the appropriate committees of the same; that the committees, after examination, each reported that no action be taken; that the secretary of the interior thereafter examined the report and evidence, and in 1882 made decision that the evidence showed that the road was properly constructed, and directed the commissioner of the general land office to certify the same for issuance of patent, and thereupon patent issued; that the defendants, relying on the result of the investigation and the issuance of the patent, did alter their position with reference to the lands, so as to render it inequitable for the government, after such lapse of time, to assert title to the land. First, laches; second, estoppel. So far as laches is concerned, of \$2,660.62; second, by payment of \$29,853.79 for taxes; third, by payment of \$109,800.97 for grading, selecting, and platting lands, and protecting their title; fourth, by selling and conveying portions of the lands with warranty of title. These defenses so pleaded consist of—First, laches; second, estoppel. So far as laches is concerned, the decision of the supreme court in this case, and in *U. S. v. Insley*, 130 U. S. 263, 9 Sup. Ct. Rep. 485, (reversing 25 Fed. Rep. 804, and *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 6 Sup. Ct. Rep. 670, reversing the judgment of the supreme court of Tennessee,

and *U. S. v. Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120, 6 Sup. Ct. Rep. 1006,) must be regarded as finally settling the doctrine that laches or staleness of claim cannot be set up as a defense to any suit in equity brought by the United States to assert rights vested in them as a sovereign government, unless congress has clearly manifested its intention otherwise.

It is contended that congress has expressed a contrary intention in this instance by providing in the act of March 2, 1889, which authorizes the prosecution of this suit, that it shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried; and it seems difficult to give any meaning to these words without giving them the construction contended for; but, in the light of the decision of the supreme court in this case, it must be held that the "other suits in equity" to which reference is made are suits in which the United States is a party, and that it was not the intention of the statute that the defendants in this suit should avail themselves of defenses not open to defendants in other suits brought by the United States.

These portions of the answer, however, set up matter by way of estoppel, and it remains to be considered whether that defense is applicable in this case. The government is not ordinarily bound by an estoppel. While individuals may be estopped by the unauthorized acts of their agents, apparently within the scope of their agency, the sovereign power, being the trustee of the people, is rarely, if ever, bound by the acts of its agents; but, while it is true that for the neglect or the illegal or unauthorized acts of its agents the government should not ordinarily be estopped to show the truth, there is good authority, based upon sound reasoning, to support the doctrine that where the government has acted by legislative enactment, resolution, or grant, or otherwise than through the unauthorized or illegal acts of its agents, and the parties dealing with the government have relied upon the same, and in good faith have so changed their relation to the subject-matter thereof that it would be inequitable to declare such action or grant illegal, the government will be estopped. *Com. v. Andre*, 3 Pick. 224; *Cahn v. Barnes*, 7 Sawy. 48, 5 Fed. Rep. 326; *State v. Milk*, 11 Fed. Rep. 397; *Pengra v. Munz*, 29 Fed. Rep. 830; *Woodruff v. Trapnall*, 10 How. 190. No good reason can be offered why the United States, in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. The defense of estoppel stands upon different ground from that of laches. It is held that laches is not imputable to the government upon grounds of public policy. The common-law rule that no lapse of time can bar the right of the king is not only recognized in the United States, but is deemed to be applicable with added reason, from the fact that here property is held, not as by a monarch for personal or private purposes, but in trust for the common welfare; and, where the agencies of the people are so numerous and scattered, the utmost vigilance would not save the public from loss; but, when matter of estoppel arises, the observance of honest dealing may become of higher importance than the preservation of the public domain. It was well said in *Wood-*

ruff v. Trapnall that we naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals.

If it be true that the matters involved in this suit were investigated, as set forth in the answer, and the patents were thereafter issued, and the defendants, assuming that such action was a final determination of the question of title, and relying on the same, made the expenditures they claim to have made, the government should be estopped from enforcing the forfeiture. The supreme court, in reversing the decree in this case, and remanding the cause, expressly refrained from deciding the questions involved in the controversy, but reversed the case, that its merits might be investigated; and I hold it to be in harmony with the construction thus given by the supreme court to the provisions of the act of March 2, 1889, as well as conformable to the general principles of equity that should govern the trial of this and all similar cases, to allow the defendants the benefit of all the defenses here pleaded.

The exceptions will be denied.

FITZSIMMONS et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1893.)

No. 68.

1. APPEAL—REVIEW—RULINGS ON MOTION FOR NEW TRIAL.

The opinion and rulings of a trial judge on motion for a new trial are not subject to review by the circuit court of appeals.

2. UNITED STATES MARSHALS—ACCOUNTING—CREDITS.

A United States marshal, in his character of disbursing officer of the government, is not entitled, as between himself and the government, to credit for unpaid disbursements, or for services rendered and fees earned by his deputies, unless he has paid for the same.

3. SAME—ACTION ON BOND—SET-OFF—MONEY DUE DEPUTIES.

In an action on the official bond of a United States marshal to recover moneys due the United States, moneys alleged to be due by the United States to the marshal's deputies cannot be allowed as a set-off when there is no showing as to the character of the services for which credit is claimed, or whether any return thereof, duly verified, with details, was ever made, as required by Rev. St. § 833, or that the same had ever been submitted to the treasury department to be audited and allowed in accordance with section 841.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

At Law. Action by the United States against Owen P. Fitzsimmons and the sureties on his official bond as United States marshal. Verdict and judgment for plaintiff, and new trial denied. Defendants appeal. Modified and affirmed.

For opinion overruling exceptions to auditor's report, see 50 Fed. Rep. 381.

Statement by PARDEE, Circuit Judge:

The case is fully stated in the following extract from the bill of exceptions taken on the trial of the case:

"Be it remembered that heretofore, in the circuit court of the United States for the northern district of Georgia, on the 12th day of May, 1890, before his honor, William T. Newman, presiding, there came on to be heard a certain case in said court pending, to wit, the United States, as plaintiff, v. Owen P. Fitzsimmons, former marshal, etc., William A. Hemphill, Evan P. Howell, Clark Howell, Sr., Albert Howell, Patrick Walsh, Robert H. May, James M. Smith, and Alexander R. Lawton, as defendants; the same being an action for debt on bond, viz. the official bond of said defendant Fitzsimmons, former marshal of the state of Georgia, and the other defendants as his sureties; and the case was heard accordingly in said court before said judge and jury. Before that time the said cause had been referred to William R. Hammond, as auditor, and his report and amended report were approved by the court, of file in the cause, and was read in the evidence accordingly. Said auditor's report and amended report are here referred to and made a part of this bill of exceptions, and the same constituted the only evidence submitted to the jury on the trial of the cause, except A. P. Woodward, who testified as to certain matters not involved in the alleged error and exceptions here in question. The defendants requested the court in writing to charge the jury, amongst other things, to wit, 'That if they find in the auditor's report a finding in favor of the deputies against the United States for fourteen hundred and one dollars and thirty-two cents, [meaning fourteen thousand six hundred and one dollars and thirty-two cents,] it is not to be regarded as a debt to the deputies, but to the marshal's office, and must be so treated by them in the findings in the case.'

"The defendants contended at the trial that, whether the defendant Fitzsimmons had paid his deputies in full or not, whatever sum may have been due and owing to the plaintiff in this behalf for services rendered by said deputies, the same was, under the issue in this case, to be deemed and considered as services rendered by defendant Fitzsimmons, by and through his deputies, and that whatever amount was due and owing by the plaintiff for and on behalf of said services was to be deemed to be due and owing by the plaintiff to defendant Fitzsimmons, and that the same was available in favor of the defendants as an answer and defense to the action; the defendants contending that the same were greater in amount than the largest sum which, without this item, is found against the defendants in the auditor's report. The court held to the contrary in this contention, and decided that said item afforded no defense, and refused to charge the rule of law as contended for by defendants, and as set forth by their request in manner and form as above set forth, and the defendants then and there excepted before said court, in the presence of the jury, in writing, and their said exceptions were allowed by the court, and filed of record in the cause.

"Before that time, when the auditor's said report and amended report were first filed, the defendants excepted thereto in writing on the following first ground, amongst others, because the auditor excluded from his consideration the accounts of the deputies, and failed or refused to treat them as a credit to be given to the marshal in the government's settlement with him, thus excluding an amount of eleven thousand nine hundred and eighty-six dollars and seventeen cents, (\$11,986.17,) which he found in the fees and emoluments, due on account of the deputies, which must be placed to the marshal's credit before a legal and fair settlement could be reached between the government and the marshal. Considering the said exception, the court, at the March term, 1889, passed the following order, to wit: 'Ordered, that the amended exceptions herein set out to the auditor's report are disallowed, on the ground that the first exception does not set up the proper matters of credit or set-off to O. P. Fitzsimmons, late marshal.' And the defendants then and there excepted, in writing, to said action, and their said exception was allowed and filed of record in the cause, in open court, to wit, on the 6th day of June, 1889, as appears of record.

"Before the trial, in the same case, and in the same court, the defendants, in due time and in due form of law, filed an amendment to their plea, wherein they pleaded as a set-off and defense, due from the plaintiff to defendant

Fitzsimmons, for the use of certain of his deputies, for services rendered by them as such deputies during the time said Fitzsimmons held the office of United States marshal for the northern district of Georgia, the sum of eleven thousand nine hundred and eighty-six dollars and seventeen cents, (\$11,986.17,) as in said plea set forth, and which plea, signed by counsel for defendants, with the bill of particulars, contained the names of the deputies, with amounts due to each respectively, as of file in the cause. To this plea the plaintiff, by its counsel, demurred generally; and, after argument, the court, under order dated June 5, 1889, as appears of record, sustained the demurrer, and ordered that said plea be stricken, on the ground that it states no legal cause for defense; and defendants then and there excepted, and in open court, on the 6th day of June, 1889, presented their exceptions, in writing, which were allowed and ordered filed by the court, and the same were filed, and appear of record in the cause. And at the trial above and before named, to wit, on the 12th day of May, 1890, the jury, under the charge of the court, returned a verdict in favor of the plaintiff against the defendants for the sum of one thousand eight hundred and eighty-five dollars and twenty-three cents, (\$1,885.23,) with interest and cost of suit. The court was about to enter a final judgment upon said verdict, and the same was written out and signed accordingly, when the defendants interposed by their motion for new trial, which appears in the record, and thereupon the said court entertained said motion for new trial, and, on the 4th day of June, 1890, during the same term, in open court, passed and made the following order in said case, to wit: 'It appearing to the court that the defendant is dissatisfied with the verdict in said case, and for causes stated, makes this motion for new trial, it is ordered that said motion be duly filed, and copy be furnished the district attorney, and the same be set for hearing at such time as the court shall appoint, and that the same operate as a supersedeas of judgment until further ordered. [Signed] William T. Newman, U. S. Judge.' The said motion for new trial was afterwards amended, (but the hearing delayed and continued,) and never heard or finally determined until March 28, 1892, when, after argument had, the court made a written opinion adverse to the motion, which opinion is filed in the cause, and afterwards, to wit, on the 21st day of April, 1892, the court made and signed, on motion of counsel for plaintiffs, a formal order, refusing a new trial, and ordering that the supersedeas do cease; and defendants say that no judgment on the said verdict became or was final until said order was entered and the supersedeas thereby ended."

The case is brought to this court on the following assignment of errors:

"(1) That the court erred in failing and refusing to charge the jury, when so requested in writing, as follows, to wit: 'If they find in the auditor's report a finding in favor of the deputies against the United States for fourteen hundred and one dollars and thirty-two cents, [meaning fourteen thousand six hundred and one dollars and thirty-two cents,] it is not to be regarded as a debt due to the deputies, but to the marshal's office, and must be so treated in their findings in this case.' The plaintiffs in error say that under the law, upon stating the balances between the marshal aforesaid and the United States, the marshal was entitled to a credit for services rendered by his said deputies; that there is and was no privity between the United States and the deputies, but only between the United States and the marshal; and that, under the law, all settlements must be made and balances ascertained as between the United States and the marshal, treating the deputies and their accounts as represented by and standing in the shoes of the marshal; and that the marshal is entitled to such credit in his accounts, whether in point of fact he had paid his deputies or not; and that the court erred in holding to the contrary and refusing to charge as thus requested.

"(2) Plaintiffs in error further say that when they excepted to the auditor's report on the ground that the auditor erred in not giving the marshal credit in his accounts for amounts due on account of services rendered by his deputies, and the court at March term, 1889, passed and made an order that said exception be disallowed, on the ground that the same did [not] set up proper amount of credit or set-off to said Owen P. Fitzsimmons, late marshal, the court erred therein. The plaintiffs in error say that the said marshal was en-

titled to such credit and set-off under the laws and facts in the case, and that the court erred in holding to the contrary, and disallowing said exception to the auditor's report, in manner and form aforesaid.

"(3) Plaintiffs in error further say that the court erred in sustaining the demurrer to their plea, wherein they had pleaded as a set-off an amount due from the plaintiff to certain of his deputies for services rendered by them as in said plea set forth, said plea being in language following, to wit: 'By leave of the court defendants amend their pleas, and for further plea say that there is still due from the plaintiff to the defendant Fitzsimmons, for the use of certain of his deputies for services rendered by them as such deputies, during the time the said Fitzsimmons held the office of United States marshal for the northern district of Georgia, the sum of eleven thousand nine hundred and eighty-six dollars and seventeen cents, (\$11,986.17.) The amount due each deputy will fully appear by reference to the bill of particulars hereto attached. Said sum defendants plead in defense of plaintiff's claim, and show nothing due plaintiff, and the residue defendants plead as a set-off in favor of defendant Fitzsimmons for the use of his deputies, to whom the same is due and owing, and pray judgment for the same. [Signed] James S. Hook, Broyles & Johnson, Defendants' Attorneys.' Plaintiffs in error say that the defense set out and contained in said plea was a proper, legal, and competent defense to the said action of plaintiff, and that the court erred in holding to the contrary thereof, and in striking said plea. The plaintiffs in error further say that if said plea had not been stricken out, and had been sustained, as under the facts and the law it should have been, the same would not only have defeated any recovery against the defendants in favor of the plaintiff, but would have resulted in a finding in favor of the marshal against the United States in the sum of ten thousand and ten and 94-100 dollars, or the like sum.

"(4) And the plaintiffs in error further say that error appears in this: His honor repeats (in his decision overruling the motion for new trial) that the plea of set-off filed by the defendants, and refers to his action during the progress of the trial disallowing and striking said plea, and affirms the correctness of that action in disallowing and striking said plea, which action and decision touching said plea was excepted to during the trial, is hereby excepted to again, and is assigned as error. And the plaintiffs in error further say that error appears in this: His honor, in his said decision, makes a quotation from the auditor's report, to show two things, to wit: First, that the auditor found no amount against the United States in favor of the deputies; second, that the accounts of the deputies were not referred to the auditor. It is respectfully submitted that the auditor's report shows that he found that the deputies did have an account against the United States, and both this finding of the auditor, and his honor's view of it, plaintiffs in error say are wrong in law and in fact, not in amount, but in the person to whom due; and that it was not the deputies, but the marshal, who has a claim on the United States for such service rendered by him through his deputies. And plaintiffs in error say that the court erred in this ruling to the contrary thereof, and they assign error on the same.

"(5) Plaintiffs in error further say that error appears in this: His honor, in his said decision overruling the motion for new trial, refers to a former suit by three deputies of the marshal, which proceeded before and was determined by his predecessor, Judge McCay, but which was not made, as it could not have been made, a part of the record in this case. It is contended that this is error, and is hereby assigned as such for two reasons: First. Said former suit had no connection with this case. Second. From the views presented by his honor it only showed that, if anybody was estopped, it was the three deputies alone who had sued and obtained that decision of Judge McCay; certainly not the United States or the defendants in this case.

"(6) Said plaintiffs allege error in this: His honor, in said decision, says: 'The auditor states in his report that in making his investigation he treated Fitzsimmons as a disbursing officer of the government, charging him with all the money which went into his hands, and giving him credit for all disbursements to which he found him to be entitled,' etc. His honor then proceeds: 'Except as to a few items, which were eliminated from the case on the trial before the jury, I do not believe that any serious objection has ever been made

by the marshal to the statement of account, calculation, and finding of the auditor, and if it was proper to treat him as a disbursing officer of the government in making his investigations. Certain legal questions, it is true, were raised as to whether the auditor pursued the correct course in his method of stating the account between the marshal and his deputies, all of which were disposed of in the opinion heretofore filed in the case. There has been no argument as to the question on this motion, and I presume that it is considered as disposed of by the former decision of the court.' Plaintiffs in error say, as touching this finding of the court, that the object of the suit necessarily put in issue a final adjustment and finding of a balance between the United States and the marshal; and that it does not make any difference what descriptive terms be used as to different items; and that, if the marshal was in law entitled to a credit for services rendered by him through his deputies, he could not be deprived of his right to that credit by merely calling him a disbursing officer. And plaintiffs in error say that both the auditor and the court erred in holding to the contrary thereof, and error is assigned in the same.

"(7) Plaintiffs in error further say that error appears in this: The whole case was tried and determined on the assumption that the marshal was not entitled to any credit in his accounts as pleaded and contended for by defendants below on account of services rendered and fees earned by his said deputies, unless the marshal had paid the same to the deputies; the defendants contending that he was entitled to such credit, and the court holding and deciding that he was not thus entitled; and the same is hereby assigned as error."

Geo. Hillyer, (Jas. S. Hook, on the brief,) for plaintiffs in error.

F. B. Earhart, U. S. Atty., for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, (after stating the facts.) The fourth, fifth, and sixth assignments of error relate to the opinions and rulings of the trial judge on the motion for a new trial, and are not subject to review. The first assignment of error, relating to a charge to the jury refused by the court; the second, relating to error in overruling an exception to the auditor's report; and the third, assigning as error the action of the trial court in sustaining a demurrer to a plea,—all raise the same question, succinctly stated in the seventh assignment of error, as follows:

"The whole case was tried and determined on the assumption that the marshal was not entitled to any credit in his account on account of services rendered and fees earned by his said deputies, unless the marshal had paid the same to the deputies; the defendants contending that he was entitled to such credit, and the court holding and deciding that he was not thus entitled."

The question presented seems to have arisen in this way: The auditor appointed by the court says in his report:

"In the examination of this case it became necessary to go into the accounts of the deputies against the United States, and to ascertain the amounts of their earnings, disallowances, reallowances, etc., and thus to ascertain the balances due them; and while, in accordance with the view I have taken of the case, the statement of those balances is not necessary to a proper understanding of the issues involved, yet I have thought proper to append the table set forth in the Exhibit L, covering two pages, showing the balances due the deputies there named from the United States."

The table appended purports to show as the balance due the deputies from the United States sums ranging from \$5.16 to \$2,784.13,

aggregating \$12,712.21, as due to some 24 persons named. The plaintiffs in error excepted to the auditor's report, because the ex-marshal was not given credit for that amount in the statement of his account with the United States. Failing on exception, they filed a further plea, (their former pleas having been practically a general denial,) pleading the amount of \$11,986.17 in defense of plaintiff's claim, "and the residue as a set-off in favor of the defendant Fitzsimmons, for the use of his deputies, to whom the same is due and owing, and praying for judgment for the same." A demurrer having been interposed and sustained to said plea, the contention was renewed by requesting a charge instructing the jury that the amount reported by the auditor as due to deputies from the United States "is not to be regarded as a debt due to the deputies, but to the marshal's office, and must be so treated in their findings in the case."

The question thus presented is whether O. P. Fitzsimmons, late marshal of the United States, in a suit against him and his sureties on his official bond to recover balances due by him as an accounting and disbursing officer of the United States, is entitled to credit for disbursements that he has not made, or to credit for alleged services of his deputies which he does not pretend to have paid. So far as the suit is one against Fitzsimmons, late marshal, as a disbursing officer of the United States, it is plain that the credit claimed is wholly inadmissible. So far as the suit is against Fitzsimmons, late marshal, for a settlement and accounting as to the fees and emoluments of his office, more difficulty is presented. The following sections of the Revised Statutes of the United States bear directly upon the matter in hand:

"Sec. 830. There shall be paid to the marshal his fees for services rendered for the United States, for summoning jurors and witnesses in behalf of the United States, and in behalf of any prisoner to be tried for a capital offense; for the maintenance of prisoners of the United States confined in jail for any criminal offense; also for his reasonable actual expense for the transportation of criminals, and of the marshal and guards, to prisons designated by the attorney general, and for hire and subsistence in that behalf, as hereinbefore provided; also his fees for the commitment or discharge of prisoners; his expenses necessarily incurred for fuel, lights, and other contingencies that may accrue in holding the courts within his district, and providing the books necessary to record the proceedings thereof: provided, that he shall not incur or be allowed an expense of more than twenty dollars in any one year for furniture, or fifty dollars for rent of a building, and making improvements thereon, without first submitting a statement and estimates to the attorney general, and getting his instructions in the premises."

"Sec. 833. Every district attorney, clerk of a district court, clerk of a circuit court, and marshal, shall, on the first days of January and July in each year, or within thirty days thereafter, make to the attorney general, in such form as he may prescribe, a written return for the half year ending on said days respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act; and every marshal shall state separately therein the fees and emoluments received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and

the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive. Said returns shall be verified by the oath of the officer making them."

"Sec. 841. No marshal shall be allowed by the attorney general, except as provided in the next section, to retain of the fees and emoluments which he is required to include in his semiannual return, as aforesaid, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the treasury department, and a proper allowance to his deputies, any sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year. The allowance to any deputy shall in no case exceed three fourths of the fees and emoluments received or payable for the services rendered by him, and may be reduced below that rate by the attorney general whenever the returns show such rates to be unreasonable."

It is to be noticed that neither the report of the auditor, the exceptions to the auditor's report, the overruled plea, nor the requested charge to the jury show in any manner whatsoever the alleged services of the deputies of the late marshal for which credit is asked, whether within or without said section 830; nor whether any return, duly verified, with details, as required by the said section 833, was ever made; nor that the same had even been submitted to the treasury department to be audited and allowed by the proper accounting officers thereof, in accordance with the provisions of said section 841. Section 951, Rev. St., expressly prohibits the allowance of credits on the trial of suits brought by the United States against individuals, except such as appear to have been presented to the accounting officers of the treasury for their examination, and to have been disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is at the time of the trial in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or by some unavoidable accident. The provisions of this section seem to have been wholly ignored by the plaintiffs in error. The record shows no attempt whatever to comply with the statutes herein referred to, nor any reason why such attempt was not made. It seems to us that the regulations provided by law for the settlement of accounts between the United States and their officers control the courts as well as the accounting officers of the treasury. Stress, also, ought to be laid upon the fact that, so far as this record shows, the amounts claimed to be due deputies of the late marshal are asserted to be due by the United States, and not by Fitzsimmons; and, further, that whether the said amounts claimed to be due said deputies are paid by the United States, or paid by the plaintiff in error and then refunded by the United States, the account between the United States and Fitzsimmons, and the balance due the United States, involved in this suit, will remain the same. If we take the case as one where the statutes of the United States in relation to the settlement of accounts with officers have been complied with, and the amounts claimed to be due the deputies have been duly presented to the accounting officers of the treasury as a proper credit to the late marshal, and by such officers disallowed, because the same had not been paid by the late mar-

shal, still we cannot see how the plaintiffs in error can get relief in this suit, unless the court, as a matter of law, is authorized to allow a credit for disbursements not made. As far as this record goes, it is the United States that owes the deputies, and, if so, will owe them until they are paid. It may be that the fees earned by the deputies belong to the office of marshal, and that the amounts due them for services are due by the office, but the matter is complicated by the fact that when the marshal has collected his maximum compensation, as in this case, the United States are the beneficiaries of the office. It may be that by lapse of time and mistaken efforts and attempted remedies legislation is necessary to do full justice to all parties, but in this suit at law we do not think that the plaintiffs in error, on the showing made in this suit on the late marshal's official bond, can be allowed credits for amounts alleged to be due by the United States to either the marshal's office or to the deputies of the late marshal.

We are constrained to hold with the trial judge, and to rule that the record presents no reversible error. The case presented, however, while showing that the judgment of the court below is proper against the plaintiffs in error, yet suggests equities in favor of other parties, to whom the judgment of the court below, if left unqualified, may be construed injuriously; and therefore, while affirming the judgment, we deem it proper to modify the same so as to avoid the semblance of such prejudice.

It is therefore ordered and adjudged that the judgment of the circuit court in this case shall not be construed so as to prevent the plaintiff in error O. P. Fitzsimmons, late marshal of the United States for the northern district of Georgia, from claiming from the United States such sums as he may hereafter properly pay to his late deputies for services rendered to the United States within the purview of section 830, Rev. St. U. S., and which are not included in any of the claims allowed and audited in this suit; nor to prevent the late deputies of the said O. P. Fitzsimmons, late marshal of the northern district of Georgia, from applying to the United States, by suit or otherwise, for the direct payment to them for services rendered the United States during the term of office of O. P. Fitzsimmons, late marshal; and, as so modified and qualified, said judgment be, and the same is hereby, affirmed.

WINEMAN v. GASTRELL.

(Circuit Court of Appeals, Fifth Circuit. January 11, 1893.)

No. 20.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

In Equity. Bill by Lucy E. Gastrell against Marx Wineman to remove cloud from title. A decree was given for complainant, which, on appeal by respondent, was affirmed. See 53 Fed. Rep. 697, where a full statement of the case will be found. Respondent now petitions for a rehearing. Denied.

Frank Johnston, for appellant.

A. M. Lea, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PER CURIAM. In this petition for a rehearing there is no point raised which had not been carefully and fully examined and considered. The grant of 35,000 acres of land was a public law, standing upon the statute books of the state. The land was described as "35,000 acres of swamp land located in the Homochitto swamp," and at the time of the purchase by appellant there was not that amount of land of that description standing upon the books of the land department, and for appellant to plead want of notice he has to ignore the existence of the grant by which this land, identified sufficiently to demand notice, had been conveyed by his grantor to other parties. In *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. Rep. 336, although no patent had been issued, nor any notice of the withdrawal of the land received, yet it was held that the title had passed out of the United States by the grant. Every point urged in the petition has been carefully considered, and, being satisfied that the case has been so fully and thoroughly argued that nothing further could be urged that could change the conclusion of the majority of the court, the petition must be denied.

BRUSIE v. PECK BROTHERS & CO.

(Circuit Court of Appeals, Second Circuit. February 7, 1893.)

1. RES JUDICATA—QUESTIONS LITIGATED—PATENTS FOR INVENTIONS.

In an action at law to recover royalties on a patented machine one of the defenses was that defendant's machine did not infringe the patent. There were admitted in evidence three machines, one being the patented machine and the others of the kind sold by defendant; and the jury, by request, made a special finding that each of the three exhibits "substantially embody the same device or idea, and accomplish practically the same results by means of the same mechanical principles." The letters patent were not in evidence. *Held*, that in another action for royalties subsequently accruing this finding was not conclusive upon the question of infringement, for in determining infringement the question is whether defendant's machines embody in their structure and operation the substance of the invention described in the letters patent, which is not the same as the question determined by the jury.

2. CONTRACTS—DEPENDENT PROMISES.

The owner of a patent granted to another the sole and exclusive right to manufacture, and also to sell, except that the owner could sell machines manufactured by the grantee, paying the latter 25 per cent. profit on the cost of manufacture. The grantee agreed to manufacture the machines of good material, and use his best endeavors to introduce the same, to pay a royalty of \$2 upon each machine sold, and not to sell below \$15 unless the price was changed by joint agreement. The owner of the patent subsequently and without cause manufactured and sold the machines at reduced prices. *Held*, that the promises were dependent, and the breach by the owner warranted the grantee in abandoning the contract.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Russell Brusie against Peck Brothers & Co. to recover royalties on a patented machine. Verdict and judgment for defendant. Plaintiff brings error. Affirmed.

Robert L. Wensley and Horace Graves, for plaintiff.
Wolff & Hodge and Robert Sewell, for defendant.

Before LACOMBE and SHIPMAN, Circuit Judges

SHIPMAN, Circuit Judge. This is a writ of error to the circuit court for the southern district of New York, which entered judgment for the defendant upon the verdict of the jury in its favor. The important facts in the case are as follows: On August 18, 1873, the plaintiff and the defendant, a Connecticut corporation, entered into a written contract, whereby the plaintiff, who was the owner of letters patent for a lawn sprinkler, granted to the defendant the sale and exclusive right to manufacture and sell the said lawn sprinkler under said patent thereafter on the terms and conditions following: The defendant to manufacture and sell the said lawn sprinklers of good material, made in a workmanlike manner, to use its best endeavors to introduce them and increase their sale, to pay to the plaintiff, Russell Brusie, a royalty of \$2 for each sprinkler known as "No. 1" so sold, and to sell said No. 1 sprinklers at a price not less than \$15 each, unless said price should be changed by the joint agreement of the plaintiff and defendant. The contract also provided that said Brusie shall have the privilege of selling said sprinklers on the condition that he shall procure the same to be made by the defendant, and should pay it a profit of 25 per cent. on the cost of manufacturing the same; no royalty to be paid on the sprinklers so made by the defendant and furnished to said Brusie to be sold by him. In the following year serious differences arose between said parties. The plaintiff was of opinion that the defendant had violated its agreement, and forbade it to manufacture any more of the machines, but manufactured and sold them on his own account, at a reduced price; and the defendant thereafter manufactured and sold machines which the plaintiff regarded as an infringement of his patent.

In December, 1875, the plaintiff brought an action upon this contract against the defendant before the supreme court of the state of New York, in which both equitable and legal relief were sought. The complaint prayed for an injunction against selling infringing sprinklers, the cancellation of the contract, for damages, and an account of sales. By direction of the court the action was stricken from the equity calendar, was set down for trial as an action at law, and the question of the amount due for royalties was submitted to a jury. One of the defenses was the non-infringement of the letters patent by the new lawn sprinkler which the defendant manufactured subsequently to the alleged rescission of the contract by the plaintiff. The letters patent were not in evidence, but the question of similarity between the respective machines was tried, and the following question was submitted to the jury: "Do each of the three lawn sprinklers, Exhibits B, C, and D, substantially embody the same device or idea, and accomplish practically the same results by means of the same mechanical principles?" D was the Brusie sprinkler, B and C were the two "Peck sprinklers." The jury answered in the affirmative, and rendered a verdict for the amount of royalties which were conceded to be due, if anything was due.

This action was one at law to recover the amount of royalties alleged to be due by the manufacture of the infringing sprinkler

after December 10, 1875. The plaintiff introduced the judgment record in the case in the state court, with oral evidence of the question submitted to and answered by the jury, as conclusive evidence that the sprinkler known as "Peck's Improved," which was manufactured after the alleged rescission, was, in substance, the patented machine. The circuit judge admitted the evidence, but refused to regard it as conclusive, and submitted to the jury the question of infringement as a question of fact. Another defense was the alleged failure of the plaintiff to observe on his part the conditions contained in the contract. The circuit judge charged that if the plaintiff, without any justification arising from the previous conduct of the defendant, entered upon the market as a competitor with it in making these sprinklers, and selling them himself, he was not entitled to recover in this action, and submitted to the jury the question whether the plaintiff violated the contract without justification arising from the defendant's previous non-performance of its agreements. The jury returned a verdict for the defendant. The assignments of error present, in various forms for review, the correctness of the action of the circuit judge, in the two particulars which have been named.

1. The conclusiveness of the judgment record in the state court. The jury found that the three lawn sprinklers embodied the same device, and accomplished the same result by means of the same mechanical principles. They did not find that the alleged infringing machines embodied in their "structure and operation the substance of the invention" described in the letters patent. *Curt. Pat. § 308*. The device and the mechanical principles, which were open to the public, might have been in each machine, and therefore the proper question for determination was whether mechanism constituting the invention described in and protected by the patent, and operating in substantially the same way, and producing the same result, was used in the new machines. If the invention of the letters patent was not used, it was immaterial how similar the two machines were in other respects. The question whether the invention of the patent was used by the defendant was not actually determined in the state court, although it could have been; but it is only in respect of matters actually in litigation and determined that the judgment is conclusive in another action. *Cromwell v. County of Sac*, 94 U. S. 351.

2. The second alleged error relates to the validity of the defense by reason of the plaintiff's unjustifiable violation of the contract. This part of the case depends upon the question whether the respective undertakings of the two parties to the contract shall be construed to be independent, so that a breach by one party is not an excuse for a breach by the other, and either party may recover damages for the injury he has sustained, or are dependent, so that a breach by one relieves the other from the duty of performance. *Kings-ton v. Preston*, Doug. 634. "Where the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other. If the agreements go to a part only of the consideration on both sides,

the promises are so far independent." 2 Pars. Cont. 189. By the contract which is the foundation of this suit Brusie granted to the defendant the sole and exclusive right to manufacture the patented sprinkler, and the sole right to sell, except that Brusie could sell sprinklers manufactured by the defendant, paying it 25 per cent. profit upon the cost of such manufacture. The defendant promised to manufacture sprinklers of good material, to use its best endeavors to introduce the same, to pay a royalty of \$2 upon each machine sold, and not to sell below \$15, unless the price was changed by joint agreement. Brusie, having manufactured and sold at reduced prices, calls upon the defendant to pay a royalty of \$2 upon every machine which it sold, and to recover damages for Brusie's violation of the contract in a separate action. The contention of the plaintiff would have weight if Brusie's fulfillment of his part of the contract had not been vital to the ability of the defendant to fulfill any part of its contract. The plaintiff bound the defendant not to sell at a less price than \$15, unless the price should be changed by joint agreement. He thereby impliedly promised that the price imposed upon the defendant should be maintained, unless altered by joint consent. The defendant's ability to pay the royalty depended upon noncompetition by Brusie at reduced prices. He could not become, as he did, the defendant's active competitor, lower prices without consent, and still compel the defendant to sell at not less than \$15, and pay a royalty of \$2 per machine. This breach by Brusie of his undertakings, when found to be unjustifiable by any previous conduct of the defendant, relieved it from the obligation which it had assumed. There was no error in the charge, and the judgment of the circuit court is affirmed.

DELAND v. PLATTE COUNTY.

(Circuit Court, W. D. Missouri, St. Joseph Division. November 5, 1890.)

1. COUNTY RAILWAY AID BONDS—AUTHORITY TO ISSUE.

Act Gen. Assem. Mo. Jan. 4, 1860, incorporating the Platte City & Des Moines Railroad Company, and providing in section 7, that if a majority of the taxable inhabitants of any strip of country through which the road may pass vote upon themselves a tax in payment of their subscription to stock in the road, at an election ordered by the county court, the court shall levy a special tax, and cause the same, as fast as collected, to be paid to the treasurer of the company, does not authorize the county court to order the issue of county bonds in behalf of the taxable inhabitants of any strip of country which is a portion of a township in payment of such subscriptions. *Ogden v. County of Daviess*, 102 U. S. 634, followed.

2. SAME.

Act Mo. March 23, 1868, authorizing the county courts to make subscription to railroad stock, and issue bonds therefor on behalf of municipal townships, relates to municipal townships as such, and does not authorize the issue of bonds on behalf of a strip of country which is only a portion of a township. *Ogden v. County of Daviess*, 102 U. S. 634, followed.

3. SAME—RETROSPECTIVE LAWS.

The amendment of March 24, 1870, to Act Mo. March 23, 1868, providing that when, by the provision of a railroad charter, the taxable inhabitants of a portion of a municipal township "have voted," or may hereafter vote,

to take stock, etc., the county court shall exercise the same power and perform the same duties in issuing bonds as in the case of a county or township, as to a vote by the inhabitants of a portion of a township had prior to the passage of the amendment, falls within the inhibition of Const. Mo. art. 1, § 28, declaring that "no * * * law retrospective in its operation can be passed." And this act is not relieved of its retrospective character by Const. Mo. 1865, art. 4, § 27, and 1875, art. 4, § 53, excepting the state from the prohibition against legalizing by local or special laws the unauthorized or invalid acts of any officer or agent of the state or of any county or municipal authority.

4. SAME—RECITALS OF RECORDS.

The requirements of a railroad charter that "a majority of the taxable inhabitants" of a strip through which the road may pass may vote to tax themselves in payment of subscriptions to stock in the road is not satisfied by a record of the county court levying such tax that "the taxable inhabitants aforesaid voted," etc., without other recital or finding that a majority voted in favor.

5. SAME—RECITALS—ESTOPPEL.

A county railway aid bond reciting that it was issued "in pursuance of an election by the taxable inhabitants of Camden Point," does not estop the county, when the act authorizing the election in a part of a township lying between designated points, Camden Point being the voting place therein, required the assent of the majority of the taxable inhabitants.

At Law. Action by Frederick N. Deland against the county of Platte to recover upon a county bond. Judgment for defendant.
Statement by PHILIPS, District Judge.

A jury having been waived on stipulation of parties, this case was submitted to the court, and from the record evidence and stipulations of counsel the court makes the following special finding of facts:

Stipulations.

"It is hereby stipulated and mutually agreed upon by the parties to this case, by and through their attorneys, Sanders & Bowers, for the plaintiff, and John W. Coots for the defendant, that this cause be submitted to the court for trial without the intervention of a jury, a jury being specially waived by the parties to this case.

"That the certified copy of the records of the county court of Platte county in reference to the calling of the election, the vote held, and the issuing of the bonds and coupons in controversy in this case, signed and certified to under the seal of the court, by Jesse J. Blakeley, county clerk, at his office in Platte City, Mo., February 15, A. D. 1888, and hereto annexed, is a true copy of the records of the defendant, the county of Platte, in all of its acts of record in reference to the preliminary steps as to the election, and the issue of the bonds and coupons in controversy in this case, and the subsequent payment of interest for a time thereon.

"That the copies in the petition of the bonds and coupons involved in this case are true and correct copies of said bonds and coupons; and that the signature of the officials purporting to sign the same are the genuine signatures of T. W. Park, then clerk, and T. H. Talbott, then presiding justice, of the county of Platte, Missouri.

"That the statement hereto attached of the bonds and coupons involved in this case is correct, and the amount due the plaintiff (if anything) April 10, 1890, is \$15,800, and his reasonable costs of suit.

"Sanders & Bowers, for plaintiff.

"W. P. Hall, for defendant."

Copy of records, Platte county, Mo., with reference to notice of election and issue of bonds of Platte county, Mo.:

"Saturday, July 10th, 1869.

"Be it remembered, that at the term of the county court, held at Platte City, Platte county, Missouri, on Saturday, the 10th day of July, 1869, there were

present as follows, to wit: Hon. T. H. Talbott, president, Hons. Jacob Hamm and Benj. R. Morton, justices, of said court; Geo. W. Belt, sheriff; and Daniel P. Lewis, clerk." Book H, p. 206.

"Adjourned Term, 1869.

"State of Missouri, county of Platte—ss.: In the county court of said county, on the 10th day of July, 1869, the following, among other, proceedings were had, viz.:

"Now, at this time come the president and directors of the Chicago and Southwestern Railway Company, and present their petition, which is in the words and figures following, to wit:

"To the Honorable, the County Court of Platte County, Missouri: The undersigned, president and directors of the Chicago and Southwestern Railway Company, a corporation organized under a special law of the state of Missouri, entitled "An act to incorporate the Platte City and Fort Des Moines Railroad Company," approved January 4th, 1860, and by certain other acts of the general assembly of the state of Missouri amendatory thereof, respectfully make and present to your honors this, their petition, praying the court, under the seventh section of said act, that a vote may be taken in a strip of country through which said railway may pass, hereinafter mentioned and described, the same not exceeding ten miles on either side of said road. That the inhabitants thereof are desirous of taking fifty thousand dollars of the stock in the said railway company, and of voting upon themselves a tax for the payment of the same, which said strip is as follows:

"All that part of the municipal township of Greene, lying and being east of the range line, between thirty-four and thirty-five; and the said railway company hereby agrees that said tax shall never be collected or paid, unless said railway is located and constructed so as to run within one mile of the town of Camden Point.

"Respectfully submitted,

F. H. Winston,

"President.

"C. A. Perry,

"James N. Burns,

"James L. Davis,

"H. Edgerton,

"H. M. Allen,

"Benjamin Bonifant,

"N. P. Ogden,

"A. L. Perrin,

"Directors."

"And the county court, being fully advised in the premises, orders and adjudges that the prayer be granted. And it is further ordered that an election in said strip be, and the same is hereby, ordered to be held at Camden Point, in Greene township, in Platte county, Missouri, on Tuesday, August 17th, 1869, and the manner of holding said election shall be as follows: All the taxable inhabitants of said territory above described shall be entitled to vote by ballot, on which shall be written or printed the words or figures, 'In favor of and assenting to the tax to secure the location and construction of the Chicago and Southwestern Railway through the strip of land mentioned in petition,' or, 'Opposed to and dissenting from the tax to secure the location and construction of the Chicago and Southwestern Railway through the strip of land mentioned in the petition.' And said first-mentioned ballots shall be deemed and counted in favor of the tax, and said last-mentioned ballots shall be deemed and counted against such tax. It is further ordered that Elliott Miller, James S. Owens, and Miles Harrington be, and they are, appointed, judges of said election, to hold and make return thereof, according to law. And the sheriff is ordered to give notice thereof according to law." Book H, p. 244.

"Monday, September 27th, 1869.

"Court meets pursuant to adjournment. Present, Hon. T. H. Talbott, president; Honorables Jacob Hamm and Benjamin Morton, justices; George W. Belt, sheriff; Daniel P. Lewis, clerk.

"And the following, among the proceedings, were had, to wit:

"In the matter of the election held at Camden Point, on the 17th day of August, 1869, in pursuance of an order of this court, made on the 10th day of July, 1869, and the returns of the poll books and ballots, and the certificates of the judges and clerks of said election.

"Now, at this day came William H. Thomas and W. Stitt, and file their motion to declare the vote taken at said election a nullity and of noneffect."

"Be it remembered, that at an adjourned term of the county court held at Platte City, Mo., on the 4th day of October, A. D. 1869, there were present as follows, to wit: Hon. T. H. Talbott, president, Hon. Jacob Hamm and Benjamin R. Morton, justices, of said court; George W. Belt, sheriff; Daniel P. Lewis, clerk." Book H, p. 250.

"And in said court the following, among other, proceedings were had, to wit:

"In the matter of the election held at Camden Point, in Greene township, on the 17th day of August, 1869, in relation to the subscription of \$50,000 to the Chicago and Southwestern Railway Company.

"Now, at this day come the petitioners for said election, as well as Wm. H. Thomas and Wm. E. Stitt, by their respective attorneys, and the motion of said Thomas and Stitt, filed to herein do declare the said election a nullity and of noneffect, being taken up and argued, the same is sustained by the court. It is therefore considered by the court that the vote taken at Camden Point, on the 17th day of August, 1869, in pursuance of an order of this court, made on the 10th day of July, 1869, be and the same is declared a nullity and of noneffect. And it is further ordered and considered by the court that the said petitioners for said election pay the costs of this proceeding, and that execution issue therefor." Book H, p. 474.

"Be it remembered, that at an adjourned term of the term of the county court, held at Platte City, Mo., on the 3rd day of October, 1870, there were present as follows, to wit: Hon. Thomas H. Talbott, presiding justice of said court; Hon. Jacob Hamm, justice of said court; George W. Belt, sheriff; Daniel P. Lewis, clerk, by Ira Norris, deputy.

"And in said court the following, among other, proceedings were had, to wit:

"In the matter of the subscription of the taxpayers of a 'strip in Greene township,' made in July, 1869, to the Chicago and Southwestern Railway Company, the motion of the issuance of the bonds by the court is now here submitted to the court, which motion is taken under advisement until Wednesday, the 5th day of October, instant." Book H, p. 476.

"And on Wednesday, the 5th day of October, the following, among other, proceedings were had, to wit:

"Court met pursuant to adjournment. Present, Hon. T. H. Talbott and Hon. Jacob Hamm and Benj. R. Morton, justices of said court; George W. Belt, sheriff; and Daniel P. Lewis, clerk.

"In the matter of the motion made to this court on the third day of October, instant, for the issuance of the bonds of the county for the amount of the subscription made by the taxpayers within a 'strip in Greene township,' in the month of August, 1869, to the Chicago and Southwestern Railway Company, it is now here ordered that this cause be continued to the next term of this court."

"Be it remembered, that at an adjourned term of the county court held at Platte City, Mo., on the 14th day of November, 1870, there were present as follows, to wit: Present, Hon. T. H. Talbott, president, Hon. Jacob Hamm and Benj. R. Morton, justices, of said court; George W. Belt, sheriff; and Daniel P. Lewis, clerk." Book H, p. 496.

"At said court the following, among other, proceedings were had, to wit:

"In the matter of the motion of Joseph E. Merryman, made to this court on the third day of October, 1870, for the issuance of the bonds of the county for the amount of the subscription made by the taxpayers within a 'strip in Greene township,' in the month of August, 1869, to the Chicago and Southwestern Railway Company, it is now here ordered by the court that the motion aforesaid be and the same is overruled by the court." Book H, pp. 592, 593.

"Be it remembered, that at an adjourned term of the county court of Platte city, held on the 14th day of February, 1871, there were present as

follows, to wit: Hon. T. H. Talbott, presiding justice; Hon. John S. Brassfield and Jacob Hamm, justices; George W. Belt, sheriff; and T. W. Park, clerk.

"And in said court the following, among other, proceedings were had, to wit:

"Whereas, the court, on the 10th day of July, A. D. 1869, made an order submitting to a vote of the taxable inhabitants of the 'strip of territory in Platte county' hereinafter mentioned and described a proposition to subscribe for fifty thousand dollars of the capital stock of the Chicago and Southwestern Railway Company; and whereas, at an election held at Camden Point, in said strip, on the 17th day of August, 1869, by virtue of the provisions of an act to incorporate the Platte and Fort Des Moines Railroad Company, approved January 4, 1860, the taxable inhabitants aforesaid voted in favor of such subscription; and whereas, by an act of the general assembly of the state of Missouri, entitled 'An act to amend an act entitled "An act to facilitate the construction of the railroads in the state of Missouri,"' approved March 23, 1868, approved March 24, 1870, the court was authorized to issue bonds in payment of such subscription; and whereas, in consideration of the order and vote above recited, said railway company has located, constructed, and completed its railway through said strip of territory, and erected and completed a depot therefor within one mile of the town of Camden Point: Therefore, it is ordered by the court that fifty bonds of the county, each for one thousand dollars, be issued and delivered to said railway company, dated October 4, 1870, which bonds shall be executed by the presiding justice and the clerk hereof, attested by the seal of the court, due twenty years after date, at the American Exchange National Bank, in the city of New York, with forty semi-annual coupons, each for fifty dollars, for interest accruing thereon, executed and payable in like manner as said bonds. It is further expressly ordered and provided that the subscription bonds and coupons aforesaid are made and executed for and in behalf of the taxable inhabitants of all that part of the municipal township of Greene, in said county, lying east of the range line between thirty-four and thirty-five. And the said bonds and coupons shall be paid by the taxable inhabitants exclusively, as provided by law, and none thereof shall ever be a charge on the county of Platte. And it is further ordered that the said Chicago and Southwestern Railway Company shall pay all expenses necessary for the transferring of the funds to New York, to pay the interest and bonds aforesaid. And the said company shall pay the expenses of the execution of the bonds, and all costs attending the same." Book H, p. 594.

"Be it remembered, that at an adjourned term of the county court of Platte county, Missouri, there were present as follows, on Friday, the 17th day of February, 1871: Hon. John S. Brassfield and Jacob Hamm, justices; George W. Belt, sheriff; T. W. Park, clerk.

"At which said court, among others, the following proceedings were had, to wit:

"Now, here comes T. W. Park, clerk, and files the receipt of James N. Burns, vice president of the Chicago and Southwestern Railway Company, for fifty bonds issued in accordance with an order made by this court, on the 14th day of February, 1871." Book H, p. 668.

"Be it remembered, that at an adjourned term of the county court held at Platte City, Platte county, Missouri, on Wednesday, June 14th, 1871, there were present as follows, to wit: Hon. T. H. Talbott, president; Hons. John S. Brassfield and Jacob Hamm, justices; George W. Belt, sheriff; and T. W. Park, clerk.

"At which said court the following, among other, proceedings were had, to wit:

"Ordered by the court, that the state and county tax be levied on the road-bed, ties, iron track, and buildings of the Chicago and Southwestern Railway Company, for the use and benefit of the strip of country, in Greene township, in Platte county,—that wherein the inhabitants voted a subscription of fifty thousand dollars to said railway company; and when said state and county taxes shall be collected, the same shall be applied to the payment, in the name of Platte county, for said strip, and which said strip is bound to pay.

And it is further ordered, that said property be and the same is valued at the sum of two hundred dollars and fifty thousand dollars, and that a copy of this order be certified to the collector, and to the proper officer of said company. And it is further ordered, that the levy be fixed at the same rate as is now fixed for the state and county purposes." Book H, p. 791.

"Be it remembered, that at an adjourned term of the county court of Platte county, Missouri, held at Platte City, Mo., on Monday, March 18th, 1872, there were present as follows, to wit: Hon. J. H. Talbott, president; Hons. Jacob Hamm and John S. Brassfield, justices; T. W. Park, clerk; and Geo. W. Belt, sheriff.

"At which court the following, among other, proceedings were had, to wit:

"In the matter of the subscription made by the taxpayers in the strip in Greene township, under an order of the county court, made on the 10th day of July, A. D. 1869.

"Ordered by the court, that the sum of twenty-five hundred dollars realized out of and by virtue of an order made on the 14th day of June, 1871, be and the same is hereby ordered to be transferred to the American Exchange National Bank, in the city of New York, to pay the interest falling due on said bonds on the first day of April next, and that J. E. Merryman be appointed agent to settle the matter, and report to this court at the May term; it being understood that the payment is made under the law in relation to subscription of township, passed 24th March, A. D. 1870." Book H, p. 847.

"Be it remembered, that at an adjourned term of the county court of Platte county, held at Platte City, Mo., on Tuesday, the 4th day of June, A. D. 1872, there were present as follows, to wit: Hon. T. H. Talbott, president; and Hons. Jacob Hamm and John S. Brassfield, justices; T. W. Park, clerk; and George W. Belt, sheriff.

"At which court, among others, the following proceedings were had, to wit:

"Ordered, that a tax of one half of one per cent. be levied upon every one hundred dollars valuation of the real and personal property in the strip of territory voting a subscription of bonds to the Chicago and Southwestern Railroad, for the purpose of paying the interest on said bonds, and that the clerk extend the same upon the tax books for 1872, in appropriate columns." Book L, p. 57.

"Be it remembered, that at an adjourned term of the county court of Platte county, held at Platte City, Mo., Monday, February 10th, 1873, there were present as follows: Hon. John S. Brassfield, president; Hons. Jacob Hamm and William E. Cunningham, justices; T. W. Park, clerk; and E. McD. Coffey, sheriff.

"At which said court the following, among other, proceedings were had, to wit:

"Ordered by the court that the payment of coupon No. 1 on bonds of Greene township to the Chicago and Southwestern Railway Company be, and the same is hereby, refused."

"Be it remembered, that at an adjourned term of the county court of Platte county, held at Platte City, Mo., on Monday, the 3rd day of March, 1873, there were present as follows, to wit: Hon. John S. Brassfield, president; Hons. Jacob Hamm and William E. Cunningham, justices; T. W. Park, clerk; and E. McD. Coffey, sheriff." Record L, pp. 84, 85.

"At which said court, among others, the following proceedings were had, to wit:

"It is hereby ordered that Stephen C. Woodson, county attorney, be and he is hereby required to take such action as may be necessary to collect the taxes paid into the state treasury by the Chicago and Southwestern Railway Company, assessed in said county of Platte for the year 1872, and pay the same into the county treasury, to the credit of the 'Greene Township Strip Fund,' and to this end the said attorney is authorized to proceed at once to Jefferson City, and make demand for said money, and he is also authorized to sign and receipt for, and in the name of Platte county, for any amount that may be paid him, in accordance with the above order." Book L, p. 86.

"Be it remembered, that at an adjourned term of the county court of Platte county, Mo., held at Platte City, on Monday, the 24th day of March, 1873,

there were present as follows, to wit: Hon. John S. Brassfield, president; Hons. Jacob Hamm and Wm. E. Cunningham, justices; T. W. Park, clerk; and E. McD. Coffey, sheriff.

"At which said court the following, among other, proceedings were had, to wit:

"Now comes James N. Burns, and files motion to instruct the county treasurer to forward to New York a sufficient sum of money to pay the interest falling due April 1st, 1873, upon the bonds of Greene township to the Chicago and Southwestern Railroad Company, which motion is continued, and set for hearing to-morrow." Book L, pp. 89, 90.

"And on Tuesday, the 25th day of March, the following, among other, proceedings were had, and entered of record, to wit:

"In the matter of the motion of James N. Burns, and the issue of bonds to the Chicago and Southwestern Railway Company by Platte county, for and on account of the taxpayers within the strip of country on both sides of the road in Greene township, it is ordered by the court, no member dissenting, that the treasurer of Platte county at once forward to the American Exchange National Bank, in the city of New York, the sum of twenty-five hundred dollars, to meet the interest falling due on said bonds on the first day of April next, and credit the fund paid in on account of the tax of said railway company, and now in his hands, belonging to said strip or collected from the Chicago, Rock Island and Pacific Railway Company, in Platte county, for the year 1872."

"State of Missouri, county of Platte—ss.: I, Jesse J. Blakeley, clerk of the county court, within and for the county and state aforesaid, do hereby certify that the foregoing is a full, true, and complete transcript of the proceedings in regard to the matter known as the issuance of the 'Greene Township Strip Bonds,' as full as the same appears of record in my office. [Seal.]

"In testimony whereof, I have hereunto set my hand, and affixed the seal of said court. Done at office in Platte City, Mo., this, the 15th day of February, A. D. 1888.

Jesse J. Blakeley, County Clerk."

The following is a copy of the bonds issued on said subscription:

"Know all men by these presents, that the county of Platte, in the state of Missouri, acknowledges itself to owe and to be indebted to and promises to pay to bearer the sum of one thousand dollars, on the first day of October, one thousand eight hundred and ninety, for value received, at the National Exchange Bank, in the city and state of New York, with interest thereon from the first day of October, A. D. 1871, at the rate of ten per centum until paid, which interest shall be due and payable semiannually on the first days of April and October each year, on the presentation of the proper interest coupon, as annexed hereto, at the said American Exchange Bank. This is one of fifty bonds, of like date, amount, and effect, numbered from one to fifty, both numbers inclusive, issued in pursuance of an election by the taxable inhabitants of Camden Point, on the 17th day of August, A. D. 1869, and for the payment of which, and the interest thereon, the county court of said county shall, from time to time, levy and cause to be collected, in the same manner as county tax, a special tax, which shall be levied on the real estate lying within the district so voting at said election."

The coupons are in the following form:

"Platte City, Mo., October 4, 1870.

\$50.

"The county of Platte, in the state of Missouri, promises to pay bearer fifty dollars, for value received, at the American Exchange National Bank, in the city of New York, on the 1st day of April, A. D. 1880, being semiannual interest on bond No. —, issued to the Chicago & Southwestern Railway Company."

Sanders & Bowers, for plaintiff.

J. W. Coots and Hall & Pike, for defendant.

PHILIPS, District Judge, (after stating the facts.) The bonds in question are predicated of section 7 of an act of the general assembly of the state of Missouri, approved 4th January, 1860,

incorporating the Platte City & Des Moines Railroad Company, which section is as follows:

"Upon the presentation of a petition of the president and directors of said company to the county court of any county through which said road may be located, praying that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles on either side of said road, that the inhabitants thereof are desirous of taking stock in said road, and of voting upon themselves a tax for the payment of the same, it shall be the duty of said county court to order an election therein, and shall prescribe the time, place, and manner of holding said election; and if a majority of the taxable inhabitants shall determine in favor of the tax, it shall be the duty of said court to levy and collect from them a special tax, which shall be kept separate from other funds, and appropriated to no other purposes, and as fast as collected shall cause the same to be paid to the treasurer of said company."

It is the settled law of this jurisdiction that the holder of municipal bonds is chargeable with notice of the provisions of the law authorizing their issue. If there was no law authorizing the issue of the bonds, the bonds are void; and a purchaser of such instruments is bound to see to it that there is some law consistent with the recitations of the bond pursuant to which it was issued. The bond in question recites that it was issued "in pursuance of an election by the taxable inhabitants of Camden Point, on the 17th day of August, 1869, and for the payment of which and the interest thereon the county court of said county shall from time to time levy and cause to be collected, in the same manner as county tax, a special tax, which shall be levied on the real estate lying within the district so voting at such election." This recital, of course, referred the purchaser to the records and law authorizing the issue of this paper; and the plaintiff has pleaded the acts of the legislature and the action of the county court aforesaid as the basis of his right of action.

It has been expressly decided in *Ogden v. County of Daviess*, 102 U. S. 634, that said section 7 of the charter of the railroad did not authorize the county court of Platte county to issue bonds for the payment of any subscription voted by the inhabitants of the "strip" of country. The court say:

"The inhabitants were not even organized by themselves, much less made a body politic, for any purpose. They could vote the tax, if called upon to do so by the county court; but that was all. The effect of their vote was nothing more than to authorize the county court to levy, collect, and pay over to the treasurer of the company the special tax they had determined upon. The requirement of the law that the money, when collected, should be paid over to the treasurer of the company, is entirely inconsistent with any idea that the obligations to be met in this way were to be in the form of negotiable paper afloat on the market as commercial securities. Under the provisions of section 6 of the charter, counties, towns, and cities were expressly authorized to issue bonds in payment of their subscriptions. The omission of any such power in section 7 is conclusive evidence that nothing of the kind was intended in case of 'strip' subscriptions. In this particular, the case is even stronger than that of *Wells v. Supervisors*, Id. 625."

Clearly, therefore, unless these bonds can be referred to some other law for their vindication, this action must fail. Counsel for complainant rely upon two acts of the legislature,—one adopted

March 23, 1868, entitled "An act to facilitate the construction of railroads in the state of Missouri." This act authorized the county court to make subscription to the capital stock of railroads, and issue bonds therefor on behalf of any municipal township of a county, when petitioned therefor, and after an election to be held in the said township, at which two thirds of the qualified voters should vote for such subscriptions. It was also expressly held in *Ogden v. County of Daviess*, supra, that this act related entirely to municipal townships, as such, and was no authority for issuing bonds on a subscription voted by a mere strip of country, or for any less subdivision of a county than the municipal townships as they existed under the political subdivisions in our state government. But plaintiff contends that by an amendatory act of the statute last aforesaid, approved March 24, 1870, the issue of the bonds was authorized. This amendment is as follows:

"In all cases where, by the provisions of the charter of any railroad company organized under the laws of this state, the taxable inhabitants of a portion of a municipal township of any county in this state have voted, or may hereafter vote, to take stock in such railroad company, they are hereby declared entitled to and shall have all the privileges, rights, and benefits in said act conferred upon counties or townships, and the county court of such county shall exercise the same powers and perform the same duties in issuing bonds, levying, collecting, and paying over the taxes, which it is required to do in the case of a county or township under the provisions of said act: provided, however, that no part of said township, outside the limits of the district voting, shall be taxed to pay any of the bonds or coupons so issued by the county court. This act shall take effect from its passage."

It will be observed that this provision relates to the instance of a vote already had, as well as to one that might thereafter be taken; and it is the retroactive feature of this provision that plaintiff invokes and relies upon. For it must be kept in mind that the subscription voted by the taxpayers of the strip was at an election held in 1869, and prior to the adoption of this amendatory statute of March 24, 1870. The contention of plaintiff is that said election was held in "a portion of a municipal township," and it is sought in argument to construe the decision in *Ogden v. County of Daviess* so as to give authority for this post mortem legislation. The chief justice, arguendo, does say:

"It must be presumed that the amendment applied only to parts of townships, separately, and not to the aggregation of townships or parts of townships, which must necessarily be included in a strip of country twenty miles wide, or less, along a railroad as it runs through a country. The bonds which this statute authorizes were to be issued on behalf of a portion of a township, not on behalf of a 'strip of country.'"

It is to be observed, however, that, while the court is reciting what the statutory amendment authorized, it does not say that this statute would authorize the issue of bonds after an election held under the charter of the railroad in question. For the learned chief justice instantly proceeds to state:

"Under the charter the taxable inhabitants of the strip were to take the stock, and they were to be taxed. We cannot, without a perversion of language, apply the act of 1870 to this provision of this statute."

Counsel for plaintiff asserts the proposition that this amendatory act of 1870 should be applied in this case as if it were a part of the act of 1868, and in existence at the time of the election held in the strip in 1869; and contends that the legislature could ratify and affirm the exercise of any power by a municipal corporation which it could originally confer; and we are referred to the following authorities in support thereof: *Anderson v. Township of Santa Anna*, 116 U. S. 356, 6 Sup. Ct. Rep. 413; *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. Rep. 736; *Jonesboro City v. Cairo, etc., R. Co.*, 110 U. S. 192, 4 Sup. Ct. Rep. 67. These are cases arising on legislative acts in the state of Illinois, in which the principle is announced that, "unless there be a constitutional inhibition, a legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts, or to ratify and confirm any act it might have lawfully authorized in the first instance." That such statutes enacted subsequent to the occurrence of the act sought to be cured may obtain in some states whose constitutions do not interdict retrospective legislation, may be conceded to the plaintiff. But the constitution of the state of Missouri, (section 28, art. 1, of the declaration of rights,) in force at the time of the issue of these bonds, declares that, "no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, can be passed." The constitution of the state of Illinois contains no such provision as the latter part of the foregoing clause. Under the constitution of Missouri, no law retrospective in its operation can be passed.

What is a retrospective law? "This word," says Bouvier, "is usually applied to those acts of the legislature which are made to operate upon some subject, contract, or crime which existed before the passage of the act; and they are, therefore, called 'retrospective laws.'" "A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in respect to transactions of considerations already past, is to be deemed retrospective or retroactive." *Sedg. St. Const. Law*, (2d Ed.) 160. This provision of the Missouri constitution has been construed and applied by the state supreme court, and is entitled to respect, and should be followed where a right, in *pari materia*, again comes under review. In *Fowler v. City of St. Joseph*, 37 Mo. 228, certain work was done for the city under an ordinance which provided for the collection of the bills by suit at law. After this work was done, the city, by a subsequent amendatory ordinance, provided that the cost of such improvement should be enforced by a special tax, levy, and sale. Under this amendatory ordinance the city proceeded by levy and seizure of property to collect the claim. The court held that when the contract was made and the work done the law in force did not make the amount apportioned to each property owner a lien on the property, but only created a personal liability, enforceable at law; it was therefore not competent by subsequent ordinance to create such lien, and provide for a different mode of collecting it, because it was retroactive in its operation. In *Insurance Co. v. Flynn*, 38 Mo. 483, the

legislature undertook by an amendment to the charter of the company to make the certificates signed by the president and secretary, attested by the corporate seal, that the party therein named is indebted to the company in the sum named, conclusive evidence of the fact, and made it retroactive as to the causes of action originating anterior thereto. The court, after quoting the text above cited from Sedgwick, said:

"The right of the legislature to change the remedy and prescribe rules of evidence, if its enactment does not create a new obligation, or attach a new disability retrospectively, is conceded: but it is not within the constitutional competency of the legislature to annul by statute any legal ground on which a previous action is founded, or to create a new bar by which such action may be defeated. No new ground for the support of an existing action ought to be created by legislative enactment, nor any legal bar which goes to deprive a party of his defense."

The case of *City of St. Louis v. Clements*, 52 Mo. 133, is still more pertinent. The city charter authorized the construction of sewers, the dimensions of which were to be prescribed by ordinance of the council. The ordinance passed left the determination of this matter to the city engineer. This was held to be an unauthorized delegation of legislative discretion, and, therefore, no liability under the contract was created against the city. Subsequently the state legislature passed an act authorizing the city to reassess the sum unpaid to the adjacent real estate benefited by the improvement. This act was held to be unconstitutional, for the reason that it was retroactive in its operation. The court, after quoting from Sedgwick that it is competent for the legislature in given cases to enact laws having a retroactive effect, unless it comes within the purview of some express prohibition contained in the state constitution, say:

"Here is a positive prohibition against the passage of any law which is retrospective in its operation. There is nothing left for construction; we are only left to ascertain what is defined to be a retrospective law, and if the law under consideration comes within the definition, the constitution pronounces the judgment."

After stating the definition given above by Sedgwick, and showing that no legal liability was created against the city, unless by virtue of the after legislative enactment, the court further say:

"How, then, can we say that this act does not create a new right in favor of the contractor, and incur a new liability on the part of the defendant? * * * To my mind this law comes exactly within the definition to be given to a retrospective law."

Two of these decisions were made prior to the issue of the bonds in question, and the other almost contemporaneously with the issuance. So that the construction placed on this clause of the state constitution was established before the bonds went into market. If the act of March 24, 1870, at least, in so far as it undertook to authorize the county court to issue bonds upon a vote "of a portion of a municipal township," theretofore taken, is not retrospective legislation, it would be difficult to conceive of an act falling within the inhibition of the constitution. At the time the vote was taken by the inhabitants of the strip of country, there was no law, say the supreme court in *Ogden v. County of Daviess*, *supra*, authorizing the

county court of Platte county to issue such bonds predicated of such election. When this subsequent legislation, therefore, is resorted to as authority for their validity, it can only be made to apply by giving to it a retroactive effect, and the constitution says this cannot be done.

Section 7 of the charter of the railroad company, under which the election was held in 1869, did not contemplate the issue of bonds in payment of the debt thus voted. What the taxpayers voted for was that the county court might "levy and collect from them a special tax" to raise the requisite fund to liquidate the debt. They never did vote for the issue of bonds. There was no law in being at the time of the election authorizing or empowering the issue of bonds for such purpose.

As said by Judge Dillon in *Gause v. City of Clarksville*, 5 Dill. 172: "There is an obvious and essential difference in incurring a debt, to be paid in the usual manner out of the revenue of the corporation derived from taxation, and the raising of money in advance by a pledge of credit, and the issue of coupon bonds payable at a long distant day, for sale in the market of the country. The bonds may be issued, and sold for sixty-seven per cent. of their par value, and the corporation is bound."

The issue of the bonds in question materially altered the condition and right of the taxpayers from what they were at the time of making the contract for which they voted. The bonds issued bear 10 per cent. interest, payable semiannually at the city of New York, and are not payable until 1890, nearly 20 years after their issue. By this act of the county court the bonds were not redeemable, however much the taxpayers may have desired to take them up, for 20 years. They must during all these years pay interest thereon semiannually at the rate of 10 per cent. If this did not make a new contract, create a new liability for the debtors, after their vote, and in despite of what they voted for, common sense is at fault. The taxpayers of the so-called "strip" can well say to the demand of these bondholders: "In hoc foedere non veni."

Attention is directed by counsel for plaintiff to section 27, art. 4, of the constitution of 1865, which declares that "the general assembly shall not pass any local or special law, legalizing, except as against the state, the unauthorized or invalid acts of any officer," and also to the enlargement of this provision in the constitution of 1875, (section 53, art. 4,) which declares that "the general assembly shall not pass any local or special law legalizing the unauthorized acts of any officer or agent of the state, or of any county or municipal authority." It may be conceded that the above provision in the constitution of 1865 does not cover the case at bar, and that the constitution of 1875 is prospective in this respect. But these provisions detract naught from the other positive prohibition against retrospective legislation. These additional limitations but illustrate the fact that it was the purpose of the framers of the fundamental law, by particularization, to throw every possible safeguard around the constituency against post mortem legislation; and as far as possible, by going into details, to prevent both legislative and judicial departments from construing away the plain and obvious scope of other more general declarations. It remains just as true to-day, as it has

since the adoption of the constitution of 1820, that no retroactive law can be passed by the legislature, which "creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." And the provision of said section 53 in the constitution of 1875 has not added one atom of strength to the prohibition. It but emphasizes the popular view of the state policy.

The case of *Lynde v. County of Winnebago*, 16 Wall. 6, which it is not too much to say carried the doctrine of implied power and agency to the utmost verge, is no authority for the action of the defendant county in issuing these bonds. In that case the power to borrow money to meet the tax voted did exist, under certain conditions. And the argument of the majority opinion proceeds upon the presumption that it could not reasonably have been within the contemplation of the legislature, or the county court, that, in providing for a necessary courthouse, "the erection should be delayed until a sum sufficient to pay for the structure had been realized from the tax authorized to be imposed, or that the work should proceed only *pari passu* with the progress of its collection from year to year." Whereas, as already shown, the act of the legislature of 1860 conferred no authority to borrow the money to meet the subscription under any circumstances; and it could not have been in the contemplation of the voters in 1869 that bonds should be issued without authority of law. Nor was the county undertaking to build the road, so as to raise any implication that it must have been within the intendment of the taxpayers, or of the county court, that the money was to be borrowed to instantly prosecute the work. The railroad company was to build the road, and the taxpayers of the strip merely voted, under section 7, to take stock in said road, and voted "upon themselves a tax for the payment of the same." To that "special tax," levied and collected by the court, "to be paid to the treasurer of said company," "as fast as collected," could the company alone look for the payment of such subscription. The case of *Dodge v. County of Platte*, 82 N. Y. 218, bears out with additional force of reason and authority the foregoing opinion.

There also occurs to me a further objection of minor importance to this action. Under the charter of the railroad company it required "a majority of the taxable inhabitants" to vote for the subscription. The record of the county court only recites that "the taxable inhabitants aforesaid voted in favor of such subscription." It is not recited, nor found by the court, that a majority of the taxable inhabitants voted therefor, to say nothing of the constitutional provision of the state, then in force, which required a two-thirds vote of the qualified voters to authorize a subscription made outside of the provisions of the antecedent charter of 1860. The fact found by the county court does not necessarily imply that a majority of the taxable inhabitants voting at said election so voted.

Does the recitation on the face of the bond cure this defect in the record? It recites that the bond was "issued in pursuance of an election by the taxable inhabitants of Camden Point." This might conclude the county from disputing that an election was had, but

the peculiarity of this recitation lies in the fact, not only that it fails to state either a majority or a two-thirds vote, but that the election held was "by the taxable inhabitants of Camden Point," whereas the election petitioned for and held was for a part of the municipal township of Greene, lying between given points. Camden Point, as appears from the face of the record of the county court, was a town at which the election was held. No vote of the inhabitants of Camden Point could have authorized the subscription; and no authority has been shown by the plaintiff for the issue of these bonds, other than the election held under section 7 of the charter, which is limited to the taxable inhabitants of the strip of country through which the railroad runs. When plaintiff resorts to the record of the county court to sustain his right, he must abide by what it shows.

It is hardly necessary to discuss the proposition advanced by counsel that the action of the county court has been ratified by any act done by it since the issue of the bonds. "He who may authorize in the beginning, may ratify in the end." *Bank v. Gay*, 63 Mo. 39. A ratification can only occur when the party ratifying possesses the power to perform the act done. *Marsh v. Fulton County*, 10 Wall. 677.

On the facts of this case I declare the law to be that the plaintiff cannot recover. Judgment accordingly.

KENEDY v. BENSON et al.

(Circuit Court, C. D. Iowa, N. D. March 30, 1893.)

DECEIT—RIGHT TO DAMAGES—ASSIGNMENT.

A receiver of a ranch company sold property thereof to defendants, and took in payment certain shares of stock. In his report to the court, he charged himself with the stock as cash, the report was approved, and he fully settled with the company on that basis, and kept the stock. Afterwards he individually brought suit against defendants to recover damages for fraudulent representations made at the time of the sale as to the value of the stock. *Held*, that the cause of action was in the ranch company, and did not pass to plaintiff when he acquired the stock, and he could not maintain the action without showing an assignment to himself.

At Law. Action by James Kenedy against R. S. Benson and G. C. Hayes to recover damages for false representations as to certain shares of stock. On demurrer to the petition. Sustained.

J. F. Duncombe, for plaintiff.

E. P. Andrews, for defendants.

SHIRAS, District Judge. From the allegations in the substituted petition filed in this case it appears that on the 10th day of June, 1889, the plaintiff herein, James Kenedy, was appointed a receiver of the "T. X. Ranch" in the state of Texas, in a suit pending in the United States circuit court for the eastern district of Texas, and as such receiver he took possession of several thousand head of cattle and other personal property; that on the 16th day of Decem-

ber, 1890, the plaintiff, in his capacity of receiver, sold to the defendants, who were copartners doing business under the firm name of Benson & Hayes, 9,000 head of cows and calves for the sum of \$63,000, the same being the property of the American Land & Cattle Company; that at the same time the plaintiff, in the capacity of general manager for said cattle company, sold to Benson & Hayes 3,000 head of cattle for the sum of \$25,000; that in payment of the cattle sold by plaintiff as receiver he received from the defendants \$20,000 in drafts, which were paid, \$7,000 in the capital stock of the Brule County Bank, of South Dakota, at par, \$3,000 in the capital stock of the South Park Improvement & Investment Company, of Kansas City, Mo.; and for the balance due on the sale by him made as receiver, and for the sum due for the sale made as manager of the cattle company, he took in payment a ranch upon the Brazos river, in Texas, containing 5,740 acres.

It is further averred that at the time the sale was made by plaintiff, as receiver, and in order to induce plaintiff to take the Brule County Bank stock, and the South Park Investment Company stock, as part payment for the cattle, the defendants made certain representations in regard to the same, which, it is averred, were false and fraudulent. It further appeared that the day succeeding the making of the sales of cattle, as above stated, the plaintiff filed his report as receiver in the court appointing him, in which he charged himself with the amount of the bank and investment company stocks as cash, aggregating the sum of \$10,000; that said report was approved; and that the plaintiff has fully settled with the American Land & Cattle Company for said stocks, and for the land received in payment as above stated. It is further averred that plaintiff was induced to charge himself in his account as receiver with the sum of \$10,000 as cash received, and to take and hold said stocks himself, by reason of the false and fraudulent statements made by defendants in regard to said stocks, the statements in regard to the bank stock being that the same was full paid, worth par, and that the bank in the past had paid and was continuing to pay dividends thereon, and in regard to the South Park Investment Company's stock that it was worth par, and could be sold for the face value. It is further charged that upon investigation, made after plaintiff had received these stocks, it appeared that the bank stock was not full paid, no dividends had ever been paid thereon, and the stock was valueless; and that the investment company's stock was worthless.

Based upon these facts the present action at law was brought, wherein plaintiff seeks to recover as damages the sums he charged himself in his account as receiver for the stocks by him taken as part payment for the cattle by him sold as receiver to the defendants. The defendants interpose a demurrer to the petition upon several grounds, the first being that it does not appear that plaintiff is the legal owner of the cause of action declared on. In the petition it is expressly averred that the cattle sold to the defendants were the property of the American Land & Cattle Company. The money and property transferred to the receiver in payment therefor, when so transferred, became the property of the cattle company. If the prop-

erty so transferred was not equal in value to what it was represented to be by the defendants, the loss caused by such depreciation in the value of the stocks was the loss, in the first instance, of the cattle company. Assuming that the representations charged to have been made in regard thereto by the defendants were false, and of such a character as to create a right of action against defendants, such right of action belonged to and was the property of the cattle company. This right of action rested in the cattle company as soon as the title to the stocks passed to it, which was when the cattle were delivered to the defendants. The right to an action for the recovery of damages having thus vested in that company it would not pass to any third person, to whom the company might sell or assign the stocks in question, as a mere incident thereto. The question is not other nor different from what it would be if the company had sold the stock to a third party, and it certainly cannot be true that a sale of the stocks would transfer to the purchaser the right of action which had vested in the company. The facts averred in the petition show a sale and transfer of the stocks to the cattle company, and assuming that the facts stated also show a subsequent legal transfer thereof to the plaintiff, upon which question no opinion is expressed, all that can be claimed is that the plaintiff has become the owner of the shares of stock through a purchase thereof from the cattle company; but there are no facts averred which show a transfer or assignment of the right to claim damages from the defendants by reason of the alleged false statements in regard to the value of the stock. No reason is perceived why the cattle company cannot now institute an action, if the right to maintain the same ever existed, against the defendants for damages caused by procuring a sale of the property of the cattle company, by false representations in regard to the stocks offered in payment thereof. It would not be a defense to such an action for the defendants to plead that the cattle company had sold and transferred the stock to the plaintiff or any other third party. The transfer of the stocks would not transfer the right of action for the damages caused by the false representations. At common law, such a chose in action was not assignable, so as to enable the assignee to maintain an action at law in his own name thereon. What the law of Texas is in this particular, and whether the laws of that state or of Iowa determine the right of assignment and of the assignee to maintain an action at law, it is not necessary to consider at the present time, for it does not appear from the allegations of the petition that any legal transfer or assignment of the chose in action, to wit, the claim for damages based upon the alleged false representations, has been made to the plaintiff.

The petition therefore fails to show that plaintiff is the owner of, or has the right to enforce at law, the cause of action claimed to have been created in favor of the American Land & Cattle Company by the false representations made by defendants in regard to the stocks transferred to the receiver of the cattle company. The demurrer to the petition is therefore sustained, with leave to plaintiff to amend the petition in case facts exist justifying the same.

GREENWICH INS. CO. v. WATERMAN et al.

(Circuit Court of Appeals, Sixth Circuit. March 30, 1893.)

No. 68.

1. MARINE INSURANCE—AUTHORITY OF AGENT—LOCAL USAGE.

A well-defined local usage, whereby marine insurance agents can make binding contracts to take effect on the day of application, without consulting their superiors, is presumably known to a foreign company engaged for years in insurance business at the place where the usage obtains, and is sufficient to prevail over the private instructions of such agents when the insured is in ignorance thereof, and is without notice of facts sufficient to put him upon inquiry. Hammond, J., dissenting.

2. SAME.

The fact that a local agent has no power to issue policies does not necessarily show that he is without authority to make binding preliminary contracts of insurance.

3. SAME—EVIDENCE.

Although the existence of a usage may be established by the uncontradicted testimony of one witness when he is explicit as to its duration, certainty, and notoriety, the testimony of an insurance broker as to the authority of agents in a certain locality to make binding preliminary contracts, which is based wholly on the practice of his own office, is not sufficient to go to the jury.

4. SAME.

The fact that a marine insurance agent acts for his company in the adjustment of losses, that he does bind the company as to cargoes, takes charge of wrecking expeditions, receives proofs of loss and notices of abandonment, does not warrant an inference that he has authority to bind the company as to vessels, by a person knowing that the agent has no authority to issue hull policies, and that application therefor must be forwarded by the agent to the general office for approval.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

At Law. Action on a contract of insurance in the circuit court for Wayne county, Mich., by Cameron D. Waterman and Joshua W. Waterman against the Greenwich Insurance Company. Defendant removed the cause to the circuit court of the United States, where verdict and judgment were given for plaintiffs. Defendant brings error. Reversed.

Statement by TAFT, Circuit Judge:

This was a writ of error to a judgment of the circuit court for the eastern district of Michigan in favor of Cameron D. Waterman and Joshua W. Waterman against the Greenwich Insurance Company for \$5,475. The action was on an agreement by defendant to insure plaintiffs against loss or damage by fire to an amount not exceeding \$5,000 on the steamer Chenango, in consideration of a premium of \$50, to be paid by plaintiffs when requested, the risk to attach from the 10th of April, 1890, at noon. On the 11th of April, 1890, the steamer Chenango caught fire, burned, and became a total loss, whereby, as plaintiffs claimed, the defendant became liable for the full amount of the insurance.

The defendant pleaded the general issue, and the case was heard before a jury. On the trial the plaintiffs introduced evidence to show that a verbal contract of insurance was made between their agent, Ralph, and Dickinson, the agent of the insurance company, the risk to attach from the 10th of April, the day of making the contract. The evidence of the defendant tended to show that Ralph had applied for insurance to date not from the 10th of April, but from the 20th of that month; that Dickinson had no authority to make a bind-

ing contract of insurance for the company, and had forwarded an application, written out by himself, fixing the date for the risk to attach on the 20th of April, and that a policy had issued in accordance with this application. The issues on the trial were—First, as to the agreement between Ralph and Dickinson; and, second, as to Dickinson's authority in representing the company. On both these issues, the jury found for the plaintiffs.

Dickinson was a clerk for Eber Ward, and was the general manager of his insurance business, and it was not denied by defendant that he had the same authority that Ward had to represent the company. Ward was a local agent of the Greenwich Insurance Company at Detroit, and did a general hull and cargo marine insurance business. He had no written commission. The limits of his authority were fixed by the course of business between him and the general agent of the company, Flint, at Buffalo. He never issued policies of insurance on vessels. He was furnished with certificates of insurance with which to insure cargoes. His course of business in insuring vessels was to receive a verbal application from the vessel owner or his agent, and then himself fill out a written application, and forward it to the general agent at Buffalo, receiving in return the policy filled out in accordance with the application. Ralph, the plaintiff's agent, knew that Ward had no authority to issue policies on vessels, or what are called "hull policies." It was undisputed that no local agents at Detroit of foreign insurance companies had authority to issue hull policies, and that the usual course of business was like that just described in Ward's case. When a policy was sent to Ward in response to an application, he would deliver it, with a premium note, to the insured. The premium note would be sent to the general agent, and returned to Ward for collection, when due. Proofs of loss under marine policies had been served on Ward without objection by the company, and so, too, had notices of abandonment. He was the agent of the company named by its secretary to receive service of process in Michigan, as required under the Michigan law. He testified that it was the distinct understanding between him and the predecessor of Flint in the general agency at Buffalo that he should have no power to make a binding contract of insurance for the company on vessels. It was the custom of vessel owners at the lake ports to delay taking out their insurance until their vessels were ready to sail on their first trips, in order to get the benefit of a reduction in rates, which not infrequently took place about that time. It was contended on behalf of the plaintiffs below that, because of this condition in the insurance business, a well-defined usage had become established by which the local agents of foreign companies were understood to have authority to bind their companies by preliminary contracts of insurance from the date of the application, when the applicant desired the risk to attach from that day.

The evidence chiefly relied on to prove the usage was that of Ralph, the agent of the plaintiffs. Another witness, Adams, also testified on the subject, but Ralph's evidence was much fuller, and less confused. Ralph's examination upon the subject was as follows: Questions by counsel for plaintiff: "Question. Is there any well-known usage among insurance men and owners of vessels on the lake ports as to when a risk for which a verbal application is made to be covered by a policy, afterwards to be issued, takes effect or attaches? Answer. Yes, sir; there is a very well-defined usage in regard to that. Q. And under that usage, or in pursuance of that usage, when does a risk of that character attach? A. At once, on the application being made to the agent, or we would not have any safety in doing business. Cross-examination: Q. I suppose you mean by that, Mr. Ralph, that it depends upon the agreement made, does it not? For instance, if you ask to have a policy attached on the 20th of April, and made the application on the 1st, it would not attach on the 1st of April. There is no usage of that kind, is there? A. No, sir; it would not attach on the 1st. Q. That all there is about the usage is that it is a matter of arrangement at the time the application is made, is it not? A. Yes, sir. If you want both to attach at once, we would consider it attached, if we made the application to the agent. Q. If the agreement is made? A. If I wanted insurance to-day, I would go to the agent and tell him and make my application, and I should consider under the usage— Q. Is

there anything more to that usage than the fact, where you apply to the agent, that some time afterwards a policy is returned, which takes effect in accordance with your application? A. Yes, sir. Q. That is all there is to it? A. Yes, sir; about. Q. And, so far as you know, no question has ever arisen in reference to it? It would not naturally arise unless there was a loss? A. Yes, sir. Q. So that the question as to whether the authority of the agents differ has never been involved in any of the cases that you refer to, so far as you know, has it? A. No, sir. Q. You have no doubt that there is a difference in the authority of agents, have you; for instance, that some have the power to accept risks themselves, without communicating with the company, while others do not? You know that from your business experience, do you not? A. Well, I consider when a man takes a risk, that binds the company. Q. Don't you know that there are conditions as between agencies that some agents are authorized expressly to bind the company, while others are not? A. I haven't had experience in other office but my own; that is, writing anybody else's policies. Q. You don't know anything about any other agencies? A. I don't know what their agreement is especially. Q. Or what their authority is? A. I know they are agents of the company. Q. You know they take applications? A. Yes, sir. Q. And upon applications taken by them the company subsequently, as a rule, writes policies in accordance with the application? A. Some are written in the local offices. Q. Do you know of any marine insurance company in Detroit that writes policies? A. Yes, sir. Q. Who? A. The Detroit Fire & Marine, and Michigan. Q. Do you know of any foreign insurance company that writes policies here in its office in Detroit? A. What do you mean,—hull policies, or marine policies? Q. Hull policies. A. No; I don't know of an agent that writes hull policies here. Q. So far as you know, it is the invariable rule for the application to go to the local agent for delivery? A. Yes, sir; for hull policies. Q. It is the invariable rule for the application to go to the general agent of the company through the local agent,—for the general agent of the company, upon that application, to write the policy and send it to the local agent for delivery? A. On hulls themselves, I think that is perhaps so. Q. So far as you know, that is the invariable rule? A. So far as it applies to Detroit."

Dickinson, Thurber & Stevenson, for plaintiff in error.

F. H. Canfield, (Levi T. Griffin, of counsel,) for defendants in error.

Before JACKSON and TAFT, Circuit Judges, and HAMMOND, District Judge.

TAFT, Circuit Judge, (after stating the facts.) By their verdict the jury found that Ralph and Dickinson stipulated that the risk should attach from the 10th of April. The finding was based on sufficient evidence after a fair submission of the issue to the jury, and cannot be reviewed in this court.

The main controversy here is on the question of Ward's authority to bind the company by a preliminary and verbal contract of insurance. The court below, in effect, charged the jury that, if there was a well-defined usage by which local agents of foreign insurance companies could make binding contracts on applications for insurance to attach the same day, Ward could bind the company accordingly, whatever his private instructions.

We are of opinion that the charge of the court on this point as a proposition of law was sound.

If such a definite usage in respect to local agents of foreign insurance companies had been proven, the Greenwich Insurance Company would have been charged with notice of it, and by establishing

Ward as its local agent the company would have given him apparent authority to bind it in accordance with that usage, if reasonable. *Goodenow v. Tyler*, 7 Mass. 31; *Fisher v. Sargent*, 10 Cush. 250; *Graves v. Legg*, 2 Hurl. & N. 210; *Mechem*, Ag. § 281.

The evidence discloses that the Greenwich Insurance Company had been doing a marine insurance business in Detroit for 10 years at least, and it could be fairly presumed that the company was familiar with any local usage obtaining there in the insurance business.

If, as testified by several witnesses, millions of dollars of insurance were placed on the day of sailing, it would be extraordinary if vessel owners would consent to an arrangement by which no insurance should be binding on their vessels until time enough had elapsed after the day of sailing for their applications to be forwarded to the general agents of the insurance companies at distant points, and by them approved, with the arbitrary right thus secured to the insurance companies, in case of a loss meantime, to reject the application. A usage by which local agents could make binding preliminary contracts for the company would seem to us, therefore, to be reasonable.

It does not necessarily show that a local agent has no authority to make preliminary binding contracts of insurance that he is without power to issue policies. 1 *Wood*, Ins. 25; *Hardwick v. Insurance Co.*, 20 Or. 547, 26 Pac. Rep. 840. But it would seem that a known want of authority to issue policies of insurance would put the applicant for insurance on inquiry as to whether the agent had authority to bind the company by a preliminary contract. The necessity for binding contracts from the date of the application, in view of the condition of the insurance business at Detroit, is quite apparent, and it is probably said with truth that no foreign insurance company could do business there unless it made some arrangement to effect binding insurance from the date of the application. This suggestion is met on behalf of the insurance company by evidence that, in case where application was made to its local agents for insurance to attach on the day of the application, they were instructed to telegraph the applications to the general agent at Buffalo, and receive by wire authority from him to accept the risk on behalf of the company. This course of business between the Greenwich Insurance Company and its local agents would not, of course, exempt that company from the operation of a local usage enabling agents to make binding contracts, unless the person dealing with this agent had knowledge of his authority.

The difficulty we have in supporting the judgment below is not in the theory of the court's charge on this branch of the case, but in the insufficiency of the evidence to show the local usage relied on by the plaintiffs. It is well settled that a usage or custom, to affect the construction of contracts, or to extend the apparent authority of agents beyond their actual authority, must be uniform, notorious, and well defined. *Black v. Ashley*, 80 Mich. 99, 44 N. W. Rep. 1120; *Reynolds v. Insurance Co.*, 36 Mich. 131; *Schurr v. Savigny*, 85 Mich. 149, 48 N. W. Rep. 547; *Stringfield v. Vivian*, 33

Mich. 681; *Lamb v. Henderson*, 63 Mich. 302, 29 N. W. Rep. 732; *Bowling v. Harrison*, 6 How. 248; *U. S. v. Buchanan*, 8 How. 83.

The evidence of usage shown in the record is not at all satisfactory, and does not fulfill the requirements above named. In answer to a leading question, Ralph does say that there was a well-defined usage in Detroit that applications for insurance to take effect at once, if accepted by local agents, bound the company; but his cross-examination clearly discloses that his evidence is based rather on his opinion of what the local agent's authority ought to be than the knowledge that the existence of such authority was recognized, notoriously and uniformly, in Detroit. He virtually admits that his knowledge of agents' authority is largely confined to his own office. His opinion of the usage is based on the fact that when an application is filed for insurance to date from the day of the application, a policy is subsequently returned to the applicant dated accordingly. It has been held that such action by the company is not a recognition of the right of the local agent to bind the company by a preliminary contract, unless it has been brought home to the company that before issuing the policy the agent has attempted so to do. *Morse v. Insurance Co.*, 21 Minn. 407. Without expressing an opinion upon the correctness of this view, it is sufficient to say that in the case at bar the evidence that the local agent telegraphed applications for immediate insurance completely removes the ground for contending that the Greenwich Company, by dating its policy back to the date of the application and evidencing a contract from that time, recognized the power of its local agent to make it. It is entirely consistent with all of Ralph's testimony that all local agents in Detroit telegraph for authority to accept risks to attach at once. We do not mean to say that even such a course of business, if not known to the public, would exempt companies pursuing it from the effect of local usage upon the apparent authority of their agents, if the usage were proven. Nor do we deny that a usage may be established by the uncontradicted evidence of one witness when he is explicit as to its duration, certainty, and notoriety, (*Robinson v. U. S.*, 13 Wall. 363;) but we do not find any such explicit statements in Ralph's evidence. Adams' testimony as to the usage is even less decided. Whether a usage exists is for the jury on conflicting evidence; but, before the jury can be allowed to consider the question, there must be some evidence tending to establish a well-defined usage, uniform and notorious. There was no evidence of this kind in this case. The question of usage should not have been submitted to the jury. The court erred in so doing, and error has been properly assigned, on exception duly taken. The error was prejudicial. Without the proof of the usage claimed, there was no evidence that Ward had actual or apparent authority to make the contract sued on.

It is clear that he had no actual authority to make binding contracts of insurance on vessels. From the circumstances that he received premiums, that he acted for the company in the adjustment of losses, that he did bind the company as to cargoes, that he may have taken

charge of wrecking expeditions, that he received proofs of loss for the company, and that he received notices of abandonment without objection by the company, Ralph had no right to infer that he had authority to bind the company as to vessels when Ralph knew that he had no authority to issue hull policies, but that such policies were issued by the general agent of the company on an application forwarded by him.

The argument is pressed upon us that, even if Ward had no authority to bind the company to hull insurance, he had authority to agree upon applications to be submitted for acceptance by the general agent, and that the general agent, by accepting the application he actually submitted for acceptance, in fact accepted the application he ought to have submitted. This, it seems to us, is a non sequitur. The minds required in this case to meet in order that a contract should be made were those of the applicant and the general agent. If the proposition of the former was never submitted to the latter, how could their minds have met? Whether, when an insurance company holds an agent out as the proper person to receive and forward applications, and an application which would have been accepted is negligently altered by the agent of the company, so that, when accepted, it does not cover a loss which would have been covered had the application been properly forwarded, the insurance company can be held liable for the injury thus occurring through the negligence of its agent, is a question not presented on the record before us, because the declaration in the court below was on a contract to insure. A similar question is suggested by *Senator Colden* in the case of *Perkins v. Insurance Co.*, 4 Cow. 645, 664, and is answered in the affirmative. We express no opinion on the point.

Numerous errors—64 in all—were assigned. Many of them were based on rulings wholly within the discretion of the court, and others were frivolous, because plainly without prejudice. It has been necessary for us to consider but one of them in the view we have taken of the case, but we allude to their number and character to deprecate a practice which so largely and uselessly increases both the costs and the labors of the court.

The judgment of the court below will be reversed, with instructions to order a new trial, the costs of the error proceedings to abide the event of a new trial.

HAMMOND, J. I concur in this reversal, but am not quite willing to assent to what seems to me a too broad proposition as to the force of local usage or custom. The opinion of this court and the charge below, in my judgment, overlook the essential element of acquiescence in the custom, express or implied. A local usage may, and often does, bind a party to a contract against his will; but this is not because he cannot free himself of the custom, but because he has not done so in the given case. Custom has not the force of a statute or other established law in the sense that it requires an act of legislation to rid one's self of it. The insurance company may, if it chooses, refuse to do business according to the custom, and act outside of it; nor is it necessary that it shall bring home a knowl-

edge to every customer that it is doing this in every instance. It will be presumed that it is doing business according to the usage, until the contrary appears, undoubtedly; and even where it has established its own course of dealing, contrary to the general usage, it may, in particular instances, by acquiescence or the peculiar circumstances, bind itself according to the custom, or, rather, be held to have done so; but this is not the broad proposition of the opinion of the court "that, if there was a well-defined usage, by which local agents of foreign insurance companies could make binding contracts on application for insurance to attach the same day, Ward could bind the company accordingly, whatever his private instructions."

This seems to me a denial to the company of the indisputable right to make contracts according to its will, contrary to the usage. If the company's instructions were "private" in the sense that they were concealed, except when displayed as occasion might require to avoid a risk, while otherwise the usage was followed, the usage would prevail unless the instructions had been brought home to the applicant; but this would be because of the concealment, or because, we should rather say, of the fact that the company had acquiesced in the usage instead of discarding it, as it had proposed or pretended to do. The company cannot take the benefits of the usage, and yet spring its instructions, either public or private, when they serve to avoid the particular risk. But if in good faith and in fact it does business in its own way, contrary to the usage, it is the business of the applicant, in that case as in others, to inform himself of the authority of the agent, and he cannot rely on the general usage if the company had not conformed to it, but set up against it, albeit he may have been ignorant of the fact that the company had so discarded the usage. It all depends upon the conduct of the company and its agents, and the question of fact is whether it has substantially followed the custom, or has substantially established a different course of dealing and business habit of its own. This particular applicant may show that it has followed the custom, more or less, and the company may show that it has not. If, in the especial relation of its habit to him, the circumstances fairly show that the company has acquiesced in the custom, it will be bound by it; but if the circumstances show that the company has a special custom of its own, and in dealing with this applicant has done nothing to bind it to the general custom of other companies, or to mislead him to his injury, the operation of the general custom cannot force upon it a contract it did not make, or which was in violation of its instructions to its agent. If, unfortunately, the applicant assumes that this particular company is doing business according to the general custom, when it is not in fact doing so, the misfortune is his, and not the company's.

If the opinion of the court is to be construed, as I fear it may be, to go further than I have indicated as a correct view of the law, I cannot assent to it. On the new trial which we have directed I think the jury should be instructed to decide whether the insurance company acquiesced in the custom, or did business in another way; and, if the latter, whether, notwithstanding that fact, it dealt with

the plaintiff below so as to mislead him into the belief that it was taking his risk under the general custom, and contrary to its own habit of doing business. If he was not so misled, he cannot have the benefit of an insurance which he unfortunately assumed that he had provided upon the notion that all companies were following the ordinary usage, while the fact was this company was not.

DOUD et al. v. NATIONAL PARK BANK OF NEW YORK.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1893.)

No. 84.

GUARANTY—NOTICE—CONSIDERATION.

A personal guaranty given by stockholders and directors of a bank to another bank, in consideration of "loans, discounts, or other advances to be made," for the repayment of any indebtedness thus created, imposes a liability on the guarantors, when acted on by the guarantee, though no notice of acceptance of the guaranty was given; for the contract shows a personal interest of the guarantors in the advances, constituting a consideration moving to them.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

Action by the National Park Bank of New York against Edward Doud and others to recover upon a guaranty. Judgment for plaintiff. Defendants bring error. Affirmed.

R. H. Wilhoyte and Thomas R. Roulhac, (Wilhoyte & Harris, on the brief,) for plaintiffs in error.

W. A. Gunter, (Semple & Gunter, on the brief,) for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The defendant in error, the National Park Bank of New York, brought its action below against the plaintiffs in error on a written guaranty expressed in the following words:

"Whereas, the First National Bank of Sheffield, Alabama, desires to establish a credit with the National Park Bank of New York whereby it may obtain advances, loans, or discounts from the said National Park Bank: Now, therefore, the undersigned, being five in number, and stockholders and directors of the bank first above named, to wit, Charles D. Woodson, Robert Cloud, James R. Crowe, Edward Doud, J. G. Chamberlain, in consideration of one dollar to each of them in hand paid, the receipt whereof is hereby acknowledged, and of the said loans, discounts, or other advances to be made, do hereby jointly and severally guaranty, promise, and agree to and with the said National Park Bank that the said First National Bank of Sheffield, Alabama, shall repay on demand to the said National Park Bank any and all sums in which the first-named bank shall be or become indebted or liable to the said National Park Bank by reason of any or all of said discounts, loans, or other advances, with interest thereon, as the same may properly accrue, at the rate of six per cent. per annum; and, in default of such payment by the said First National Bank of Sheffield, Alabama, the undersigned hereby jointly and severally

agree to pay the same on demand, together with any interest which may have accrued thereon, and to fully indemnify and save harmless the said National Park Bank against all loss, damage, and injury by reason of said loans, discounts, or advances, the same not to exceed at any one time an aggregate of twenty-five thousand dollars of principal. This obligation is to be a continuing one for a period of eight months from its date, and is to apply to and cover all overdrafts, loans, advances, and discounts made as above named during the period.

"Dated at Sheffield, Alabama, this 13th day of May, 1889.

"Ohas. D. Woodson.

"Robert Cloud.

"James R. Crowe.

"Edward Doud.

"J. G. Chamberlain."

It alleged that said writing was accepted as a security and indemnity for advances, loans, and discounts to be made by it to the said Sheffield Bank, upon the faith of which it did make such advances, loans, and discounts to said Sheffield Bank, on account of which a balance is overdue, unpaid, and owing the guarantee bank from said Sheffield Bank and the said guarantors. The plaintiffs in error demurred to the declaration, on the ground that the complaint does not show that notice of the acceptance of said guaranty was given the guarantors. This demurrer being overruled, the same defense, in two phases of it, was presented by pleas, which were stricken out on motion of the plaintiffs, and, the case going to trial, judgment was rendered against the guarantors, who sued out a writ of error, and assigned these specifications of error:

"(1) That the circuit court erred in overruling the demurrer of the plaintiffs in error, defendants below, to the complaint of the defendant in error, plaintiff below; (2) that the circuit court erred in sustaining the demurrers of the defendant in error, the plaintiff below, to the second plea of plaintiffs in error, defendants below, to the complaint in this cause; (3) that the circuit court erred in sustaining the motion of the defendant in error in the court below, to strike out the portions of the third plea of the plaintiffs in error, which was in words and figures as follows, to wit: 'Defendants aver that they had no notice that plaintiff had made any advancements, loans, or discounts to or for the First National Bank of Sheffield, Alabama, or that plaintiff made any advancements, loans, or discounts to said bank on the faith or security of these defendants.'"

We are of opinion that there was no error in these rulings of the circuit court. The writing declared on shows that the guarantors had a direct personal interest in the credit to be extended to the principal debtor, and it expresses that a part of the consideration, and clearly the whole real consideration, moving them, is "the said loans, discounts, and other advances to be made." Concede that the writing is an offer of guaranty; it is given on a consideration moving to the guarantors through their bank, and in such cases the performance of the consideration by the guarantee implies its acceptance, completes the contract, and imposes the liability. Langd. Cas. Cont. p. 987. The precedents on this subject are reviewed, and their doctrine stated, in *Davis v. Wells*, 104 U. S. 159. There is nothing in the case of *Sewing Mach. Co. v. Richards*, 115 U. S. 524, 6 Sup. Ct. Rep. 173, to support the contention of the plaintiffs in error in this case. There it affirmatively appeared that there was not

a contemporaneous acceptance, and it did not appear that any consideration moved from the guarantee to the guarantors, or that the guarantors had any interest in the matter except as purely accommodation indorsers in case their sufficiency was approved and their guaranty accepted by the sewing machine company.

The judgment of the circuit court is affirmed.

ZIMPELMAN v. HIPWELL.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1893.)

No. 65.

1. PAROL EVIDENCE TO VARY WRITTEN CONTRACT.

The purchaser of a mine received a deed purporting to convey a three-fourths interest therein, for which he paid partly in cash, and gave his note for the balance, knowing that the grantor at the time owned only a half interest. The grantor represented that he had an option of another fourth, and orally promised to purchase and convey it to the grantee. *Held*, that the grantee, in a suit on the note, could not introduce parol evidence to prove the oral promise.

2. EVIDENCE—PROOF OF FOREIGN JUDICIAL PROCEEDINGS.

Legal eviction from a mine in Mexico can be proved in a United States court only by a certified copy of the record in the Mexican court, and not by parol evidence of the agent of the defendant in the eviction proceedings.

3. NEGOTIABLE INSTRUMENTS—FAILURE OF CONSIDERATION—EVIDENCE.

Where a promissory note is given for the balance due for the purchase of a mine, and in a suit thereon defendant fails to sustain, by proper evidence, his allegations that the title has failed in whole or in part, or that he has been, or is liable to be, evicted by a superior outstanding title, of which he had no notice at the time of purchase, the court should direct a verdict for plaintiff.

4. APPEAL—APPEALABLE ORDERS—REFUSAL TO GRANT NEW TRIAL.

A refusal of a federal court to grant a new trial is not reviewable on writ of error.

In Error to the Circuit Court of the United States for the Western District of Texas. Affirmed.

The statement of the case in the brief of plaintiff was adopted by defendant in error, and sanctioned by the court. It is as follows:

This is an action at law on a promissory note, brought in the United States circuit court for the western district of Texas on the 26th of March, 1890, by the defendant in error, R. J. Hipwell, against the plaintiff in error, George B. Zimpelman.

On April 7, 1892, the plaintiff below filed his "first amended original petition," alleging:

"That heretofore, to wit, on the 6th day of April, 1890, said defendant made, executed, and delivered to plaintiff, for a valuable consideration, his certain promissory note, in words and figures substantially as follows:

"San Diego, California, April 16, 1890.

"On or before thirty days after date, without grace, for value received, I promise to pay to the order of R. J. Hipwell the sum of three thousand and three hundred dollars, without interest.

[Signed]

"Geo. B. Zimpelman."

"Whereby he, the said George B. Zimpelman, became liable and promised to pay plaintiff the sum of three thousand and three hundred dollars, thirty days from said 6th day of April, 1890, together with legal interest on said sum from the maturity of said note. That plaintiff is the legal owner and holder of said note, and, though the same is long since due, defendant has wholly failed to pay the same, or any part thereof, excepting the sum of fifty dollars, on the 4th day of October, 1890, indorsed as a credit on said note, and the balance of said note remains unpaid. Plaintiff has often requested payment of same, and plaintiff says he has been damaged in the sum of five thousand dollars. Whereof plaintiff prays (the defendant having heretofore been cited, and now being in court) that he have judgment for the amount still due upon said note, and interest and costs of suit."

On April 7, 1892, defendant below filed his "third amended original answer," pleading:

First. A general denial.

Second. A plea of failure of consideration, as follows: "And for further plea and answer in this behalf, the said defendant, George B. Zimpelman, comes and says that heretofore, to wit, on or about March 19, 1890, said plaintiff sold to defendant three-fourths interest in a certain gold mining claim named 'El Senor,' situated in the territory of Lower California, republic of Mexico, in the mining district of Santa Clara, for the sum of \$7,300, for which defendant paid plaintiff \$4,000 in cash, and executed a promissory note, sued on and set out in plaintiff's petition, for the sum of \$3,300, the balance of the purchase money thereof; that, at the time of said sale, said plaintiff represented to this defendant that he (plaintiff) owned a one-half interest in said mine, and that he had an option to purchase from W. R. Moler, his one-fourth interest in said mine; and that he (plaintiff) then and there promised said defendant that he (plaintiff) would pay for Moler's one-fourth interest in said mine, and procure him to convey the same to said defendant, so as to make defendant a perfect title to said three-fourths interest in said mine.

"Defendant further says that in his plea of failure of consideration, heretofore filed in this cause, said defendant, through inadvertence and by mistake, alleged that plaintiff owned a one-half interest in said mine, whereas, in truth and in fact, he intended to allege, and now does allege, the fact to be, the said plaintiff, at the time of said sale, represented and claimed to own one-half interest in said mine, and represented to defendant that he also had an option to purchase from Moler his one-fourth interest in said mine.

"Defendant further says that relying, in full confidence, upon the representation of said plaintiff as aforesaid, that he did in fact own and have title to one-half interest in said mine, and that he would procure and pay for Moler's one-fourth interest in said mine, so as to make defendant a perfect title to said three-fourths interest in said mine, this defendant was induced to purchase, and did purchase, the three-fourths interest in said mine, and in consideration thereof said defendant paid the money aforesaid, and executed said promissory note to said plaintiff. The plaintiff has refused to secure the said one-fourth interest of said Moler, and has failed and refused to make to defendant any title whatever to said mine, except on the 19th of March, A. D. 1890, the said plaintiff executed to said defendant a certain deed conveying three-fourths interest in said mine, and reciting therein the consideration of \$1,000, whereas the true consideration of said deed was the sum of \$7,300, \$4,000 of which was paid in cash, and the said note was made and executed for the balance; that said deed was duly acknowledged by the said plaintiff on the 10th day of April, 1890, and, by mutual agreement of plaintiff and defendant, placed in escrow, to be delivered when the plaintiff perfected his title to the said three-fourths interest in said property; that said plaintiff never perfected his title to said three-fourths interest in said mine, and the said deed was never delivered to said defendant, but, as defendant is informed and believes, was delivered back to plaintiff or his attorneys. And defendant further says that after being put into possession of said mine, and expending about the sum of \$5,000 in the development thereof, over and above all the returns therefrom, which was wholly lost to defendant, that the said Moler, in whose name the said mine was denounced, and who had the legal title to

the entire mine, and the right of property, was put into possession of said mine by the mining judge of the district, and this defendant evicted therefrom, and that the said Moler continued to hold possession of said mine, and work the same, in such a manner as to damage the same in the sum of \$5,000.

"And defendant further says that the said plaintiff did not have the title to any interest in said mine, in his own name, at the date of said purchase, but the same was in the name of W. R. Moler, who claimed the same in his own right, and refused to recognize any interest in this defendant under the purchase aforesaid from the said plaintiff, and that said plaintiff has hitherto failed and refused, and still refuses and fails, to make defendant any title whatever to said mine, except the deed placed in escrow, as aforesaid, which was never delivered to defendant, or accepted by him.

"Wherefore, defendant says that in consequence and by reason of said failure of said plaintiff to make this defendant a title to said mine as he promised and undertook to do, the consideration for which said note was given and money paid, as aforesaid, has wholly failed, and this he is ready to verify. Wherefore, he prays judgment."

On April 7, 1892, plaintiff filed his "first supplemental petition," denying the allegation in defendant's special answer, and alleging "that if any agreement was ever made by plaintiff with defendant respecting the mine, or any interest therein described, besides the deed described in said answer and the note sued upon, then said agreement was an oral agreement, and not in writing, and he here pleads specially the statute of frauds, requiring all contracts respecting real estate, or any interest therein, to be in writing."

On the 7th day of April, 1892, said cause came on for trial before a jury, and during the progress of the trial (the plaintiff having introduced in evidence the note and deed) the defendant, George B. Zimpelman, testified in his own behalf as follows:

That he executed the note sued on as a part of the consideration of the purchase of a mining claim called "El Senor," situated in the territory of Lower California, republic of Mexico, in the mining district of Santa Clara, from the plaintiff, R. J. Hipwell. That he bought from said plaintiff three-fourths interest in said mining claim, and paid \$4,000 in cash, and executed the note for \$3,300, sued on, for the balance; the true consideration being \$7,300, and not \$1,000, as stated in the deed, (that sum being named in the deed, by agreement, for the purpose of reducing the stamps, under the Mexican regulations.) That the deed was delivered to him and left in escrow with the attorneys of both parties in San Diego. That the deed was held in escrow, and is in escrow now. It was left with the attorneys at San Diego. "I have tried to get it, and have written to Col. Welborn, the person it was left with, and he wrote that he did not have it." That he (witness) took possession of the mine about the 20th of March, 1890, and kept possession of the same until about the last of June of 1st of July, 1890.

"At the time the deed was executed, the agreement was: Hipwell would make a fresh deed, altogether, for the whole concern,—Moler's portion included; and at the time I was to buy, if I could, or Hipwell was to buy, the one fourth mentioned in that deed from Mr. Wentworth. I bought that. The deed was put in the hands of Col. Welborn by Hipwell. I do not think I was present at the time the deed was deposited with Col. Welborn. It was understood it was to be left there for the purpose of having it, and, when Moler conveyed his one-fourth interest, then Hipwell was to make the deed he promised he would, that is, a deed in full to the three fourths. Hipwell at the time claimed to own one half. The facts were that, as soon as Hipwell could get the title from Moler, he would then—and if he could, or I could—buy the one-fourth interest of Wentworth, then he would make a title which was to be sent down to the City of Mexico, regularly stamped, and the title would pass there, and the balance of the money was to be paid. I have never had the deed, from that day to this. I never accepted the deed that was placed in escrow with Col. Welborn. It was never delivered to me. I saw the deed at the time of its execution. After it was placed in the hands of Col. Welborn, I never saw it. The deed was put in the hands of Col. Welborn with the consent of both parties. I took possession of

the mine before the deed was executed, and before the deed was put in the hands of Col. Welborn, and before the 1st of April, 1890. I left the mine in May of that year, and left my son, George, in possession of the same. At the time of the contract and purchase, Hipwell told me that Moler had one-fourth interest in the mine, and he said that he (Hipwell) had an option to sell it. He conveyed me the three fourths, conveying his one half and Moler's one fourth. He claimed he had a right to sell Moler's part. He said he had an option to sell Moler's part, and he would sell it. I relied upon that representation by Moler, and I would not have made the trade, had I not relied upon it. The \$50 credit on the note is money I loaned to Hipwell at the time of the credit. The note was not put in escrow. Hipwell had said frequently to me that he wanted to buy Moler's interest, and wanted to get it at his own price. I have always told Hipwell that, if Moler makes the title, it is settled."

To this testimony the plaintiff objected on the following grounds: "The deed and promissory note being in evidence, and being in writing, shows the contract between the parties respecting the property; and parol testimony is not admissible to contradict the deed, or to show a contemporaneous agreement between the parties respecting the conveyance of the property, or to establish a covenant for further assurance on the part of Hipwell; and parol evidence is inadmissible to establish the agreement set up by the defendant respecting the acquisition and conveyance by Hipwell of the one-fourth interest in the mine, alleged to have been owned by Moler, for the reason, if such a contract was ever made, it should have been in writing, in accordance with the statute of frauds, requiring all contracts respecting the purchase and conveyance of any interest in lands to be in writing."

Plaintiff's objections were sustained by the court, and the evidence excluded from the jury; to which ruling of the court the defendant excepted at the time, and tendered his bill of exceptions, which were duly allowed by the court.

Defendant also, on the 7th day of April, 1890, called George Zimpelman, Jr., as witness for the defendant, who testified as follows: "That the defendant was his father, and about the 1st of April placed him in possession of El Senor mine, and left for Texas. That he continued to hold possession thereof, and work the same, until about the 1st of August, 1890, when W. R. Moler set up claim to said mine, and shortly afterwards Judge Zueta, the mining judge of Santa Clara district, Lower California, Mexico, summoned himself and Mr. Moler to appear before him, and that on doing so he stated to him that the mine had been denounced in the name of W. R. Moler, and that the title was in him, and he was entitled to the possession, and ordered him (said witness) to leave the mine, and he placed said Moler in possession of the same; that afterwards plaintiff (Hipwell) came to him (witness) while Moler was in town, and told him to take a six-shooter, and go up and take possession by force, but that he would not go up with him, as he feared Moler would kill him (Hipwell) if he did; that he (witness) was never able to get possession of the mine, nor had his father ever regained possession."

To this testimony the plaintiff also objected, on the ground "that the same was not competent to establish a legal eviction from the mine, and for the reason that, if defendant was evicted by virtue of any legal judgment or judicial order, a certified copy of the same, duly authenticated, should be produced, and the record could be proven as the law requires."

This closed the evidence, whereupon the court instructed the jury to return a verdict for the plaintiff for the full amount due upon the note sued on, with legal interest due thereon, to which defendant excepted at the time, and tendered his bill of exceptions, which was duly allowed by the court.

Under the charge of the court the jury returned a verdict for the plaintiff for the full amount due upon the note, with legal interest thereon, amounting to the sum of \$2,692.65, for which judgment was rendered.

On April 9, 1892, defendant filed his motion for a new trial, on the following grounds: "First. Because the court erred in excluding the evidence of George B. Zimpelman, defendant, upon the objection of the plaintiff, as shown by bills of exception marked 'Exhibit A,' filed in said cause, and

made a part hereof. Second. Because the court erred in charging the jury to return a verdict for the plaintiff for the amount of the principal of the note sued on, with interest thereon, and thereby withdrawing from the jury all evidence in the case, as shown by bill of exception marked 'Exhibit B,' filed in said cause, and referred to and made a part hereof,"—which motion was overruled by the court.

Joseph Paxton Blair and F. J. Beall, (Davis, Beall & Kemp, on the brief,) for plaintiff in error.

Millard Patterson, (A. G. Wilcox, on the brief,) for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The statement of facts found on the first 12 pages of the brief filed by plaintiff in error is expressly approved and adopted by the defendant in error, and therefore may be accepted as a correct statement of the case.

The plaintiff in error relies upon the following assignments of error for a reversal of this case:

(1) That upon the trial of said cause the court erred in excluding from the jury the evidence of George B. Zimpelman, defendant, upon the objections of plaintiff.

(2) The court erred in excluding from the jury the evidence of George Zimpelman, Jr., upon objections by the plaintiff.

(3) The court erred in instructing the jury to return a verdict for the plaintiff, R. J. Hipwell, for the amount of the note sued on.

(4) The court erred in overruling the motion for a new trial made by the defendant, George B. Zimpelman.

1. In support of this assignment, counsel for plaintiff in error claims that it is a well-settled rule at common law that proof may be used to contradict or vary the consideration recited in a deed or written contract; that in this case, the deed and note sued on forming a part of the more comprehensive transaction, the terms of which are not attempted to be expressed in writing, parol testimony as to such parts of the transaction as were not reduced to writing is admissible; that a total failure of consideration will avoid a commercial instrument resting upon it as completely as an original want of consideration; and that the failure to give a good title to land or personal property, which has been sold, is always a good defense, and, if the entire title fails, it will be a total failure; otherwise, only a partial failure. The correctness of these propositions may be safely admitted, but a reference to the bill of exceptions shows that the evidence of George B. Zimpelman, defendant, so far as it is affected by said propositions, was not excluded, but was only excluded in so far as it was offered by defendant to show (a) that Hipwell only owned a one-half interest in the mine at the time of the execution of the deed; and (b) that there was a contemporaneous agreement by which Hipwell was to secure a one-fourth interest in the mine from one Moler for the defendant, and convey the same, or cause the same to be conveyed, to the defendant.

(a) The answer of the defendant pleads a total failure of consideration by reason of an alleged eviction, but admits that, at the time of making the contract of sale of the three-fourths interest in the mine, the said Hipwell "represented and claimed to own one-half interest in said mine, and represented to defendant that he also had an option to purchase from Moler his one-fourth interest in said mine. Defendant further says that relying in full confidence upon the representations of said plaintiff, as aforesaid, that he did in fact own and have title to one-half interest in said mine, and that he would procure and pay for Moler's one-fourth interest in said mine, so as to make defendant a perfect title to said three-fourths interest in said mine, this defendant was induced to purchase, and did purchase, the three-fourths interest in said mine, and in consideration therefor said defendant paid the money aforesaid, and executed said promissory note, to said plaintiff." The answer does not charge any fraud on the part of plaintiff, Hipwell, but seems to base the defense in regard to the one-fourth interest solely upon the failure of Hipwell to acquire the same from Moler. So far as the bill of exceptions shows, no legal proof showing an eviction from the property, in whole or in part, has been offered. The rejected evidence, if admitted, could only have tended to show a partial failure of consideration. In *Greenleaf v. Cook*, 2 Wheat. 13, relied upon by defendant in error, it was held that, where a promissory note was given for the purchase of property, the failure of consideration through defect of title must be total, in order to constitute a good defense to an action at law on the note; but in *Withers v. Green*, 9 How. 213, reaffirmed in *Van Buren v. Digges*, 11 How. 476, it was determined that, in an action on a promissory note between the original parties, (in order to avoid circuity of action, mainly,) a partial failure of consideration may be set up as a defense pro tanto. The rule declared in the supreme court of Texas in regard to failure of consideration in whole or in part, pleaded by a purchaser under an executed contract, is found in *Price v. Blount*, 41 Tex. 472, as follows:

"Where the purchaser holds under an executed contract, as a deed with warranty, he cannot resist the payment of the purchase money on proof that the title may be doubtful. He must do more. He must show with reasonable certainty that the title has failed, in whole or in part, and that he has been evicted, or, if not, that he is liable to be evicted, by a superior outstanding title, of which he had no notice at the time of his purchase;" citing *Cooper v. Singleton*, 19 Tex. 266; *Woodward v. Rodgers*, 20 Tex. 178; *Johnson v. Long*, 27 Tex. 21; *Demaret v. Bennett*, 29 Tex. 263.

The contract between Hipwell and Zimpelman was executed. Zimpelman was put in possession of the property, and he admits that at the time of purchase he knew of the outstanding title of Moler to one fourth of the same, and he produces no legal evidence of any eviction.

(b) The terms of the contract of sale between the parties were reduced to writing, so far as the obligation to pay, the stipulations of Hipwell to sell and convey, and the thing to be sold and conveyed, were concerned; and they duly appear in the note sued on, and in the deed found in the record, which deed reads as follows:

"Know all men by these presents, that I, R. J. Hipwell, of San Diego, California, for and in consideration of the sum of one thousand dollars, (\$1,000.00,) lawful money of the United States, in hand paid me, the receipt of which is hereby acknowledged, do by these presents, grant, bargain, sell, and convey unto George B. Zimpelman, his heirs and assigns, all my right, title, and interest in and to the El Senor mine, situated at Almo, L. C., the same being a three-fourths of the whole; and I expressly hereby agree with Geo. B. Zimpelman that, should I purchase the other one-fourth interest in said mine, that I will not demand any portion of the profits of said mine until all debts against same are paid, including the amount paid me for my present three-fourths interest.

[Signed]

"R. J. Hipwell. [Seal.]

"Witnesses:

"W. L. Maury, Jr.

"W. F. Steagall."

The said promissory note and deed being in evidence, parol testimony was not admissible to contradict or vary the terms of the deed, nor to show a contemporaneous parol agreement between the parties respecting the property to be conveyed, nor to establish a covenant for further assurance on the part of the plaintiff, Hipwell. 1 Greenl. Ev. § 225; Railroad Co. v. Garrett, 52 Tex. 139. And authorities might be multiplied indefinitely. We conclude, therefore, that the ruling complained of in the first assignment of error was correct.

2. The testimony of George Zimpelman, Jr., was objected to by the plaintiff as not competent to establish a legal eviction from the mine, and for the further reason that, if the defendant was evicted by virtue of any legal or judicial order, a certified copy of the same, duly authenticated, should be proved, and the record should be proven, as the law requires. The defendant, in order to maintain his defense, was bound to show a legal eviction, (Westrope v. Chambers, 51 Tex. 188,) and to that end parol evidence is not admissible, (1 Greenl. Ev. §§ 501, 514.) This assignment of error is not well taken.

3. We think the court properly instructed the jury to find a verdict for the plaintiff. From the evidence in the case, the defendant did not show with reasonable certainty, by proper evidence, that the title to the property purchased had failed, either in whole or in part, nor that he had been evicted, or was liable to be evicted, by a superior outstanding title, of which he had no notice at the time of purchase. See Price v. Blount, supra.

4. Motions for a new trial are within the discretion of the trial court, and refusals to grant the same cannot be reviewed upon writ of error.

From a careful review of the whole case, and an examination of all the points and authorities urged by the plaintiff in error, we do not find any error in the proceedings, warranting a reversal of the judgment rendered in the court below; and it is therefore affirmed, with costs.

COULSON v. PANHANDLE NAT. BANK et al.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1893.)

No. 89.

1. ATTACHMENT—PROCEDURE—TEXAS LAW.

Rev. St. Tex. arts. 167, 2292, providing for the levy of attachment and execution on property where defendant has an interest, but to the possession of which he is not entitled, by service of notice upon the person who is entitled to possession, does not apply to a defendant who is a joint owner of a flock of goats, and has possession thereof. In such a case the proper method of levy is by taking possession of defendant's half interest. *Brown v. Bacon*, 63 Tex. 597, and *Clagett v. Kilbourne*, 1 Black, 346, distinguished.

2. SAME—MEASURE OF DAMAGES.

Where a flock of goats is unlawfully seized upon levy of attachment without malice, and subsequently returned after being clipped, there being no evidence to show that the flock had any usable value beyond the clipping of mohair, which was far short of the expense of keeping, nor that the goats depreciated in value during such detention, an instruction that the proper measure of damages is the lawful interest on the value of the flock from the time of seizure until it was returned is not prejudicial to the owner.

3. SAME—IRREGULARITY OF SALE.

The purchasers of a half interest in a flock of goats executed a deed of trust to secure the payment of the purchase money, authorizing the trustee to take possession and sell the goats at public auction at the courthouse door, "or in the place where said goats may be located when the said trustee takes possession." To save expense the trustee sold the goats at the courthouse door, without taking them into possession, or having them at the place of sale. There was no evidence that a fair price was not obtained, or that the owners were in any wise damaged by this method of sale. *Held*, that this irregularity rendered the sale voidable, not void, and was immaterial in a suit by a joint owner for damages for a prior seizure of the flock; for the voidable character of the sale can be asserted only in a direct suit for the purpose, wherein plaintiff offers to do equity with regard to the proceeds applied to his use.

In Error to the Circuit Court of the United States for the Northern District of Texas.

At Law. Action by J. C. Coulson against the Panhandle National Bank and F. M. Davis for damages for the unlawful seizure of a flock of goats. Verdict for plaintiff, who, being dissatisfied with the damages, moved for a new trial. The motion was overruled, and judgment entered. Plaintiff brings error. Affirmed.

M. L. Crawford, for plaintiff in error.

Seth W. Stewart, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. This action was commenced by the plaintiff in error against the defendants in error in the United States circuit court for the northern district of Texas to recover damages, actual and punitive, for the alleged wrongful seizure and conversion of a certain flock of Angora goats, alleged to have been the property

of the plaintiff. The facts of the case sufficiently appear from the bill of exceptions, as follows:

"Be it remembered, that on the trial of the above-entitled cause the plaintiff, J. C. Coulson, offered evidence tending to prove that Bessie Maddox was his sister, and the wife of S. S. Maddox; that in January, 1886, John and Andrew Nelson, by bill of sale in writing, sold to J. C. Coulson and Bessie Maddox 1,548 Angora goats for \$6,000,—\$1,000 cash, \$1,000 in four months, and \$4,000 in twelve months. The deferred payments were secured by deed of trust upon the goats, which deed of trust and notes were executed by J. C. Coulson and Bessie Maddox, the husband, S. S. Maddox, not joining in either paper. There was testimony tending to show that all the money was paid by Coulson, and that Mrs. Maddox was to have an interest in the flock in proportion to the amount of the purchase money paid by her or her husband. The evidence also tended to show that the plaintiff, Coulson, through his agents, had the exclusive possession and control of the entire flock of goats. The evidence also tended to show that on the 21st of October, 1886, Bessie Maddox, joined by her husband, S. S. Maddox, by writing, conveyed to J. C. Coulson all of their interest in the flock of goats, and that the written conveyance was in execution of a verbal agreement so to do, made some months before the date of the instrument. The evidence also tended to show that the instrument was not recorded until May 23, 1892, and was not intended by the parties as a conveyance of any interest in the flock of goats, but merely to cancel and annul the agreement made between Mrs. Maddox and Coulson when the goats were purchased from Nelson, by which Mrs. Maddox was to have an interest in the flock in proportion to the amount paid by her, or her husband for her use. On October 28, 1887, the Panhandle National Bank instituted two suits in the county court of Wichita county, Texas, against S. S. Maddox, and in each suit caused a writ of attachment to issue against the property of S. S. Maddox; the return to such writs showing that they were levied upon an undivided one-half interest in the flock of goats, then numbering two thousand head, and by taking possession of the same. The evidence tended to show that in making the levy the defendant F. M. Davis took possession of the entire flock of goats, and kept the same until November 12, 1887, when he sold an undivided interest in the same, under an order of the county court, to the Panhandle National Bank for sixty dollars, and that, after the sale of the entire flock, was delivered to said bank. Said sale was made at public outcry, and Coulson gave public notice that he was the owner of the entire flock. The testimony tended to show that the goats were worth from one dollar to five dollars per head; that the yield of mohair was from one to three pounds per head, and was worth from twenty to forty cents per pound. The defendants introduced testimony tending to show that the original purchase of the flock of goats from Nelson was made by Coulson and S. S. Maddox jointly, and that the conveyance to the same was made in the name of Coulson and Mrs. Maddox in order to defeat the creditors of S. S. Maddox, he being insolvent; and that S. S. Maddox paid one half of the money received by Nelson for the goats. The evidence also tended to show that Coulson and S. S. Maddox had joint possession of the goats when the writs of attachment were levied and before that time. The evidence also tended to show that the sheriff only levied on the undivided one-half interest in the goats claimed by Maddox, and only took possession of such undivided half interest. When the goats were sold the bank only purchased an undivided one-half interest in the flock, and took joint possession of the flock with Coulson, and never had or claimed the exclusive possession of the flock until the goats were purchased by the bank under the deeds of trust executed by Coulson and Bessie Maddox to Coffield to secure the sum due Nelson for the purchase money of the goats. The testimony tended to show that the deed from Bessie Maddox and her husband to J. C. Coulson, and dated October 21, 1887, and acknowledged October 31, 1887, was not in fact executed until long after the levy of the attachments, and that it was made to defraud the creditors of S. S. Maddox. January 16, 1887, Coulson and Bessie Maddox (her husband not joining) executed to Coffield two deeds of trust upon the flocks of goats to secure the Nelsons

In the payment of purchase money for the same; and, about \$2,300 of said purchase money remaining unpaid, the trustee sold said goats on August 1, 1888, and the bank became the purchaser at the sum of \$2,390, after which the bank claimed to be the owner of the entire flock, and sold the same. The deeds of trust under which the sale by the trustee, Coffield, was made, provides: 'And the said W. T. Coffield is hereby fully authorized and empowered to take possession of said goats, without process of law, and to sell the same to the highest bidder for cash at public vendue; said sale to be made at the courthouse door in Wichita Falls, or at the place where said goats may be located when said trustee takes possession of them by virtue hereof.' The proof was that the goats were sold at the courthouse door, and that, the goats being some distance in the country, to save the expense and trouble of moving them the trustee did not take them into possession, and they were not present when sold. The evidence also tended to show that the expenses of keeping and maintaining the goats by the plaintiff from January 16, 1886, until October 28, 1889, the time during which plaintiff had them in possession, exceeded the value of the mohair and increase of the flock, and that the expenses of keeping and maintaining said goats from the date of the sale of Maddox's interest under order of court, November 12, 1887, until the sale by the trustee, August 13, 1888, exceeded the value of mohair and increase of flock; and that from the fall of 1888, when the bank sold the goats after buying at trustee's sale, until the date of trial, June 9, 1892, the loss in the flock was greater than the increase, and the income from the mohair taken from the goats had not paid the expenses of keeping them. The evidence also tended to show that, after the levy on the sale of the Maddox interest in the goats, plaintiff, J. C. Coulson, intentionally and voluntarily abandoned the possession of his interest in said goats.

"In this condition of the proof, the plaintiff requested the court to instruct the jury as follows: 'If you find from the evidence that, at the date of the levy of the attachment, plaintiff and S. S. Maddox were joint owners of the goats, then you are instructed that the sheriff, in levying the attachment, was not authorized to take into his possession any part of said goats; and that the levy so made was illegal and void, and defendants can acquire no right under it;' but the court refused so to charge, but instructed the jury as follows: 'You are further instructed that the levy of the attachments introduced in evidence on the undivided one-half interest of S. S. Maddox in said goats, and the order of sale, and sale and deed thereunder to the Panhandle National Bank, conveyed to said bank an undivided one-half interest of the goats in controversy, unless the deed of S. S. Maddox and his wife, Bessie, of their interest in the goats, dated October 21, 1887, and acknowledged October 31, 1887, conveyed their interest before the attachment was levied on October 28, 1887, to plaintiff, Coulson, or unless, under paragraph No. 8, hereinafter given, you find plaintiff had acquired the interest of Maddox and wife in said goats.'

'(8) If you find that plaintiff, Coulson, had by verbal contract or assignment from S. S. Maddox, after the deed from Nelson to him and Bessie Maddox, acquired the title of Maddox and wife, and taken exclusive possession, through his agents, of the goats in controversy, and kept such exclusive possession until after the attachment of October 28, 1887, then he had title to all of said goats at the date of said levy. Or if you find under foregoing instructions that plaintiff acquired title to Maddox's one half of said goats under the deed from Maddox and wife, of October 21, 1887, then, no matter whether his title to the Maddox interest came to plaintiff in the one way or the other above indicated, you will find for plaintiff eight per cent. per annum interest on the value of one half of said goats from the date of said levy of said attachment to the date of the sale of said goats by the trustee, Coffield, on August 13, 1888; and the value of the goats upon which you allow interest should be, if you find for the plaintiff under this charge, the full one half of the goats, without reference to the mortgage to Coffield. (9) If you find from the evidence that at the date of the levy of attachment by the sheriff he took possession of all the goats and ousted the possession of the plaintiff, and would not permit plaintiff nor his agent to have any control over said goats, then you will find for plaintiff eight per cent. per annum interest on the full value of one half of said goats from the date of the levy of said attachment on October 28, 1887, to August 13, 1888, the date

said goats were sold under trust deed by Coffield.' The half of the goats referred to in this paragraph of the charge was the half recognized as plaintiff's by defendants, and not levied on. '(11) The deed from W. T. Coffield, as trustee, to the defendant bank, divested all interest of plaintiff in the goats in controversy and invested it in said bank at its date, to wit, on August 13, 1888.'"

The jury returned a verdict in favor of the plaintiff for the sum of \$316.65. The plaintiff, not satisfied therewith, moved for a new trial, and, that being refused, brought the case to this court for review, assigning errors as follows:

"First. The court erred in holding that the levy of the writs of attachment upon an undivided one-half interest in the goats, by taking actual possession thereof, was valid; the said levy should have been made by serving notice of the writ upon the party in charge of the flock of goats, according to the laws of the state of Texas. Second. The court erred in holding that the measure of plaintiff's damage was 8 per cent. interest on the value of the goats unlawfully seized by the defendants, from the day of the seizure until they were sold under the deeds of trust executed by Coulson and Bessie Maddox. Third. The court erred in holding that the sale of the trustee, Coffield, divested the title to said goats out of the plaintiff, and vested the title in the defendant the Panhandle National Bank."

1. There was evidence tending to show that the plaintiff, Coulson, and S. S. Maddox were the joint owners and had joint possession of the flock of goats when the writs of attachment against Maddox were levied; that only the interest of Maddox was levied upon, and that the sheriff took possession only of the half interest belonging to Maddox. Article 167, Rev. St. Tex., provides that "the writ of attachment shall be levied in the same manner as is or may be the writ of execution upon similar property;" and article 2292 of the same Revised Statutes provides that "the levy upon personal property is made by taking possession thereof when the defendant in execution is entitled to possession. Where a defendant in execution has an interest in personal property, but is not entitled to the possession thereof, a levy is made thereon by giving notice thereof to the person who is entitled to the possession, or one of them where there are several." Under this state of the law, it was not error on the part of the court to refuse to instruct the jury:

"If you find from the evidence that, at the date of the levy of the attachment, plaintiff and S. S. Maddox were joint owners of the goats, then you are instructed that the sheriff, in levying the attachment, was not authorized to take into his possession any part of said goats, and that the levy so made was illegal and void, and defendants can acquire no right under it."

If Maddox was an owner and in possession, it seems clear to us that the proper method of making the levy was by taking possession,—the same possession that Maddox had and was entitled to. The sheriff could not have treated Maddox's ownership and possession as an interest merely, and, if he had so treated it, there was no other person than Maddox to serve with notice of seizure. Joint possession and ownership cannot be assimilated to an interest in property similar to a partnership interest, and therefore the authorities relied upon by plaintiff in error—*Brown v. Bacon*, 63 Tex. 597; *Clagett v. Kilbourne*, 1 Black, 346—do not apply.

2. The measure of damage for the unlawful seizure, without malice, of personal property, where the property is subsequently returned to the owner, is the difference between the value of the goods at the time and place of the unlawful taking and at the time and place where returned, in addition to the value of the use during the time of detention. *Bates v. Clark*, 95 U. S. 204; 3 *Suth. Dam.* p. 529. Damages resulting from deterioration in price in such cases should be specially pleaded. *Harris v. Finberg*, 46 *Tex.* 79. There is no evidence in this case tending to show that the flock of goats seized had any usable value other than that resulting from the clipping of mohair during the time elapsing between the seizure under the writs of attachment and the practical return of the flock to the plaintiff in error, and the evidence shows that this usable value was far short of paying the expense of keeping and maintaining the flock. There was no pleading charging, and no evidence tending to show, that the goats depreciated in value between the time they were seized under attachment and the time they were practically returned to the plaintiff in error. Under these circumstances, we are of the opinion that the charge of the court holding the measure of the plaintiff's damages at 8 per cent. interest on the value of the goats unlawfully seized, from the day of seizure until they were sold under the deeds of trust, need not be considered, for, if erroneous at all, it was not prejudicial to the plaintiff in error.

3. The third assignment of error is based on the charge of the court that the deed from W. T. Coffield, as trustee, to the defendant bank, divested all the interest of plaintiff in the goats in controversy and invested it in said bank at its date, to wit, on August 13, 1888; and said charge is here assigned as error, because it is said that the trustee, under the deed of trust, did not take actual possession of the flock of goats before proceeding to sell the same to the highest bidder for cash. The trust deed executed by the plaintiff, and under which the goats were sold to pay the plaintiff's debts, provided: "The said W. T. Coffield is hereby fully authorized and empowered to take possession of said goats without process of law, and to sell the same to the highest bidder for cash at public vendue;" and "said sale to be made at the courthouse door in Wichita Falls, or in the place where said goats may be located when the said trustee takes possession by virtue hereof." The proof was that the goats were sold at the courthouse door in Wichita Falls, and, to save expense and trouble of moving them, the trustee did not take them into possession, and they were not present when sold. There was no evidence tending to show that a fair price was not obtained at the sale, or that the plaintiff was in any wise damaged because of the failure of the trustee to take actual possession of the goats before making the sale. As a general rule, the power of sale given in a deed or mortgage must be strictly followed in all its details, in order to render the sale thereunder valid, (*Perry, Trusts*, § 602,) and where the power is that, in case of default in payment, the trustee may enter and take possession and sell, entry and possession are in general prerequisite to a valid sale. *Id.*; *Roarty v. Mitchell*,

7 Gray, 243. In our opinion, the failure on the part of the trustee, Coffield, to take possession of the goats before the sale was an irregularity which rendered the sale voidable, but not void, and, if this were an action brought to test the validity of said sale, the error assigned on the judge's charge would be sufficient to reverse the judgment. This, however, is an action brought to recover damages for an unlawful seizure, long prior to said sale, by the trustee, and the material question in the case with regard to the sale is not whether it was strictly regular, but whether it operated as a practical return of the property seized to the plaintiff. Inasmuch as thereby the property was directly applied to the plaintiff's use and benefit, it would seem immaterial in this action for damages for a prior seizure whether the goats were taken into possession by the trustee before the sale or not, for it is clear that on the day of sale they were practically returned to the plaintiff by and through the acts of his agent under a power previously granted. Besides this, the voidability of the sale in question can only be asserted in a direct action for the purpose, wherein plaintiff shall have offered to do equity with regard to the proceeds of the sale which have been applied to his use.

The errors assigned in this court, and called to our attention by the plaintiff in error, are not well taken. The judgment of the circuit court is affirmed, with costs.

PLUCHE et al. v. JONES et al.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1893.)

No. 44.

1. DONATIO CAUSA MORTIS — MARRIAGE CERTIFICATE AND CONTRACT — LOUISIANA AND TEXAS LAWS.

A Hebrew marriage certificate, dated New Orleans, June 30, 1836, and containing a contract as to the disposition of land (donated to the bride by a previous marriage contract) after the death of the parties, and purporting to be signed by the bride and groom, two witnesses, the rabbi, and a person styling himself "secretary," was ineffective as a donatio causa mortis; for it was not in accordance with the formalities then required in such case either by the law of Louisiana, where it was executed, or of Texas, where the land was situated.

2. SAME—CONVEYANCE OF LAND.

Such certificate could not operate as a conveyance of the land, for it did not purport to convey any property otherwise than by ratifying the donation previously made, and it was not such an instrument as could pass title to land in Texas.

3. LIMITATION OF ACTIONS—RUNNING OF STATUTE—REMAINDER-MAN.

Rev. St. Tex. art. 3194, requiring suit to be brought within 10 years after the cause of action shall have accrued, does not run against a remainderman during the pendency of the life estate. *Cook v. Caswell*, 17 S. W. Rep. 385, 81 Tex. 678, followed.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Action of trespass to try title brought by Adelaide J. Pluche, Jeanette Lyon, Albert Emanuel, and others, against D. M. Jones and others. The circuit court instructed the jury to return a verdict for defendants, and gave judgment accordingly. Plaintiffs bring error. Reversed.

H. C. Mayer, (H. Chilton and Ben B. Cain, on the briefs,) for plaintiffs in error.

H. M. Whitaker, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The facts necessary to the consideration of this case sufficiently appear in the following extracts from the bill of exceptions found in the record:

A jury having been duly impaneled and sworn, as the law provides, plaintiffs read their second amended original petition, filed January 17, 1891, being a formal petition of trespass to try title, under the statutes of Texas, to the following property, to wit: "A certain tract of land," etc. Defendants read their answer, consisting of plea of not guilty, special pleas of three, five, and ten years' limitations, and improvements in good faith, under said statutes of Texas; also disclaimers by each defendant to all the land sued for, except the number of acres claimed by each of them, respectively. Plaintiffs prove title from sovereignty of the soil to Sarah Ann Duncan, as colonist, June 16, 1835, for all the land sued for, to wit, the Sarah Ann Duncan league of land, and title from Sarah Ann Duncan to Albert Emanuel for an undivided half of said league, June 25, 1836. Plaintiffs next offered in evidence copy of a marriage contract between Albert Emanuel and Louisa Clarentina Hart, dated June 29, 1836, as follows, to wit:

"Marriage Contract.

"Louisa C. Hart with Albert Emanuel.

"29th June.

"Be it known that this day, before me, David L. McCay, a notary public in and for the city of New Orleans, duly commissioned and sworn, herein representing William Boswell, a notary public, now absent from the state, duly authorized by a resolution of the legislature of this state, approved on the second day of March last past, 1836, personally came and appeared Miss Louisa Clarentina Hart, of this city, aged twenty-two years, legitimate daughter of Simon Moses Hart and Rachel Levy, dwelling in this city, the said daughter herein proceeding with the consent and assistance of her said father and mother, present with her, and stipulating in her own name, of the one part, and Mr. Albert Emanuel, of the state of Coahuila and Texas, aged twenty-eight years, legitimate son of Joseph Emanuel and Adelaide Hart, of Arolson, Prime Walder, Europe, the said appearer herein stipulating in his own name and behalf of the other part, which appearer declared that in contemplation of the intended marriage which they bind themselves, each to the other, to solemnize whenever thereunto required, either of them by the other, they have made, and by these presents do make, the following matrimonial agreements: There shall be a community of acquests and gains between the said parties, and the same shall be regulated by the Civil Code now in force in this state, all laws, customs, and usages of other countries to which they may hereafter remove to the contrary notwithstanding. All debts contracted previous to said intended marriage shall be borne and paid by the party with whom they shall have originated, and the other party and his or her estate shall not in any manner, nor under any circumstances, be made nor held liable therefor. And thereupon the said intended husband declared that, as a testimony of his affection to his said intended wife, he does hereby make unto her donation

inter vivos propter nuptias of the following described lands, situated in Texas:

- (1) Two thousand nine hundred and fifty-two acres of land, situated near the Neches, on the waters of Elkhart creek, the estimated value of which is two thousand dollars.....\$ 2,000
- (2) Three thousand and seventy acres of land fifteen miles from Soda lake, and twelve miles from the line which divides the United States from the republic of Mexico, the estimated value of which is two thousand dollars..... 2,000
- (3) Three thousand and seventy acres of land located on the river Attoyac, the estimated value of which is two thousand dollars..... 2,000
- (4) Two thousand nine hundred and fifty-two acres of land near the Sabine bay, the estimated value of which is two thousand dollars.... 2,000
- (5) Two thousand nine hundred and fifty-two acres of land adjoining the above-described tract, the estimated value of which is two thousand dollars..... 2,000
- (6) Two thousand nine hundred and fifty-two acres of land situated on the borders of the Sabine, about two miles from the mouth of the river Neches, the estimated value of which is two thousand dollars.. 2,000
- (7) Eleven thousand and seventy acres of land situated above and below the main road leading from Nacogdoches to Gains' Ferry, between the Bayou Palagacho and Sabanillo or Bridges' creek, the estimated value of which is eight thousand dollars..... 8,000

\$20,000

—Amounting in the aggregate to the sum of twenty thousand dollars; which donation is hereby accepted by the said intended wife, which tracts of land were acquired by the said Albert Emanuel from Mr. John S. Turner, by act passed before David L. McCay, representing the said William Boswell, notary public, on the twenty-eighth day of June, current.

“Done and passed at New Orleans, in presence of Edward Barnett and Francios N. Mioton, witnesses, who have signed their names with the parties and me, notary, on this twenty-ninth day of June, in the year of our Lord one thousand eight hundred and thirty-six, and sixtieth of the independence of the United States of America.”

Plaintiffs next offered in evidence original Hebrew marriage certificate, dated June 30, 1836, with depositions of Henry Cohen, in which he states that he is acquainted with the English language, and can both speak and write it, and also the Hebrew language, and that he can translate the latter into English. He says: “I have examined the parchment in question, and find it is written in Rabbinical Hebrew. It purports to be executed in Orleans, America, and is dated, according to computation of time in this country, the 30th of June, 1836. It purports to be a marriage certificate and a contract as to the disposition of property between the bride and groom mentioned in the certificate, both of the property mentioned in the body of the certificate and that left upon their death. I annex the translation to my answer, marked ‘B’ by the notary. It is customary to leave the marriage certificate in the hands of the family of the bride.”

The translation is as follows:

“B.

“Translation of Hebrew Marriage Contract.

“On the 4th day from Sabbath, the 15th of the month of Tamuz, in the year 5596 from the creation of the world, according to the date which we date here in Orleans, in America, he, Mr. Albert Emanuel, the son of Mr. Judah, of the same surname, says to her, this virgin Louisa, the daughter of Mr. Simon Hart, ‘Be thou my wife according to the law of Moses and Israel, and I will serve and honor and maintain and sustain you after the manner of Jewish men, who serve, honor, and maintain and sustain their wives faithfully. And I bring you as a maiden gift 200 silver zuzim, to what you are by law entitled, and your maintenance and your clothing and your support, and all other requirements to which you are entitled according to the custom of all the world.’ And this

virgin Louisa consents and becomes to him a wife, and the dowry that she brings to him from the house of her father, whether in silver or in gold, whether in ornaments or presents of clothing or of bed furniture, three hundred dollars' worth. And this bridegroom, Mr. Albert Emanuel, consents and adds to it from his own property twenty thousand dollars' worth as an inheritance in the state of Texas, making altogether \$20,300 worth. And thus says this bridegroom, Mr. Albert Emanuel, 'The responsibility of this written contract and this supplement and this dowry I have taken upon myself even to the coat from off my shoulders, in life or in death, from this day, and forever.' And the responsibility of this written contract, and the supplement he takes upon himself, this bridegroom, Mr. Albert Emanuel, as well as the onus of all copies of this contract and supplement, as is customary among the daughters of Israel, which are made after the dicta of our sages of blessed memory, and not the empty form, and not a useless contract; and a pledge from Mr. Albert Emanuel, this bridegroom, to Louisa, the daughter of Mr. Simon Hart, according to all that is written and explained above, in the proper way pledged by him to be all completed and thoroughly established.

[Signed]

"Rabbi Menachem, the Son of Jacob, Minister.

[Signed]

"Albert Emanuel, Bridegroom.

"Witnesses:

"Abraham, the Son of Moses, Righteous Judge.

[Signed] "Sam'l Hyams and Joseph De Pass.

"The conditions agreed upon between the bride and groom that if, God forbid, the groom dies, the survivor becomes the heir, then her children, and if the bride, God forbid, dies, the groom becomes the heir, according to our holy law, the husband becoming the heir of the wife. And the groom, the above-mentioned Albert Emanuel, entitles the above-mentioned bride, Louisa, daughter of Mr. Simon Hart, from now to all the proper and established gift above mentioned, all of which is proved and clearly established.

[Signed]

"Albert Emanuel, Groom.

"Louisa Hart, Bride.

"Witnesses:

"Abraham, the Son of Moses, Righteous Judge.

"Samuel Hyams and Joseph De Pass.

"Attest: [Signed.] A. J. Marks, Secretary."

Plaintiffs proved that Albert Emanuel died, intestate, August 8, 1851, and left surviving him Mrs. Louisa C. Emanuel, his wife, and these plaintiffs, her children by said Emanuel, who were and are his only surviving heirs at law; that Mrs. Louisa C. Emanuel died on the 16th day of November, 1888. Defendants proved title to themselves from James Boulter for 1,376 acres of said league of land, and from Charles Baldwin to 1,027 acres of said league of land. Boulter derived title to an undivided half of said league from Mrs. Sarah Ann Duncan, and Charles Baldwin derived title to the other one half by deed from Mrs. Louisa Emanuel, dated January 2, 1855, also another deed, dated February 10, 1860, both deeds conveying all her interest in said league of land, to wit, all her right, title, and interest; also proved partition between Boulter and Baldwin interest on the 1st day of March, 1867. Defendants also proved continuous occupation of the different tracts claimed by them for 10 years prior to the bringing of suits, and, in case of B. D. Harry, payment of taxes and deeds duly registered; also value of lands without improvements. The vital question was as to construction of said marriage certificate. The court instructed the jury as follows: "It has been shown by the marriage contract offered in evidence that, at the death of Albert Emanuel, Louisa C. Emanuel, his wife, took an absolute title in fee simple to the land in controversy, and, she having conveyed the same to Charles Baldwin, the plaintiffs in this suit have no title to the same. You will therefore find for defendants."

A verdict having been rendered for the defendants, in accordance with the charge of the court, and a judgment entered thereon, the plaintiffs, after vainly moving for a new trial, because of the alleged

erroneous charge of the court, brought the case to this court for review, assigning error as follows:

"The court erred in his charge to the jury, which was as follows, to wit: 'It has been shown by the marriage contract offered in evidence that, at the death of Albert Emanuel, Louisa C. Emanuel, his wife, took an absolute title in fee simple to the lands in controversy, and, she having conveyed the same to Charles Baldwin, the plaintiffs in this suit have no title to the same. You will therefore find for the defendants.' And it was erroneous for the court to refuse plaintiffs' motion for a new trial, pointing out the errors complained of in said charge, as follows, to wit: 'First. The marriage certificate charged to be a marriage contract is not and was not a marriage contract, but, if anything at all, a mere attempt to make a donation mortis causa under the laws of Louisiana; and not being made in accordance with law, but against it, was absolutely void, and of no effect. Second. Said marriage certificate was not a conveyance of property. It was not such an instrument as passed title to real property in Louisiana or Texas, and, as such, is and was of no force and effect, and in fact a nullity. Third. If said certificate was in effect a conveyance of property, the same was not offered in evidence by defendants as a link in their chain of title or otherwise; and the same could not and did not form a part of their title before the jury. Fourth. If said marriage certificate was a valid contract conveying property, yet it could not and did not take effect until the death of the donor, Albert Emanuel, August 8, 1851, and was governed by the laws then in force and effect. If it passed any title at all from Albert Emanuel to Mrs. L. C. Emanuel, the title so passed was a life estate in the separate property of said Albert Emanuel, with remainder vested in her children, and Mrs. Emanuel did not acquire an absolute title, as charged.'"

It does not appear from the record whether the marriage contract referred to in the charge complained of was the marriage contract which was passed before a notary and two witnesses on the 29th of June, 1836, or the marriage certificate with supplemental agreement, which was entered into on June 30, 1836, before the Jewish rabbi and two witnesses, or both together, considered as contemporaneous and interdependent contracts. The former appears to have been a regular marriage contract, entered into and duly passed before a notary and two witnesses, according to the forms provided by the laws of Louisiana then and now in force. It, however, makes no disposition or proposed disposition mortis causa, nor does it appear that the lands in controversy were referred to therein; certainly not unless embraced within the vague description of the 11,070 acres of land situated above and below the main road leading from Nacogdoches and Gains' Ferry between the Bayou Palagacho and Sabanillo or Bridges' creek, the estimated value of which was \$8,000. The record negatively shows that the lands in controversy were not embraced in said marriage contract, because the statement is made therein that the lands donated were acquired by the said Albert Emanuel from Mr. John S. Turner by act passed before David L. McCay, notary public, on the 28th day of June, 1836; while it appears from the plaintiffs' evidence that the land in controversy was acquired by Albert Emanuel from Sarah Ann Duncan on June 25, 1836. The marriage certificate refers to the dowry brought by the bride of \$300 worth, and states that to this Mr. Albert Emanuel consents, and adds from his own property \$20,000 worth as an inheritance in the state of Texas; the parties evidently having in mind the donation inter vivos propter nuptias

described in the marriage contract. To the marriage certificate is attached a provision signed by the contracting parties, witnessed by "Abraham, the Son of Moses, Righteous Judge," and "Samuel Hyams and Joseph De Pass," as follows:

"The conditions agreed upon between the bride and groom that if, God forbid, the groom dies, the survivor becomes the heir, then her children, and if the bride, God forbid, dies, the groom becomes the heir, according to our holy law, the husband becoming the heir of the wife. And the groom, the above-mentioned Albert Emanuel, entitles the above-mentioned bride, Louisa, daughter of Mr. Simon Hart, from now to all the proper and established gift above mentioned, all of which is approved and clearly established."

This provision states the agreement and will of the parties with regard to the disposition mortis causa of the respective estates of the married couple.

The first contention of the plaintiffs in error in this court is that the marriage certificate charged to be a marriage contract is and was not a marriage contract, but, if anything at all, a mere attempt to make a donation mortis causa under the laws of Louisiana; and, not being made in accordance with law, but against it, it was absolutely void, and of no effect. At the time of the marriage of Albert Emanuel and Louisa Hart, marriage contracts in Louisiana were required to be made before a notary and two witnesses, and, when so made, could validly contain all stipulations with regard to donations inter vivos and mortis causa that were permitted by the law of Louisiana. *Fowler v. Boyd*, 15 La. 562; *Succession of Bellisle*, 10 La. Ann. 468-478. At the same time the law of Texas, which was the Spanish civil law, permitted parties intending to enter the marriage state to enter into such stipulations as they pleased, provided the agreement have nothing in it unlawful, dishonest, or forbidden by custom, (1 *Domat*, Civil Law, § 846;) and it would seem that under that law a marriage contract containing dispositions mortis causa should be executed and passed with the witnesses and formalities required for testaments, which are as follows:

"(1) Testament is a testimonial in which is contained and set forth the will of him who makes it, establishing or appointing his heir, and disposing, as he thinks fit, of his property after his death. L. 1, tit. 1 p. 6. It is of two sorts,—open and closed. The open or nuncupative will ought to be executed before a public escribano and three witnesses, inhabitants of the place; and, if the testator is blind, five are necessary; and, if there is no escribano, five witnesses of the place are requisite, unless they cannot be met with, and then three inhabitants of the place, or seven strangers or nonresidents, will be sufficient. L. 1, tit. 4, lib. 5, Rec. The closed or written will, which is made in secret, according to L. 2, tit. 1, p. 6, is delivered to the escribano, signed on the outside by the testator and seven witnesses, with the attestation of the escribano. L. 2, tit. 4, lib. 5, Rec." 1 *White*, New Recop. p. 98.

See, also, *Schmidt*, Civil Law Spain & Mex. 214.

The statute of the state of Texas of January 20, 1840,—and which seems to have been the law since that time,—permits parties intending to enter the marriage state to enter into such stipulations as they please, provided they are not contrary to good morals or to some rule of law, but prohibits any agreement in the marriage contract the object of which would be to alter the legal order of descent either with respect to themselves or what concerns the in-

heritance of their children or posterity which each may have by any other person, or in respect to their own children. Pasch. Dig. art. 4632; Rev. St. Tex. art. 2847. The same law provided that every matrimonial agreement must be made by an act passed before a notary and two witnesses. Pasch. Dig. art. 4633. It thus appears that both at the time the marriage contract was entered into and at the time Albert Emanuel died, (1851,) under neither the law of Louisiana, where the contract was made, nor the law of Texas, where the property sought to be affected is situated, was the marriage certificate with its supplemental contract made and executed according to the forms required by law. It seems to follow that the contention of the plaintiffs in error as to the nullity of the said certificate and supplemental agreement as a marriage contract is well taken.

The plaintiffs in error next contend that the marriage certificate and supplemental contract were not a conveyance of property, and, not being such an instrument as passed title to real property in Louisiana or Texas are and were of no force and effect. The said document was not intended to convey real property, nor does it purport to convey any property otherwise than in ratifying the donation inter vivos propter nuptias of the day before. It is therefore clear that it cannot be construed as conveying title to the property in controversy. These conclusions render it unnecessary to discuss the other objections urged against the marriage contract and the marriage certificate with supplemental agreement. As the marriage contract does not affect the property in controversy, and as the marriage certificate, with supplemental agreement, is of no effect as a disposition mortis causa, and is ineffectual as a conveyance of property, the charge of the court directing a verdict on the ground that "it has been shown by the marriage contract offered in evidence that, at the death of Albert Emanuel, Louisa C. Emanuel, his wife, took an absolute title in fee simple of the lands in controversy," was erroneous.

The defendants in error, however, contend that, although the reasons given by the court for instructing the jury to find for the defendants may be erroneous, nevertheless, if the conclusion is correct, and can be sustained by the other facts in evidence, the judgment ought not to be disturbed; and they rely, under the facts stated in the bill of exceptions, upon the following statute as a bar to plaintiffs' claims, to wit:

"Any person who has the right of action for the recovery of any lands, tenements, or hereditaments against another having peaceable and adverse possession thereof, cultivating and using and enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterwards." Rev. St. Tex. art. 8194.

The recitals in the bill of exceptions show that the defendants had title derived from Mrs. Louisa Emanuel by two deeds, one dated January 2, 1855, and the other February 10, 1860, both deeds conveying all her interest in the league of land in controversy, to wit, all her right, title, and interest; and that the defendants proved continuous occupation of the different tracts claimed by them for

10 years prior to the bringing of the suit. It is not, however, shown that the occupation referred to was peaceable and adverse, or that the defendants were cultivating, using, and enjoying the property. In fact, several presumptions, not warranted by the recitals in the bill of exceptions, must be made in behalf of the defendants in order to bring their case within the bar of the statute. There is another, and perhaps a better, answer. Albert Emanuel died, intestate, in 1851, leaving his wife and children surviving. Although Mrs. Emanuel took no estate in Albert Emanuel's lands, under the stipulation attached to the marriage certificate, she did take, under the statutes of the state of Texas, a life estate in one third of his lands, with remainder to his children. Article 1646, Rev. St. Tex. Mrs. Emanuel died November 16, 1888. The statute relied upon by the defendants in error does not run against a remainder-man during the pendency of the life estate. This appears by the language of the statute, and is well supported by authority. See *Cook v. Caswell*, 81 Tex. 678, 17 S. W. Rep. 385; *Beattie v. Wilkinson*, 36 Fed. Rep. 646; *Pickett v. Pope*, 74 Ala. 122, and cases there cited. The charge complained of was certainly erroneous as to one third of the lands sued for, if not for the whole tract, conceding, for the argument only, that, except as to Mrs. Emanuel's one-third interest, the action was barred by the statute. The judgment of the circuit court is reversed, and the cause remanded, with instructions to award a new trial.

TREUSCH et al. v. OTTENBURG et al.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1893.)

No. 50.

1. FRAUDULENT CONVEYANCES—GARNISHMENT UNDER MICHIGAN STATUTE.

The garnishment process provided for in 3 How. St. Mich. § 8091, is not strictly limited to legal demands and remedies, but includes rights and relief of an equitable character, such as reaching the proceeds of property which may have been acquired by the garnishee fraudulently as against the creditors of the person from whom the same was acquired.

2. SAME—PROVINCE OF COURT AND JURY.

In a proceeding under this statute to reach the proceeds of property alleged to have been fraudulently conveyed, the court cannot direct a verdict for defendant when the evidence shows that the debtor made the conveyance with fraudulent intent, and also tends to prove that the garnishee not only had notice of the fraudulent purpose, but also participated therein.

3. SAME—EVIDENCE—ADMISSIBILITY.

In such an action it is proper to prove that the debtor made false statements to a commercial agency as to the extent and character of his assets and liabilities; and it is not necessary that such statements should have been made in the presence of the garnishee, for they tend to show fraud on the debtor's part, and the garnishee's connection with the fraud may be subsequently shown.

4. SAME.

In such an action, when the bona fides of the debt for which the goods were transferred is questioned, and both the debtor and the garnishee are charged with fraud, it is competent for the debtor's bookkeeper to testify as to the estimated value of his book accounts, and as to the

garnishee's visits to the debtor's store, and how the two conversed together.

5. SAME.

In an action under the Michigan statute the court charged, in effect, that a creditor who receives in payment for his debt property which his debtor has acquired fraudulently, is liable if he had notice of such fraud, while a creditor who accepts property honestly acquired by his debtor but transferred with intent to defraud creditors, must not only have notice of the fraudulent intent, but must participate therein. *Held*, that this charge was not open to the objection that it told the jury that defendant was chargeable because of mere notice of the debtor's fraudulent intent in making the transfer, although defendant did not participate therein, and his debt was an honest one.

In Error to the Circuit Court of the United States for the Southern Division of the Western District of Michigan. Affirmed.

Niram A. Fletcher and George P. Wanty, for plaintiff in error.
A. R. Rood, for defendants in error.

Before JACKSON and TAFT, Circuit Judges, and HAMMOND, District Judge.

JACKSON, Circuit Judge. The defendants in error, as partners under the firm name and style of S. Ottenburg & Bros., having brought suit in the circuit court on several claims and demands contracted in the spring and summer of 1891 by Jacob Lustig for goods and merchandise sold him, and, having obtained judgment thereon against said Lustig for the sum of \$7,623.90, together with the costs of suit, thereafter applied for and caused to be issued a writ of garnishment against the plaintiffs in error, citizens of Michigan, and residents of Grand Rapids, in said state, for the purpose of reaching and subjecting to the payment of their said judgment funds and property, or the proceeds thereof, which it was claimed said garnishees either owed to said judgment debtor, or held by title or conveyance void as to his creditors, and which, under the laws of Michigan, was property applicable to the satisfaction of their judgment. No question is raised as to the correctness of the judgment against the principal debtor, nor as to the regularity of the garnishment proceeding, which conform to the statutes and practice of the state, under and by virtue of which the affidavit on which the garnishment is based constitutes the declaration or complaint, and the answer of the garnishee the defense, thus forming the issue for trial between the judgment creditor and the garnishee. While the matters or issues presented by the garnishment proceedings are triable at law before a jury, they are not limited or confined to strictly legal demands and remedies, but may involve and include rights and relief of an equitable character, such as reaching the proceeds of property which may have been acquired and appropriated by the garnishee fraudulently as against the creditors of the person from whom the same was received.

The statute of Michigan relating to the subject provides that, "if any person garnished shall have in his possession any of the property aforesaid of the principal defendant, which he holds by a conveyance

or title that is void as to creditors of the defendant, or if any person garnished shall have received and disposed of any of the property aforesaid of the principal defendant, which is held by a conveyance or title that is void as to creditors of the defendant, he may be adjudged liable as garnishee on account of such property, and for the value thereof, although the principal defendant could not have maintained an action therefor against him." 3 How. St. § 8091, enacted July 3, 1889. The supreme court of Michigan, in the case of *Heineman v. Schloss*, 83 Mich. 157, 47 N. W. Rep. 107, had occasion to construe this statute, and held that it enabled the creditor, by and through the agency of a garnishment proceeding, to reach and subject to the payment of his judgment against the principal debtor property or the proceeds thereof which the garnishee might hold by conveyance or title that was fraudulent as to creditors of such debtor, and that its effect was not to enlarge the liability of garnishees, but to render them liable at law in all cases where they could be reached in equity.

The garnishment proceeding in the present case was based upon that construction or view of the statute, and sought to charge the plaintiffs in error with the value or proceeds of property, consisting of tobacco and cigars, which it was claimed that Jacob Lustig, the principal debtor, had, in 1891, sold and transferred to them fraudulently as against his creditors. The sales and transfers of tobacco and cigars specially attacked as fraudulent amounted to about \$13,199.00, and extended over a period of about four months; that is, from the latter part of March to the middle of July, 1891. There was a verdict and judgment against the garnishees, to reverse which the present writ of error is prosecuted.

The issues of fact presented were: First, whether in making said sales the principal debtor, Jacob Lustig, intended to defraud his creditors; and, secondly, whether the plaintiffs in error were so connected with such fraudulent intent as to render said sales or the title acquired by them void as against the vendor's creditors. Upon the first question there is little or no controversy. The testimony, with all the attendant facts and circumstances, leaves no room to doubt that said Lustig, both in making his purchases of goods on credit and in selling the same to plaintiffs in error, intended to defraud his creditors. Neither the charge of the court below on this branch of the case, nor the finding of the jury thereon, is complained of. But the errors assigned relate to the second issue of fact, and to the instructions given by the court to the jury in connection therewith. When the testimony was closed, the garnishees moved the court to direct a verdict for them. This the court declined to do. This refusal is assigned as error; the plaintiffs in error, by their counsel, insisting that the evidence did not warrant the court in submitting the case to the jury. A careful examination of the testimony as set out in the bill of exceptions fails to satisfy or convince us that this action of the court was erroneous. The evidence, with the inferences that might be legitimately drawn therefrom, fairly presented such a case or questions of fact as should have been submitted to the jury under proper

instructions from the court. Without undertaking to set forth in detail all the facts and circumstances disclosed by the testimony which constituted such badges or "indicia" of fraud on the part of plaintiffs in error as made it proper for the jury to pass upon the case, it will suffice to state by way of general outline what the evidence either established or tended to prove. The plaintiffs in error, under the firm name of Treusch & Bro., were wholesale cigar and tobacco merchants at Grand Rapids, Mich. Jacob Lustig, the principal debtor, was their brother-in-law, and was taken into their employment in 1885 at a salary of \$10 per week. This employment at said wages continued until January, 1888, when the plaintiffs in error started a branch business in their store, called the Lustig Cigar Company, in which said Lustig was given or allowed one third of the net profits in consideration of his management and attention to the business of said company, the capital of which, consisting chiefly of tobacco and cigars, was furnished and supplied by the plaintiffs in error. This branch concern was not a success, and continued in existence until January 29, 1889, when the plaintiffs in error sold out the business to said Lustig, who thereafter conducted the same as sole proprietor. For the year it was in business prior to said sale the company seems to have made a net profit of \$1,064.86. In order to enable Lustig to make said purchase, he was allowed the whole of said profit, less his overdrawn account, was loaned by one of plaintiffs in error the sum of \$3,500, which, together with about \$2,800 held by them for Lustig's wife, or in her name, was applied on the purchase price or consideration to be paid by him, and, in addition thereto, he executed his two notes for \$1,000 each, due at 30 and 60 days. This transaction was entered upon the books of said Lustig and of plaintiffs in error in such way as to present the appearance of a purchase chiefly, if not entirely, for cash, and was calculated to create the impression that Lustig was worth and had invested in his business about \$8,000. It is, however, shown that he was without means, that he had little or nothing, and that the plaintiffs in error knew this fact. After Lustig's purchase and the commencement of business as sole proprietor of the Lustig Cigar Company, one of the plaintiffs in error, upon being asked for information concerning Lustig's financial condition by a representative of Bradstreet's Commercial Agency, exhibited a statement of said transactions as shown by their books, and on which said agency based its report of said Lustig's means and standing. This representative of the Bradstreet Agency states that "the substance of what Treusch told me was that Lustig was worth in the neighborhood of \$8,000, which he had invested in his business," which was substantially what the statement they furnished showed, and upon which said agency gave Lustig a rating of \$5,000 to \$10,000, by which was meant that he was estimated to be worth five to ten thousand dollars above his debts. The appellants are subscribers for and take the book of said agency, which they use in their business to get the commercial rating of parties with whom they deal or do a jobbing trade. In making said statement and report of Lustig's financial condition to said agency, the plaintiffs in

error did not disclose the actual facts of the transaction. They failed and omitted to state that Lustig had or purported to have borrowed from one of them \$3,500, and from their firm about \$2,800, which they held for his wife, to enable him to make the alleged purchase; and, further, that he was in fact worth nothing, although the transaction as entered on their books and furnished said agency showed that he was worth, and had invested in his business, fully \$8,000. One of said firm further represented to said agency in June, 1891, that they were willing to extend said Lustig such credit as he might ask, which statement, the evidence tends to show, was not made in good faith.

Lustig, after making said alleged purchase, and commencing business on his own account, made still stronger representations as to his financial condition to the local manager of the R. G. Dun & Co. Commercial Agency, stating that his stock and fixtures inventoried \$11,000, and that he had paid therefor \$9,000 cash and given two notes for \$1,000 each, and had then in bank to his credit \$1,600. These representations were known to be untrue and false when made, and were, from time to time, repeated; but upon the basis of their correctness said Dun Agency gave him a rating of \$5,000 to \$10,000, with good credit. Both Lustig and plaintiffs in error well knew that he was not entitled to that rating. During the year 1889, Lustig, after settling in some way said two notes of \$1,000 each, purchased goods to a considerable extent from the plaintiffs, in error, in settlement of which he, on December 2, 1889, executed his note to them for \$4,966.27, payable one year after date, with 7 per cent. interest. In addition to this, it is claimed that they loaned him \$2,000 on October 23, 1889, at 90 days, which, after one renewal, was paid in merchandise. During this first year of business Lustig purchased moderately of other parties on credit. From March 1, 1890, to July 31, 1890, his purchases amounted to about \$20,636.81. During the same period in 1891, or from March 1, 1891, to his failure, on July 18, 1891, he made purchases largely in excess of the requirements of his business, principally from 26 new houses, to the amount of \$40,292, generally on four months' credit. There was testimony tending to show that his letters proposing purchases from these new houses or firms were suggested by one of plaintiffs in error, who was often during that period in secret and private conference with said Lustig. From January 29, 1889, to the date of his failure, as appears from his books, Lustig drew out of the business on his personal account over \$10,000, which was never restored. Between March and the 18th of July, 1891, on goods purchased during that period, there was a shortage of 224,333 cigars,—a deficit by brands, amounting to over \$6,000,—which is unaccounted for. In addition to this, other deficits are shown in his merchandise accounts, which are unexplained. It is shown that during March and April, 1891, 50 per cent., and in May and June, 1891, about 60 per cent., of Lustig's total sales were made nominally or really to the plaintiffs in error, who received from him during said months goods to the value of \$13,199. It further appears that many of these goods were turned over and delivered to them in original

packages, just as they had been purchased by said Lustig, and that such packages were generally transferred from Lustig's store to the store of the plaintiffs in error at an hour of the day when no one was present in the former's store except himself, and that they were delivered and received at the back door of the Treusch's store. Lustig's business was chiefly retail, while that of plaintiffs in error was wholesale. The \$13,199 worth of goods so received by plaintiffs in error from Lustig during the three or four months preceding his failure, it is said, were paid for by them partly in cash, partly in merchandise, and partly in notes,—the cash stated to have been paid by them being \$1,340.90 in the latter part of June, 1891; the merchandise being stated at \$1,214.24; and the balance in the notes of Lustig, one of which being for \$4,966.27, given the firm of Treusch & Bro., December 2, 1889, and the other for \$3,500, given January, 1889, to E. Treusch, who, it is alleged, turned the same over to said firm.

On July 18, 1891, when, as appears by his books, his stock inventoried about \$10,000 and his accounts about \$9,000, Lustig executed three mortgages thereon,—the first to secure a note of \$4,000, indorsed by plaintiffs in error, and held by the Grand Rapids National Bank; the second, a note of \$2,000, to Herman Lustig, a brother to Jacob Lustig; and the third to secure a note of \$2,500 to J. R. Warner, a cousin of Lustig's wife and the Treuschs. Said stock and accounts were hurriedly sold under the latter mortgage about July 28, 1891, and bought by E. Treusch, for the plaintiffs in error, for the sum of \$2,400, subject to the two prior mortgages, making the total purchase prices therefor about \$8,400. The purchasers at once closed out the stock and fixtures at a profit of nearly \$4,000, and still had on hand a majority of the accounts uncollected. There was no testimony showing who received the proceeds of the \$4,000 note indorsed by plaintiffs in error and held by the Grand Rapids National Bank, nor was there any evidence as to the notes secured by the second and third mortgages to Lustig's brother and to the cousin of plaintiffs in error having been given for any valuable or bona fide consideration. Neither is it shown, by any testimony appearing in the record, that plaintiffs in error have ever settled or paid to said parties or any one the amounts of said notes. Said mortgages were executed shortly before Lustig's notes given for his heavy purchases in the spring of 1891 upon credit extended by new houses were maturing, and were manifestly made in contemplation of early suspension; and the circumstances, together with the course of dealing on the part of Lustig, fairly raised a presumption that they were fraudulent, and called for clear and satisfactory explanations.

Plaintiff in error Morris H. Treusch, in his examination as garnishee, states, among other things, that "when the \$4,966.27 note was given he insisted upon prompt settlement every week or two, or every month. We insisted on no more notes, and that cash must be paid for the balance on either side, and this was done." It is stated by their bookkeeper that during the time said Lustig was in business the plaintiffs in error sold him goods to the amount of

\$25,734.55, and that Lustig sold to them goods to the amount of \$25,721.60, making a difference in their respective sales to each other of only \$12.95. Said bookkeeper further states that during said period Lustig paid plaintiffs in error in cash only \$6,125.63, while plaintiffs in error paid him in cash \$14,502.72; a difference of \$8,377.09. This is singular, to say the least of it, and no explanation is given of the matter.

It, however, appears that during the four months preceding his failure, plaintiffs in error sold Lustig goods to a very small and limited amount,—say about \$41 worth in April, \$22.18 in May, and \$196.27 in June,—during which period they were purchasing goods from him by the wholesale, and in original packages, just as they were received by Lustig from the new wholesale houses with which he commenced dealing in the spring of 1891. There was testimony tending to show that E. Treusch put Lustig up to soliciting samples from, and to commence dealing with, such new houses, and that he sometimes took the samples of goods thus furnished Lustig, and afterwards, when Lustig would order and procure such goods, they would be turned over to plaintiffs in error, as already stated, in original packages. It appears from their books, as stated by Morris H. Treusch, that on January 3, 1889, the stock of goods which Treusch & Bros. had on hand amounted to \$9,834.78. Since that date no inventory has been taken, nor does it appear that their stock or business has since been increased or enlarged.

It is further stated by said Morris H. Treusch that “we [plaintiffs in error] had some money invested in the Lustig Cigar Co., and it hadn’t been a success.” They sell this unsuccessful enterprise to their brother-in-law, whom they know to be without means. They enter the transaction upon their books in a way to present the appearance of his being worth over \$8,000. They show this statement to Bradstreet’s Commercial Agency when inquiry is made of them touching Lustig’s financial condition, and thereby substantially represent that he is worth and has invested in his business about \$8,000. That agency, with their knowledge, thereupon gives him a rating of \$5,000 to \$10,000, which they see, and, while knowing the same to be untrue, remain silent. They start the insolvent brother-in-law in business by furnishing credit and goods for awhile. They gradually draw out while he is obtaining credit with new houses. They encourage or suggest the extension of his purchases beyond the needs of his business. They, as wholesale dealers, buy from him, a retail merchant, chiefly, large quantities of goods within the three months preceding his failure, taking original packages by wholesale in many instances, and in a secret way. They keep and present no clear or satisfactory accounts of their dealings with their insolvent brother-in-law, who is a near neighbor, and with whom they maintain close business and family relations, and, after securing a large part of the goods he has fraudulently acquired with no intention on his part of ever paying for the same, they obtain the remnant of his stock and accounts under mortgages made just before failure, to secure themselves and their and his near relations in alleged indebtedness which is neither shown to have been

bona fide or valid, nor to have been paid by them. There was proof tending to show the foregoing state of facts, and to establish the close connection of plaintiffs in error with the principal debtor and his fraudulent scheme and conduct. Under such circumstances it would have been clearly improper for the trial court to have instructed the jury, as requested by plaintiffs in error, that there was not sufficient evidence on the question of fraud, so far as they were concerned, to go to the jury, who should, therefore, have been directed to return a verdict for them.

The next error assigned is to the action of the court in allowing the witness Ferguson to testify as to the statements made to him, as the agent of R. G. Dun & Co., by Jacob Lustig, in respect to the latter's financial condition, on which said Dun & Co.'s agency gave him a rating of \$5,000 to \$10,000. This testimony was offered to establish fraud on the part of said Lustig, which was one of the facts to be shown by the plaintiffs below. In admitting this testimony the court properly stated that Lustig's conduct and statements were not, in and of themselves, binding upon the plaintiffs in error, and could have no effect upon them, unless the same was substantially brought home to their knowledge; that it was necessary for the plaintiffs below to show a fraudulent intent not only on the part of Lustig, but also on the part of the garnishees, in order to succeed; and that if, in the end, the testimony failed to establish any fraudulent purpose on the part of either Lustig or the Treuschs, the action would fail. The testimony was certainly competent in making out the fraud on the part of the principal debtor,—an essential fact in the proceeding,—without the establishment of which the cause would fail as against the garnishees, and which would only affect them by connecting them therewith, or bringing it home to their knowledge. There is no valid objection to the order in which such testimony is introduced. In the present case it appears from the testimony of the witness Idema, the representative of the Bradstreet Agency, that one of plaintiffs in error made substantially the same statement as to Lustig's financial condition, on which he was given the same rating as the Dun Agency had given him. There is no merit in the objection made to the admission of this testimony, even if the exception thereto were in proper form. Nor is there any error on the part of the trial court in permitting the witness Stebbins, a former bookkeeper of Lustig, to give an estimate of the value of his book accounts, and to testify as to Emanuel Treusch's visits to Lustig's store, and how they conversed with each other. This testimony was clearly competent, and its weight, or the consideration to be given it in connection with the other evidence, was for the jury.

The next error assigned and mainly relied on for a reversal of the verdict and judgment below is that the lower court charged the jury that, although plaintiffs in error held an honest debt against Lustig, and received from him in payment therefor goods only to the actual amount of their debt, still, if they had notice that Lustig intended to defraud his other creditors, they could not obtain title to the goods they purchased, notwithstanding they did not partici-

pate in the fraudulent intent, and did not aid and abet or connive at such action on the part of Lustig. This assignment is not well taken. The charge, in its whole tenor and effect as given to the jury, and the court's modifications of the special instructions asked for, laid down no such legal proposition; on the contrary, the jury were distinctly told that plaintiffs in error must in some way have participated in Lustig's fraud in order to be affected by it.

There were two theories on which the plaintiffs in error were sought to be made liable: First, that there was a scheme and combination between them and Lustig, by which it was arranged and planned that the latter should obtain goods on credit, with no intention of paying therefor, and then turn over or sell the same to the former in fraud of creditors; and, secondly, that if said garnishees were not actually parties to such scheme of fraud on Lustig's part in the procuring of goods, which he had neither intention or ability to pay for, they had notice of and participated in his sale and disposition thereof with the intent and purpose of defrauding his creditors. The court instructed the jury upon both aspects of the case, as follows:

"The question of fact involved then upon this main branch of the case is divided into two specific branches: First, in regard to the intent of Lustig in making those purchases of the goods that were turned over to the Treuschs; and, second, as to whether the Treusch Brothers connived at Lustig's purposes, or had notice of the fraud on his part in buying and turning over to them those goods; because, gentlemen, the law is that, however so fraudulent the conduct of a debtor may be in acquiring the title to goods, and however his own motive may be, in turning them over to a creditor, unless that creditor has notice of the fraudulent purpose, or aids and abets in it some way,—in other words, if he is entirely innocent of all fraud himself, or knowledge of the intended fraud on the part of the debtor,—he is not responsible for it. He stands on his own merits, and is not to be condemned because of the fault of his debtor, not known to him. If Lustig bought a large stock of goods on credit, without intending to pay for them, or without having any expectation of being able to pay for them, and for the purpose of turning those goods over, so far as necessary, to Treusch Bros. in payment of his debts to them, and they were so turned over, and Treusch Brothers, or either of them, had notice that the goods thus received were so purchased by Lustig with the intent and purpose above stated, then you should find those goods came into the hands of the defendants unlawfully, for it would be a fraud upon creditors, and they would be chargeable with their value in this suit. Or if, without regard to the intent with which Lustig bought the goods, and independent of the question of his fraudulent purpose, if he had any, in buying these goods, after having got them by whatever means, honestly or otherwise, he turned the goods over to Treusch Brothers in payment of his debt to them, with intent to defraud his creditors, or as part of his scheme to defraud his creditors, and the Treusch Brothers, or either of them, had notice of such intent, and participated therein, then the result would be that they secured these goods unlawfully, because in fraud, and they would be chargeable with their value in this suit."

After referring to the testimony in relation to statements made by one of the garnishees to the representative of Bradstreet's Commercial Agency touching Lustig's financial condition, the court proceeded as follows:

"Now, it is true, that Treusch was under no legal obligation, perhaps, independent of other questions, to give any definite answer, or to give full answer to those inquiries; still if, knowing the purpose for which the commercial

agent came, he intentionally put him off the scent, and misled him by laying a false basis before him upon which to rate the financial standing of Lustig, and that was done for the purpose of enabling Lustig to extend his purchases by credit, that would be fraud upon creditors if it was done with that motive, and make him a party with Lustig in accomplishing the result which the party giving that information might reasonably and naturally understand would be the consequences. If you find that was the case, gentlemen of the jury, it would be a circumstance which you may take into account in considering whether the Treuschs colluded with Lustig to enable him to make purchases which you may find, from the evidence in the case, were, as to the creditors of Lustig, fraudulent. But, whether relatives or not, no creditor can collect his dues from his debtor by or through a fraud upon others, such as would result in the obtaining from them by purchases of their property, without payment or expectation of payment, and the obtaining of those goods in payment of his debts by a creditor having knowledge of the circumstances of their purchase. In other words, if you are satisfied from the facts that have been laid before you that Lustig devised a scheme of purchasing a large quantity of goods from people abroad, and transferring those goods, either in lot or as occasion might offer, to the Treuschs in payment of his debts to them, when he knew or had every reason to believe that he would not be able to pay for the goods that he was purchasing, that was a fraud on his part; and, if the Treuschs had notice of it, they were mixed in it, and became subject to the consequences of it. Nor where the goods have been honestly purchased, on credit or otherwise, can a creditor receive in payment of his debts goods of his debtor, where the debtor makes that disposition of his property with the actual intent and purpose to defraud his other creditors; and, the creditor so receiving the goods, participating in that extent, such creditor acquires by such transfer no title to such goods, (as against the defrauded creditors.)"

There is nothing in these instructions, taken as a whole, on which to base the objection made by counsel for plaintiffs in error that the court below refused to charge the jury that the garnishees must have in some way participated in Lustig's fraud in order to be affected by it, and that mere notice of his intent to defraud his creditors would not affect them if their debt was honest, and they did not aid, abet, or connive at any scheme to defraud Lustig's creditors. On the contrary, the two propositions submitted to the jury on the testimony are: First, that if there was a scheme on the part of Lustig to purchase or obtain goods on credit with no intent to pay therefor, that was a fraud on his part, and, if such goods were turned over to the Treuschs in payment of Lustig's debt to them, and they knew or had notice of Lustig's fraud in acquiring the property, they would be affected by his fraud, and their title would be unlawful or invalid as against the defrauded creditors of Lustig; and, secondly, that if Lustig acquired the goods honestly, on credit or otherwise, and thereafter turned the same over to the Treuschs in payment of his indebtedness to them, with the intent and for the purpose of defrauding his creditors, and the Treusch Brothers, or either of them, had notice of such intent, and participated therein, then their acquisition of such goods would be unlawful as against the creditors defrauded, and they would be liable for the value thereof. In other words, the jury was told, in substance, that if Lustig obtained the goods by fraud or by means of a fraudulent scheme, and the Treuschs had notice of that fact, they could not lawfully accept such goods in payment of their debt against him, and hold the same against such defrauded creditors; but if Lustig had procured the

goods honestly, and without any such fraud, and thereafter turned the same over to Treusch Brothers in payment of his debt to them, with the actual intent and for the purpose of defrauding his creditors, then the Treuschs must not only have notice of such fraudulent intent, but must also have participated therein, in order to render their title invalid as against the creditors defrauded by such disposition. The distinction taken is that the creditor who receives in payment of his debt property which his debtor has acquired fraudulently is affected by notice of such fraud, while the creditor who accepts in payment of his debt property honestly acquired by his debtor, and which such debtor transfers with the intent and for the purpose of defrauding his creditors, must not only have notice of, but must participate in, such fraudulent intent.

Counsel for defendants below requested the court to charge the jury "that these defendants are not responsible for any acts of Jacob Lustig, and are not to be bound by them, and no unfavorable prejudice should be given place in your minds against them on account of any transactions of Lustig, unless the proof shows that they have aided, abetted, or connived at such action; and if the proof does not show that they so aided, abetted, or connived, then no acts of Jacob Lustig are to be considered as establishing any fraud on the part of said defendants;" which the court gave with the insertion after "connived:" "Or had notice that he was acting with intent of defrauding his creditors." The court was further requested by defendants to charge the jury "that you should come to the considerations of the questions involved in this issue with minds entirely unprejudiced, and with the presumption that all of the acts of the defendants were honest; and you must not find a verdict for the plaintiffs until the presumption is overcome by proof which satisfies you that the defendants are participants in a fraud perpetrated by Jacob Lustig on his creditors," which request the court gave to the jury, with the addition of the words: "Or, what was the same thing, as I have said, had notice that Lustig was perpetrating a fraud on his creditors." It will be observed that these requests, referring to Lustig's transactions and acts, did not indicate to which branch of the case they related, and it is fairly to be assumed that the court understood them as applying to the first branch or portion of the charge relating to Lustig's having procured the goods by means of a fraudulent scheme, and the defendant's connection therewith, by aiding, abetting, or conniving at the same, or by having notice thereof, when taking the goods from Lustig. That the court so understood and treated said requests is shown by its further instruction, immediately following:

"So that you will see it comes to this result: that substantially you are to determine whether these transactions were honest or not. If they were,—that is, the transactions of buying these goods and turning them over, and the acceptance of them by the Treuschs,—if that was honestly done, then these defendants ought not to be held liable because Lustig was their brother-in-law. He had a right to pay them by honest means, and they had a right to get their pay by honest means. But if you believe this was a dishonest scheme to enable the Treusch Brothers to get payment of their debt from Lustig to themselves, at the expense of the sellers of these goods, then you

ought not to have the slightest hesitation in putting your stamp upon it. If that fact is not made out in this case to your satisfaction, you should with equal readiness render a verdict for the defendants."

These instructions were not only correct under the authority of *Klein v. Hoffheimer*, 132 U. S. 375, 377, 10 Sup. Ct. Rep. 130, and *Jones v. Simpson*, 116 U. S. 614, 6 Sup. Ct. Rep. 538, but were more favorable to the plaintiffs in error than the testimony warranted. They assumed in their favor two facts which were not fully or satisfactorily established by the proofs, viz. the existence of a valid indebtedness against Lustig, and their reception of the goods in payment of that indebtedness. The facts and circumstances of the case were of a character to raise grave doubts as to the bona fides of the transactions between plaintiffs in error and Lustig. They were of such suspicious character as to impose upon the plaintiffs in error the duty of establishing the validity of their alleged indebtedness against Lustig by clear and satisfactory evidence, under the rule laid down in *Callan v. Statham*, 23 How. 477-480; *Jones v. Simpson*, 116 U. S. 614, 6 Sup. Ct. Rep. 538; and *Crawford v. Neal*, 144 U. S. 595, 12 Sup. Ct. Rep. 759,—that, where the fraudulent intent on the grantor's part is shown, and the circumstances are suspicious, the purchaser must show that he has paid value; and upon the establishment of that fact the attaching creditor must then make it appear that the purchase was made in bad faith, or with notice of the fraud. In other words, as stated in *Jones v. Simpson*, 116 U. S. 614, 6 Sup. Ct. Rep. 538: Upon its appearing that the vendor made the sale with the fraudulent intent to hinder or delay his creditors, the burden of proof is upon the vendee, as between him and existing creditors, to show by competent proof that he paid a sufficient consideration for the property. "But such payment being shown, the vendee is entitled to a verdict and judgment, however fraudulent may have been the intent of the vendor, unless it appears affirmatively from all the circumstances that he purchased in bad faith; and such bad faith may exist where the vendee purchases with knowledge of the fraudulent intent of the vendee, or under such circumstances as should put him on inquiry as to the object for which the vendor sells." So in *Klein v. Hoffheimer*, 132 U. S. 375-379, 10 Sup. Ct. Rep. 130, where the transactions were of a suspicious character, the supreme court held that it was not improper for the trial court to impose upon the garnishees, in a suit like the present, the burden of establishing the fairness of the proceeding by which they obtained possession of the property. Plaintiffs in error were not, as they might have been, subjected to any such requirement. Again, the court's instructions assumed that Lustig had turned over the goods in payment of his debt to the plaintiffs in error, when the proof showed, or tended to show, that money and other goods constituted a part of the consideration on which he had made the disposition of the property. This fact did not entitle plaintiffs in error to an instruction, such as they claim was denied them, that a creditor may lawfully accept property from his debtor in payment of his debt even though he has notice of his debtor's intention to defraud his other creditors in turning

over or transferring such property. There are authorities—such as *Covanhovan v. Hart*, 21 Pa. St. 500, 501—holding that, where preferences are allowed, and as an incident of the owner's power of disposition and the right to be paid, a creditor may receive property from his debtor in payment without being affected by such debtor's motives or intentions in so disposing of the same. It is not necessary to discuss or pass upon that question in the present case, inasmuch as there were other considerations, besides actual or alleged indebtedness to the purchasers, in money and goods, which formed in part a present consideration, and of such a character as enabled the fraudulent vendor to place the same out of the reach of creditors. This partial present consideration, if actually paid by the plaintiffs in error to the fraudulent vendor with notice of his intended fraud upon his creditors, would have invalidated the transactions, treating them as one continuous proceeding. If void in part, the transaction would be void in toto as to Lustig's creditors. This is well settled by the authorities.

After a careful examination of the court's instructions to the jury, which must be considered as a whole, (*Insurance Co. v. Ward*, 140 U. S. 76, 11 Sup. Ct. Rep. 720,) we fail to discover any error therein prejudicial to the plaintiffs in error. The charge is supported by the decisions of the supreme court cited above, nor is it in conflict with any rule or principle laid down by the supreme court of Michigan in the cases of *Hill v. Bowman*, 35 Mich. 191; *Jordan v. White*, 38 Mich. 255-257; *Sweetzer v. Higby*, 63 Mich. 22, 29 N. W. Rep. 506; and *Steel Works v. Bresnahan*, 66 Mich. 489, 501, 33 N. W. Rep. 834,—relied on by counsel for plaintiffs in error.

It is lastly urged that the court below erred in refusing to charge the jury, as requested by defendants' counsel:

"That, in order to render a verdict against the defendants, you must find not only that Lustig purchased goods in a general way with an intent not to pay for them, but that he purchased the identical goods that were turned over to Treusch Brothers with that intent; and, further, that he, as a matter of fact, had not paid for them, because any goods that he had actually paid for, which were turned over to Treusch Brothers on account, would belong to Treusch Brothers, and no recovery for such goods could be had in this action; and, unless you can find by the proof that the identical goods that were turned over to Treusch Brothers on his indebtedness had never been paid for by Lustig, your verdict must be for the defendants."

This request was properly refused. There was no testimony on which to predicate such an instruction. The transactions on Lustig's part were claimed to be fraudulent, not merely against some of his creditors or vendors, but against all who sold him goods on credit; and there was testimony tending to show that all his purchases during 1891 were made on credit, and were never paid for, and never intended to be. The proceeding was not one in which the persons selling the goods to Lustig were seeking to disaffirm the sales for fraud, and to recover the identical goods or the value thereof. On the contrary, it recognizes Lustig's title to the goods so fraudulently purchased by him, and treated him as the principal debtor therefor; and the request wholly ignored the second branch or theory of the case on which the court had instructed the jury,

that, if Lustig had acquired the goods honestly, so as to vest him with a good and unimpeachable title thereto, and thereafter turned such goods over to Treusch Brothers with the purpose and intent of defrauding his creditors, and they (Treusch Brothers) had notice of and participated in such fraudulent intent and purpose, they would be affected by his fraud, and would hold such goods unlawfully as against the defrauded creditors, etc. The instruction requested did not, therefore, cover the whole case. Nor did its assumption of facts constitute a complete defense to the action, and, if given, would have been erroneous.

Upon the whole case, our conclusion is that there is no reversible error, and that the writ of error should be dismissed, with costs, and it is accordingly so ordered.

TAFT, Circuit Judge, (dissenting.) Were this a proceeding in equity under the statute of 13 Eliz. to set aside the sale from Jacob Lustig to the Treusch Brothers as in fraud of creditors, which had resulted in a decree for the complainants below, I should have no hesitation in sustaining the decree as fully supported by the evidence in this record. But the statute of Michigan has changed the form of action to enforce rights secured by the statute of 13 Eliz. to defraud creditors from the chancery to the law side of the court, by permitting the creditor to garnishee the fraudulent grantee of the debtor, and recover from him the goods, or their value, in a suit at law before a jury. Under this procedure the alleged fraudulent grantee is entitled to have the facts passed upon by the jury after the court in its charge shall have correctly laid down the principles of law upon which their investigation of the facts must proceed. If the principles of law in their application to the facts of the case are not correctly expounded to the jury, then it is the right of either party to have a new trial, no matter what result an appellate court might reach if, sitting as an appellate court of equity, it could determine the issue on its merits. In this case the defendants in error sold to Jacob Lustig, a cigar and tobacco dealer in Grand Rapids, more than \$7,000 worth of goods and merchandise, which he never paid for. Lustig about the same time had purchased on credit a large amount of goods from other tobacco houses, with the evident intention of never paying for any of them. Of the goods furnished by other creditors than the plaintiff below he transferred some \$10,000 worth to his brothers-in-law, Morris and Emanuel Treusch, the defendants below and the plaintiffs in error. It is in evidence that none of the goods sold to Lustig by the plaintiffs below were transferred to the Treusch Brothers. The action by the defendants in error, therefore, was as general creditors to recover by garnishee process the value of the goods which they had never owned to the amount of their claim against Lustig. The only ground for their action was that Lustig, being the owner of these goods and in failing circumstances, transferred them, in fraud of their rights as general creditors, to the Treusch Brothers. The fraud which Lustig had been guilty of in procuring the goods transferred to the Treusch Brothers from other creditors than the plaintiffs, gave the plaintiffs no right to complain.

The plaintiffs' right to recover goods or their value from Treusch was wholly dependent on Lustig's title to them and ownership in them. It was not material, as an ultimate fact in this controversy, that the Treusch Brothers conspired with Lustig to defraud the persons from whom the goods held by Treusch were purchased. The persons thus defrauded could, of course, recover in trover the value of the goods from the Treusch Brothers, as transferees with knowledge of the fraud in Lustig's title; but the plaintiffs, from whom the goods were not purchased, had no such right. Their rights grew out of the fraud, if any, in the transfer by Lustig to the Treusch Brothers of goods which, so far as third persons were concerned, belonged to him, in fraud of general creditors. In order to show that the transfer of these goods from Lustig to Treusch was in fraud of general creditors, it might be relevant to introduce evidence of a general scheme of fraud in the purchase of the goods, in which the Treuschs and Lustig were acting together, as tending to show a guilty relation between Lustig and Treusch which would overcome a claim that Treusch was an honest creditor honestly receiving pay for his debts. But the ultimate fact which must have been established in order that the plaintiffs below could have the right to set aside the transfer from Lustig to Treusch was fraud in that transfer, not as against the original owners of the goods, but as against the general creditors of Lustig, solely on the hypothesis that Lustig was the owner of the goods transferred. Any other view seems to me to confuse the right of a general creditor, which is that the debtor shall not hinder or delay the collection of his debt by fraudulently disposing of his assets available for its payment, and the right of the vendor who has been defrauded into selling his goods to set aside the sale and recover the goods.

With this statement of the principles which should govern in a consideration of the facts of this case, let us see what the charge of the court was. The bill of exceptions states a part of the charge as follows:

"After instructing the jury, in substance, that the evidence in the case did not support the claim of plaintiffs that goods of Lustig other than those accounted for on the books of Lustig and Treusch went into the Treuschs' hand, and that there was no evidence in the case showing that the defendants ought to be held for any deficit, if any, in Lustig's stock, and that the jury should leave that basis of plaintiffs' claim out of the case, the court charged the jury: 'The question of fact involved, then, upon this main branch of the case is divided into two specific branches: First, in regard to the intent of Lustig in making these purchases of the goods that were turned over to the Treuschs; and, second, as to whether the Treusch Brothers connived at Lustig's purposes, or had notice of the fraud on his part in buying and turning over to them those goods; because, gentlemen, the law is that, however so fraudulent the conduct of a debtor may be in acquiring the title to goods, and however fraudulent his own motive may be, in turning them over to a creditor, unless that creditor has also notice of the fraudulent purpose, or aids and abets it in some way,—in other words, if he is entirely innocent of all fraud himself, or knowledge of the intended fraud on the part of the debtor,—he is not responsible for it. He stands on his own merits, and is not to be condemned by the faults of his debtor, unknown to him. If Lustig bought a large stock of goods on credit without intending to pay for them, or without having any expectation of being able to pay for them, and for the purpose of turning

v.54p.no.5—56

those goods over, so far as necessary, to Treusch Brothers, in payment of his debts to them, and they were so turned over, and Treusch Brothers, or either of them, had notice that the goods thus received were so purchased by Lustig with the intent and purpose stated, then you should find that those goods came into the hands of the defendants unlawfully, for it would be a fraud upon creditors, and they would be chargeable with their value in this suit.' "

In my view, the statement by the court to the jury that there was no evidence to impeach the validity and bona fides of Lustig's debt to the Treusch Brothers was not warranted by the evidence, and was prejudicial to the plaintiffs below; but, as the plaintiffs below recovered a verdict, it requires no further comment. My object in making the above quotation from the charge is to show that the court, in effect, charged the jury that, if Lustig obtained the goods which were the subject of this suit by fraud on his vendors, in which fraud the Treuschs connived, then the plaintiffs below were entitled to recover in the action. Now, it is conceded that there was no evidence whatever to show that the goods sought here to be recovered were ever owned by the plaintiffs below. Therefore the court's charge to the jury was that A., a creditor of C., might recover from B. goods transferred to B. by C. in payment of an honest debt owing by C. to B., because B. and C. had conspired together to defraud D., the fraud consisting in the intention on the part of C., known to B., not to pay D. the price of the goods. This, I submit, is a confusion of elementary principles. D., of course, would have the right in an action of trover, without regard to the statute of 13 Eliz., or the Michigan statute, under which this action was brought, to recover the goods fraudulently obtained, either from C. or B. But A. had no interest, and was not prejudiced by the fraud practiced on D. by B. and C. The only complaint which A. could make of the transfer of goods by C., which A. had never owned or had any interest in, must have been entirely predicated on C.'s title to the goods and on A.'s right as a general creditor to have his debt paid by levy or other process on goods owned by C. The charge which I have quoted was duly excepted to. As it was, to my mind, erroneous, and presented the theory to the jury upon which the verdict doubtless rested, the judgment should, in my opinion, be reversed, and a new trial ordered.

CARTER & CO., Limited, v. FRY et al.

(Circuit Court, E. D. New York. December 28, 1892.)

PATENTS FOR INVENTIONS—PRELIMINARY INJUNCTIONS—PRIOR ADJUDICATIONS—NEW EVIDENCE—DUPLICATE MEMORANDUM SLIPS.

On a motion based on prior adjudications for an injunction against the infringement of letters patent No. 288,048, issued November 26, 1883, to J. H. Frink, for duplicate memorandum or sales slips, there was produced as entirely new evidence a sales slip called the "Taft Book," which was shown to have been in use in Detroit prior to the time of Frink's invention, and that Frink had knowledge thereof. From this evidence it appeared highly probable that the Frink combination contained no patentable invention. Held, that the preliminary injunction should be denied.

In Equity. Bill by Carter & Co., Limited, against William H. Fry and Charles B. Wolfe for an infringement of the Frink patent for duplicate memorandum slips. The patent has been passed upon in the following reported cases: *Hurlburt v. Carter*, 39 Fed. Rep. 802; *Carter v. Houghton*, 53 Fed. Rep. 577; *Same v. Wollschlaeger*, Id. 573. The present case is heard on motion for preliminary injunction. Denied.

W. Caryl Ely, for complainant.

Worth Osgood and Arthur M. Pierce, for defendants.

BENEDICT, District Judge. This action is brought by the owners of a patent numbered 288,048, dated November 26, 1883, issued to J. H. Frink, for an invention of duplicate memorandum or sales slips. It now comes before the court upon a motion for a preliminary injunction to prevent the defendant from manufacturing sales slips which are alleged to infringe the Frink patent. The defendants deny the validity of the Frink patent. This patent has been before several courts, and has each time been sustained; the last time by Judge Coxe, in the northern district of New York. *Carter v. Wollschlaeger*, 53 Fed. Rep. 573. Upon the present motion facts are shown which did not appear in any of the prior adjudications, and the question to be decided was never before presented.

On this motion it appears that, prior to the date of Frink's invention, there was in use in Detroit a certain kind of sales slip, called in these proceedings the "Taft Book." The proofs presented show that the Taft book was made and in use prior to the time of Frink's invention, and that it was known to Frink before his application for a patent. The defense here relied upon, therefore, is not based upon oral testimony and the uncertain memory of witnesses as to the character of the Taft book. The book itself is produced, and it is proved to have been used prior to the date of Frink's invention, and that Frink knew of it. Indeed, Frink himself says that the original specification of his application for a patent referred to the Taft book as then existing. There is therefore no doubt or uncertainty as to the facts relied on to show the Frink patent to be invalid. A consideration of these facts has led me to the conclusion that it is highly probable that upon final hearing it will be held that the combination of old devices effected by Frink, constituting the first claim of his patent, involved no invention, and that his patent is invalid for that reason. Under such circumstances, it would be improper to grant an injunction.

Motion denied.

REECE BUTTONHOLE MACH. CO. v. GLOBE BUTTONHOLE MACH. CO. et al.

(Circuit Court, D. Massachusetts. March 29, 1893.)

No. 2,938.

1. PATENTS FOR INVENTIONS—BUTTONHOLE MACHINE.

Letters patent 240,546, granted April 26, 1881, to John Reece, for a buttonhole sewing machine, are not infringed as to claims 5, 11, 12, 13, and 18 by the machine made under letters patent 450,844 and 450,950, issued April 21, 1891, to James H. Reed and Charles A. Dahl, for a buttonhole stitching and barring machine; for the Reece patent, by its specifications and claims, is a machine moving the cutter and stitcher to and over the cloth clamp and cloth, while the Reed and Dahl machine moves the cloth clamp and cloth to and under the cutter and stitcher.

2. SAME—EXTENT OF CLAIM—LIMITATION.

Reece's eleventh claim was in part for a device "to change the positions of the frame and bedplate longitudinally." This was objected to on the ground that no means were shown for moving the bedplate relatively to the framework, as the claim would seem to imply. The claim was modified so as to read, "move said framework longitudinally upon said bedplate." *Held*, that the patentee was limited to a machine wherein the frame moved and the bedplate was stationary, although a machine built substantially according to the description of the patent could be made to operate by fixing the frame and moving the bedplate.

In Equity. Bill by the Reece Buttonhole Machine Company against the Globe Buttonhole Machine Company and others for infringement of letters patent. Bill dismissed.

James H. Lange, F. P. Fish, and J. J. Storrow, for complainant.

Charles E. Mitchell, Clarke & Raymond, and Frederic H. Betts, for defendants.

CARPENTER, District Judge. This is a bill to enjoin an alleged infringement of claims 5, 11, 12, 13, and 18 of letters patent No. 240,546, granted April 26, 1881, to John Reece, for a buttonhole sewing machine. The machine made by the respondents is described in general and essential features in the specifications and drawings of letters patent Nos. 450,844 and 450,950, both issued April 21, 1891, to James H. Reed and Charles A. Dahl, for a buttonhole stitching and barring machine. The only issue here is whether the respondents have infringed.

In constructing a machine to make buttonholes there are two classes of elements to be taken into account: First, the cloth or leather in which the buttonhole is to be made; and, secondly, the various devices (1) to support and clamp the work; (2) to cut the buttonhole; and (3) to stitch the buttonhole. At the time the Reece invention was made, the known machines for this purpose, none of which were entirely automatic, were divided broadly into two classes. In one class, the cloth being supported on the cloth plate and there clamped, the cloth plate remained at rest, and the cutting and stitching mechanisms were moved with relation thereto; in the second class, the cloth being in like manner supported, the cloth plate moved so as to present the work in the proper

relation to the operating mechanism for cutting and stitching. The machine shown in the patent to J. A. and H. A. House, No. 39,442, dated August 4, 1863, is an example of the first class; while the machine known as the "Humphrey" or "Union" machine, first patented to Daniel W. G. Humphrey, October 7, 1862, and the machine shown in the patent to J. A. and H. A. House, No. 36,932, dated November 11, 1862, are examples of the second class. The Humphrey machine required the work to be turned half way around at each buttonhole, while the House machine moved the work forward to the extent of the length of the buttonhole, and laterally to the extent of the width of the eye of the buttonhole. The Humphrey machine may be said to turn the work, and the House machine to move the work.

I come, then, to consider what construction shall be given to the Reece patent, or, in other words, what is the extent of the Reece invention? This, I take it, is to be determined by ascertaining what is the new function conceived by Reece as embodied in his machine. For the purpose of this case the question may be solved, in one view, by ascertaining whether the new function of the Reese machine was conceived by him as applying to both the general methods of operation above described, or whether it was confined to one alone. This question appears to be significant when attention is turned to the machine of the patent and to the alleged infringing machine. They differ in nearly every detail of construction, and nearly every operation is performed by different devices. For the purpose of the present discussion, however, these different devices may be assumed to be equivalents for each other. But there is a broad distinction between the patented machine, as literally described in the patent and as actually built by the complainant, on the one hand, and the machine of the respondents on the other. The first machine moves the cutter and the stitcher to and over the cloth clamp and the cloth, while the second machine moves the cloth clamp and the cloth to and under the cutter and the stitcher. This broad difference not only characterizes the machines, as wholes, but also evidently determines many of the differences in detail between the two, in respect to which differences in detail the Dahl machine, being the junior machine, may be said to vary by the substitution of what may be assumed, as before said, to be equivalents. The question, then, recurs whether the fixed cloth plate type of machine described in the patent is intended by the Reece patent to be the best machine in which his invention may be embodied, or whether it is intended to limit the field of his invention to machines of that type. I confess that the preamble of this specification, although not, of course, conclusive, seems to me very persuasive on the question as to what was the real invention. He says:

"This invention relates to sewing machines for stitching buttonholes, and is an improvement upon that class of the said machines wherein the stitching mechanism is made to travel first along one side of the buttonhole slit, then about the eye, and along the other side of the slit."

It might be said that this language imports that the machine is one which shall cause the presentation of the needle to the cloth

in a certain way, without reference to whether this be effected by the motion of the needle or by the motion of the cloth. But this suggestion is met by the consideration that there were previous machines in which the needle—in an imperfect way, indeed—traveled, but still traveled in this same path, as appears by reference to the machines to which I have already referred. The statement seems to me strongly to suggest that the machine as conceived by the inventor was not a machine in which, for example, the needle at successive points of time was to be found at successive points of space over the surface of the cloth, but rather a machine in which the needle reached those points successively by its own motion as distinguished from the motion of the cloth. If this be so, of course the statement qualifies and is to be read into each claim, and limits them all, so as to exclude all machines constructed like those built by Dahl.

I think the reading of the claims, taken in connection with their history, strongly confirms this view. In the fifth, eleventh, and thirteenth claims the framework which carries the cutting and stitching mechanism is literally described as "moving." The eleventh claim, as originally drawn, was as follows:

"(11) In a buttonhole sewing machine, a clamp and bed to hold the material, the framework, a, the buttonhole cutting device connected therewith, combined with a cam disk to operate the said buttonhole cutter to cut a slit in the material held by the clamp, and then to [change the relative positions of the frame and bedplate longitudinally,] to remove the blade of the cutter from above the clamp, substantially as described."

The examiner objected as follows:

"In the first claim the inclusion of means for changing 'the relative positions of the bedplate and framework longitudinally' must be objected to, as no means is shown and described for moving the bedplate relatively to the framework, as the claim would seem to imply. The eleventh claim must be objected to for the same reasons as were urged to the first claim, no means being shown for changing the relative position of the bedplate with respect to the frame, as the claim would seem to imply."

The petitioner thereupon amended the eleventh claim by striking out the words above included in brackets, and inserting in their place the words "move said framework longitudinally upon said bedplates." The first claim was amended in similar terms. Words of the same import were inserted in the twelfth and thirteenth claims, in response to objections of the examiner, but under circumstances which make these changes less persuasive than that above quoted.

I now pass to a consideration of the question whether this change operates to limit the scope of the patent to the literal terms of the inserted words, in so far as they differ from the terms of the words for which they were substituted. It is clear that these literal terms, if originally written in the claim, would not limit the invention to a machine having the specific motions indicated by them, if it appeared that the state of the art at the time of the invention would permit a construction so broad as to include other correlative and equivalent motions, whether of the part described as moving or of one or more of the associated parts. On the other hand, it is clear that if the literal terms under discussion were substituted neces-

sarily, and only, for the purpose of limiting the claim to the specific motion finally described, as distinguished from the motion described by the erased words, then they do operate so to limit the claim to that extent. The complainant in this case refers to the fact that nearly all the cases in which specific words have been so construed have been cases in which the prior state of the art would have so limited the invention, even if the specific words had not been used, and he urges that the doctrine should not be extended further. But it seems to me that this argument would make the doctrine of no effect. The inventor may be limited to the only possible invention, and this is to be determined by an examination of the state of the art. He may also be limited by the actual limits of the invention, so far as those limits may be ascertained from his own words; and such a limit I think may be inferred from his intentional substitution of a narrow claim for a broad claim. When he has himself fixed such limits, he cannot afterwards claim a construction which will extend his rights beyond them. He has himself decided in advance whether the invention which he has in fact made be a broad one or not. *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624, 5 Sup. Ct. Rep. 475. The complainant contends that the patent itself shows that the invention of Reece was broad enough to cover both the corresponding or reversed motions which appear in these two machines, because the machine literally described in the patent is capable of both motions. It is, indeed, true, as shown by experiment at the hearing, that in a machine built substantially, in the respects here considered, according to the description of the patent, if it be so placed as that the bedplate, rather than the frame, rests on the earth through suitable supports, the operation of making a buttonhole may be carried on by the movement of the bedplate, carrying the cloth clamp and the cloth, while the frame remains at rest. But this was not the apparent intent of the inventor, and the machine as a whole is not, I think, so constructed as to suggest such a use, or to make it desirable or economical. The whole construction of the machine, as distinguished from the underlying principle on which it operates, seems to me to be contrived with great skill to operate only by the movement of the frame, and to be a development of the idea or invention of a machine which should operate only in that way. But laying aside this consideration, which is not conclusive, but only confirmatory, it seems to me most clear that when the complainant suggests that the Reece machine, as described in the patent, is capable, by a change of anchorage of the parts, of the reversed motion, wherein essentially the Dahl machine differs from it, he points out the course which the patentee might have taken had he intended to claim the construction for which the complainant now contends. The officer of the patent office rejected the claim which seemed to imply that the bedplate might be made to move, not because an invention so broad as that was impossible, by reason of the state of the art, which would show that it was not novel, but he rejected it because, by reference to the specifications, it seemed to him that the inventor had not described, and therefore had not in fact made, an invention so broad.

If, in this conclusion, the patent office official was in error, the patentee might have answered the objection in either of two ways: He might have pointed out that the description in the specification implied the reversal of motion, because it was evident from an inspection of the drawing that if the bedplate, rather than the frame, were anchored, the proper motions of the interacting parts would still go on. He would have been plainly right in this assertion. And if the examiner had rejoined that the specification shows no description or reference to an organization whereby the bedplate is anchored, the patentee would have satisfied this objection by so amending the specification as to describe the method by which the alternative motion could be effected. Instead of so doing, he modified the claim so as to bring his invention within the limited field to which the examiner apparently supposed it to be in fact confined.

It has been strongly argued that, when an invention as actually made appears to have a broad scope, the court ought to make every possible intendment in order to give the inventor the full benefit of his invention. The argument is very persuasive. But I think that in this case the inventor has deliberately and unequivocally fixed a limit beyond which, under the present decisions on this point, the court is not at liberty to extend his rights. In reading with great care the testimony of the inventor in this case, and the specifications and claims of the patent, I find myself also more and more led to the conclusion that the patent, as above construed, does in fact cover the actual invention. The inventor, in his testimony, describes very clearly, and still briefly, the whole train of operations by which by the mere tripping of a single lever by the operator (and with the slackening or pulling down of the thread, which is a necessary preliminary to the operation of most, if not all, sewing machines) is performed automatically the whole work of making a buttonhole. But he does not claim as an integral organism the mechanism which performs this work. He claims separately the mechanism which performs each step in this train of operations, but makes no claim which combines any of these separate mechanisms. It is true, indeed, that this may arise from the opinion of the person who drew the papers as to the proper function of the claims, rather than from the opinion of the inventor as to the scope of his invention. But from considerations broader than this, in fact, from the case as a whole, it seems to me that the invention as it lay finally in the mind of the inventor was that of a completely organized automatic machine to make a buttonhole by moving the stitching mechanism, and, further, that the inventors of the Dahl machine have reached the same result by a different road.

The bill must be dismissed, with costs of the respondents.

GERARD v. DIEBOLD SAFE & LOCK CO.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1893.)

No. 60.

PATENTS FOR INVENTIONS—CLAIM—INFRINGEMENT.

Letters patent No. 246,748, issued September 6, 1881, to Alonzo Gerard, for a combination consisting of "an improvement in burglar-proof safes," which do not claim any improvement in the lock, but admit that "any suitable locking device" may be used, are not infringed by the making and selling of locks for jail cages similar to those used in the patented safes. 48 Fed. Rep. 380, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

In Equity. Bill by Alonzo Gerard against the Diebold Safe & Lock Company for infringement of letters patent. A demurrer to the bill was sustained, and the bill dismissed. See 48 Fed. Rep. 380, where a full statement of the facts will be found. Complainant appeals. Affirmed.

Statement by LOCKE, District Judge:

The complainant in the court below, appellant here, filed his bill January 28, 1891, alleging, in substance, that he was the original inventor of a new and useful improvement in burglar-proof safe locks, and had upon due application received letters patent No. 246,748 for the same; that since the granting of said letters patent the defendant company has caused to be made and sold, and had used in the construction of locks in jail cages, the invention and improvement described and claimed in said letters patent, thereby infringing complainant's patent, greatly to his damage, and praying an injunction and an accounting and computation of damages, and judgment therefor. The defendant demurred to complainant's bill, and upon hearing the demurrer was sustained, and the bill dismissed. From that judgment this appeal was taken.

Clarence H. Miller, (Franz Fiset, on the brief,) for appellant.

H. F. Ring, (Goldthwaite, Ewing, and H. F. Ring, on the brief,) for appellee.

Before McCORMICK, Circuit Judge, and LOCKE and BILLINGS, District Judges.

LOCKE, District Judge, (after stating the facts.) In the complainant's bill, he asks an injunction and damages under an invention and improvement in burglar-proof safe locks; but, when an examination is had of the letters patent presented in support of the claim, it appears that the patent was granted for an improvement in burglar-proof safes. In the court below it was held, in an extended opinion, after a careful examination of the patent, that the patent was in no way for an improvement in burglar-proof safe locks, as is alleged in complainant's bill, but that the safe was an important and necessary element in the combination, which would be required, to show an infringement; and with the views therein expressed we concur.

The specifications filed in the application for a patent provide for an improvement in burglar-proof safes, and state directly, in terms, that "this invention relates to burglar-proof safes, the object being to provide a safe with nonexplosive seams," and exhibit how a sys-

tem of interlocking projections around the door of the safe, and sliding hinges, accomplishes this result. There is no claim as to an improvement in a lock, but, on the other hand, the specifications admit that "any suitable locking device may be operated to throw a bolt on the inner face of the door." The letters patent follow the specifications and claim of the application, and are granted "for alleged new and useful improvement in burglar-proof safes."

The only question is whether we should consider, notwithstanding the language of the specifications, claim, and letters patent, that complainant is entitled to protection from what might upon examination be found to be a similar device, regardless of its connection with a burglar-proof safe. In doing so it would be necessary for us to assume that such similar device had never been used in any other connection except with a safe, or enter upon an extensive examination of that question, which is the special and peculiar province of the patent office.

In *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, the supreme court says:

"The courts have no right to enlarge a patent beyond the scope of its claim as allowed by the patent office, or the appellate tribunal to which contested applications are referred. When the terms of a claim in a patent are clear and distinct, as they always should be, the patentee, in a suit brought upon the patent, is bound by it. * * * He can claim nothing beyond it."

In *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. Rep. 76, the rights of the patentee, under his claim and patent, are fully discussed, and the doctrine well established that he is bound by the language there used, and recognized and granted in the letters patent, and he is presumed to have abandoned the residue to the public.

In this case there was no claim for a lock or locking device, but for an improvement in safes; and it would unquestionably be extending the terms of the patent to afford protection against infringement in the use of a lock omitting the principal element mentioned in the specifications and claim. We find that the allegations of the bill are not supported by the grant of the letters patent filed in support thereof, and the judgment of the court below must be affirmed, with costs, and it is so ordered.

FALK v. GAST LITHOGRAPH & ENGRAVING CO., Limited.

(Circuit Court of Appeals, Second Circuit. February 7. 1893.)

1. COPYRIGHT—HOW LOST—"PUBLICATION."

The proprietor of a copyrighted photograph may, without losing his copyright, use a card containing 100 miniature samples of different copyrighted photographs which has not the word "copyright" impressed thereon, for the sole purpose of enabling dealers to give orders. Such a use is not a publication, within the meaning of the copyright laws.

2. SAME—INFRINGEMENT.

One who reproduces a copyrighted photograph cannot escape liability as an infringer by merely showing that the copy which he reproduced did not bear the notice of copyright when he purchased it, but he must also show that it bore no notice when it left the custody of the owner of the copyright. 48 Fed. Rep. 262, affirmed.

3. SAME—INFRINGEMENT—ACCOUNTING.

The right to an account of profits is incident to the right to an injunction, under Rev. St. § 4970, in copyright cases. *Belford v. Scribner*, 12 Sup. Ct. Rep. 734, 144 U. S. 488, followed.

4. TRIAL—OBJECTIONS TO EVIDENCE—WAIVER.

Defendant moved to strike out certain testimony "unless the contract is produced and offered in evidence." Subsequently plaintiff, without proving execution, offered the contract, and defendant objected solely on the ground of incompetency and immateriality. *Held*, that proof of execution was waived.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Equity. Suit by Benjamin J. Falk against the Gast Lithograph & Engraving Company for infringement of copyright. The circuit court gave complainant a decree. 48 Fed Rep. 262. Defendant appeals. Affirmed.

William B. Ellison and Charles C. Gill, for appellant.
Rowland Cox and Isaac N. Falk, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a decree of the circuit court for the southern district of New York upon a bill in equity for the infringement of the complainant's copyright in a photograph of Miss Julia Marlowe. The decree sustained the complainant's bill, and directed an injunction and an accounting. The complainant was the author of the photograph in question, which is known by the title of "No. Ninety-Four of Julia Marlowe," and which, with about 100 other different photographs of the same actress, was taken by the complainant under a contract with Miss Marlowe whereby he became proprietor of the various photographs of her which he took. The contract was offered in evidence by the complainant on April 21, 1891. Its execution was not proved. The defendant had moved on March 25, 1891, to strike out a certain clause of the complainant's testimony "unless the contract be subsequently produced and offered in evidence." When it was offered, the defendant objected only upon the ground that the evidence was incompetent and immaterial. The admission of the contract is now objected to because its execution was not proved. This objection was waived.

The facts in regard to the originality of the photograph, its intellectual production as the result of thought and conception on the part of the author, are substantially the same as those in the case of *Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. Rep. 279, upon which the supreme court decided that the photograph which was the subject of that suit was an original work of art, and that exclusive rights were properly secured to its author by the statutes of the United States. The proper title of the photograph was deposited by the complainant, as proprietor, in the office of the librarian of congress, on September 17, 1888, and before publication. On December 6, 1888, he delivered at the office of the librarian two printed copies of the photograph described in the title, and which were iden-

tical with the subject of this suit. The proof of identity, in addition to the proof afforded by the librarian's ordinary certificate of the deposit, was furnished by the testimony of a witness who had inspected one copy, marked "No. 2," in the office of the librarian.

The defendant's assignments of error are numerous, but it principally relies upon the alleged inability of the complainant to sustain the affirmative upon two questions of fact. These are: (1) That the complainant, before the commencement of the suit, gave notice of his copyright by printing upon a visible portion of the several copies thereof, which had then been published, the notice which the statute requires; and (2) that copies of the photograph were deposited in the office of the librarian before the expiration of 10 days from the date of the publication.

The first question is the one upon which the defendant has offered the most substantial testimony. Upon each point it has introduced the testimony of a former employe of the complainant, which, for reasons abundantly disclosed in the record, is entirely discredited. Mr. Gray, the treasurer of the defendant, testifies that he bought a copy of the photograph No. 94, which was subsequently reproduced by the defendant, with some modifications, in large lithographic form, for the use of a Philadelphia company, on a Saturday afternoon in February, 1889, at the store of one Ritzmann, who was the principal retail dealer in celebrity photographs in New York; that he bought other photographs at the same time, and that no copyright notice appeared upon any of his purchases; and that he carefully examined each, because he knew the consequences of an unlawful use of a copyrighted photograph. Mr. Medairy, the artist who made the sketch from which the lithograph was produced, testifies that the photograph did not contain the notice of copyright. The photograph which was thus purchased and used has been lost.

The testimony of the artist, who, at the time he used the photograph, was making about 25 similar sketches per month for a period of a year, and who is testifying from his recollection of this particular photograph, does not carry much weight with it. Much reliance could be safely placed upon the testimony of Mr. Gray, but for the fact that in two affidavits—one to be used upon the motion for preliminary injunction in this case, and one to be used in a Philadelphia case—he testified that he bought the photograph in his own office from some one of the dealers who called there almost daily to sell such goods, but whose name he did not remember. This discrepancy diminishes seriously the value to be placed upon his testimony, while its honesty is not questioned. Instances were produced of mistakes in the mounting of other copyrighted photographs in the complainant's gallery. The mistakes of importance were in cases where different photographs of the same person, some copyrighted and others not copyrighted, had been mounted, and the proper distinction in regard to the notice of copyright had not always been made by the work people in the mounting room. The testimony for the complainant is clear that special care was taken with the Marlowe photographs, by reason of the terms of the contract, and the fact that each separate photograph was copyrighted, and that only

one mistake had been known, which was discovered before the photograph went out of the complainant's establishment. The testimony satisfies us that all the copies of No. 94, including the one which was purchased by Mr. Gray, left the shop of the complainant with the proper copyright notice properly inscribed upon the face of the substance upon which the same were mounted. If the proper statutory notice of copyright was upon each copy as it left the control and ownership of the proprietor of the copyright, he cannot be responsible for any changes which were afterwards improvidently made upon a particular copy before it came into the hands of the last purchaser.

In January, 1889, the complainant sent around to the retail dealers an exhibition card or sheet containing copies, in very reduced size, of nearly 100 different photographs of Julia Marlowe. From this card the dealers were to order the particular cabinet photographs which they desired to purchase. The card announced the fact that the photographs were copyrighted, but not in the language which the statute prescribes. The defendant claims that, by the circulation of this card, copies of photograph No. 94 were distributed which did not bear the required notice of copyright, and that consequently this suit cannot be maintained. Section 4962 requires a proprietor, as a prerequisite to an action for the infringement of a copyright, to give notice thereof by inserting in the several copies of every edition published, on the title page, or the page immediately following, if it be a book, or, if a photograph, by inscribing on some portion of the face or front thereof, or on the faces of the substance on which the same shall be mounted, the notice of copyright. This card or sheet of miniature copies of photographs for the inspection of dealers is not one of the published editions of the photographs which it contained, within the meaning of the section. The statutes refer to a published edition, which is an edition offered to the public for sale or circulation. An exhibition of a card of miniature samples to the dealers alone, for the purpose of enabling them to give orders, is not a published edition, within the meaning of the statute.

Upon the second point there is very little to cast doubt upon the positive testimony of the complainant's manager. Miss Marlowe sat for No. 94, and about 20 or 25 other photographs, during the latter half of the month of September, 1888. They were numbered consecutively, ending with No. 105. When the usual order for a dozen pictures is given, about two weeks generally elapses after the sitting before the photographs are delivered. Professional pictures, orders for which have not been given, are sometimes delayed, as they have to await the prior finishing of pictures which have been ordered. It is therefore difficult to surmise when No. 94, and its associate numbers, were, in the usual course of business, probably delivered. Miss Marlowe's testimony, that she saw photographs of herself, including No. 94, in an exhibition frame, in Washington, on November 5th, and that she received some in the latter part of November in New York, is unreliable. Her knowledge of the fact that No. 94 was among the number which she saw or received is manifestly uncertain. If her testimony was convincing, we should be called upon to examine and

decide the question of law, whether an exhibition of a photograph for the purpose only of exhibition, and not for sale, and the delivery of photographs to the sitter in accordance with the contract between her and the author, but not for sale, constituted a publication. The only satisfactory evidence is that, as soon as the photographs known as "No. 94" were completed, two copies were sent to the librarian. Upon this state of facts, an examination of the proper conclusions of law from another set of facts becomes not only needless, but unprofitable.

The appellant claims that a decree for an accounting is erroneous, because the only pecuniary remedy which has been provided by statute for the author is an action at law for a forfeiture, and for a penalty. Section 4970 confers upon circuit courts the power, upon bill in equity, to grant injunctions to prevent the violation of rights secured by the laws respecting copyrights. "The right to an account of profits is incident to the right to an injunction in copy and patent right cases." *Stevens v. Gladding*, 17 How. 447; *Belford v. Scribner*, 144 U. S. 488, 12 Sup. Ct. Rep. 734.

The other assignments of errors do not call for any comment. The decree of the circuit court is affirmed.

AIKEN et al. v. SMITH.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1892.)

No. 54.

1. ADMIRALTY—APPEAL—PARTIES.

An admiralty appeal should be dismissed as to certain of the appellants when there is nothing in the record to show that they are privy to the suit except a statement in their unsworn petition for appeal that they are owners of interests in the vessel; but such dismissal should not affect the appeal so far as proper parties thereto are concerned, the misjoinder not prejudicing the appellee.

2. SAME.

The master of a libeled vessel who enters a claim stating that he is the lawful bailee of the owner named in the claim, and who gives a release bond with surety, may alone appeal from the decree of the trial court and thereby bring the whole case before the appellate court, though the owner and surety both appear of record, and may join in the appeal if they wish. *Hardee v. Wilson*, 13 Sup. Ct. Rep. 39, 146 U. S. 179, distinguished.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

In Admiralty. Libel by Charles Smith against the steamboat *Whisper*. W. E. Barre, master, entered a claim stating that he was the lawful bailee of the owner, John F. Aiken, and executed a release bond with Bernard H. Menge as surety. A decree was rendered for libellant. Aiken, Barre, and Menge appeal, together with J. B. Woods and others, styling themselves "owners" of the steamboat. On motion to dismiss appeal. Granted as to the latter defendants.

John D. Grace, for appellants.

Richard De Gray, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. This suit was instituted in the court below by a libel brought by appellee against the steamboat Whisper, and against all persons intervening for their interest therein in a cause of subtraction of wages and damages, civil and maritime. Admiralty process having been issued and served, and the steamboat Whisper seized, the following claim was entered:

"And now comes W. E. Barre, master, who on oath states that he is master of the steamboat Whisper, and that John F. Aiken is the managing owner thereof, and deponent is lawful bailee of the owners, and prays for the release of the vessel on bond."

Release being ordered on the said claim, a release bond was given, signed by William E. Barre, master and bailee for owners of the steamboat Whisper, with Bernard H. Menge as surety. A sworn answer was filed in the cause by John F. Aiken, styling himself "claimant and managing owner of the steamboat Whisper." Upon the issues made by the libel and this answer, the cause was heard, and a decree rendered as follows:

"It is therefore ordered, adjudged, and decreed that the libellant, Charles Smith, do have and recover from the steamboat Whisper the sum of five hundred and six dollars and seventy-five cents, as follows: \$6.75, amount tendered by claimant for wages due; and \$500, damages,—with legal interest from judicial demand and costs of suit. And whereas said steamboat Whisper was released from seizure and restored to her owner on giving bond with William E. Barre, as master thereof and lawful bailee for the owner thereof, with John F. Aiken, as principal, and Bernard H. Menge, as surety, it is further adjudged and decreed that the said William E. Barre, master and lawful bailee of the owner of the steamboat Whisper, principal, and Bernard H. Menge, as surety, be condemned in solido to pay the foregoing judgment, with interest at the rate of five per cent. per annum from judicial demand, and costs of suit."

From this decree an appeal was taken to this court by John F. Aiken, J. B. Woods, Thomas K. Voorheis, E. J. Comeaux, and Walter Comeaux, styling themselves "owners of the steamboat Whisper," and by Bernard H. Menge, surety on the bond for the release of said steamboat Whisper, and by William Barre, master and lawful bailee of said steamboat.

Appellee moves to dismiss as follows:

"First. As to all appellants, because claimant has taken into the appeal herein other parties than those who are parties to this suit, viz. J. B. Woods, Thomas K. Voorheis, E. J. Comeaux, and Walter Comeaux, and has appealed jointly with them. Second. And, in case the above should be overruled, then he moves to dismiss the appeal herein as to said J. B. Woods, Thomas K. Voorheis, E. J. Comeaux, and Walter Comeaux, because neither of them are parties to this cause, and there is no judgment against them or either of them. Third. And, in case neither of the above are allowed, then appellee moves to dismiss said appeal as to John F. Aiken, because there is no judgment against him or in his favor."

A person not a party nor privy to a judgment or decree cannot appeal therefrom. *Ex parte Cutting*, 94 U. S. 14; *Guion v. Insurance Co.*, 109 U. S. 173, 3 Sup. Ct. Rep. 108; *Elwell v. Fosdick*, 134 U. S. 513, 10 Sup. Ct. Rep. 598.

It is apparent that J. B. Woods, Thomas K. Voorheis, E. J. Comeaux, and Walter Comeaux were not parties to the suit in the court below; and there is nothing in the record to show that they are privy to the said suit, except that in the unsworn petition for appeal they are styled "owners of the steamboat Whisper." Having no right to join in the appeal, it follows that as to the parties named the appeal should be dismissed. Such dismissal, however, ought not to affect the appeal as to the remaining appellants, as the joinder complained of has not prejudiced the appellee.

The rule that, where there is a joint judgment against several parties, all must join in the appeal, or there must be a summons and severance or equivalent proceeding, (see *Estis v. Trabue*, 128 U. S. 230, 9 Sup. Ct. Rep. 58,) is said by the supreme court in *Owings v. Kincannon*, 7 Pet. 399, to be based on the propriety, if not necessity, of bringing the whole cause before the court. In the case of *Hardee v. Wilson*, 146 U. S. 179, 13 Sup. Ct. Rep. 39, (recently decided,) the same court says that there are two reasons for the rule: (1) That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed; (2) that the appellate tribunal shall not be required to decide a second or third time the same question on the same record. In the present appeal, William E. Barre is master of the steamboat *Whisper*, and lawful bailee thereof, representing all the owners, and his appeal brings the whole cause to this court, and no other parties appellant were necessary. John F. Aiken's interest appears of record, as does that of Bernard H. Menge. Both had a right to appeal, and their joinder with Barre does not prejudice appellee.

The motion to dismiss the appeal should be granted as to J. B. Woods, Thomas K. Voorheis, E. J. Comeaux, and Walter Comeaux, but overruled as to the other appellants, each party to pay his own costs on this motion; and it is so ordered.

AIKEN et al. v. SMITH.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1893.)

No. 54.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—PERSONAL INJURIES.

The engine used for hoisting and lowering a boat's stage could only move one way, and could not reverse. It was the duty of the fall tender to put proper turns of the fall or rope around the drum while it was stationary, and then pay out or receive the slack according to the way the drum should turn. Thinking the engine was running the wrong way, he attempted to throw the turns off the drum while it was in motion, and was injured. *Held*, that he was guilty of negligence, and the fact that the engineer was an inexperienced person did not contribute to the injury.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

In Admiralty. Libel by Charles Smith against the steamboat *Whisper*, (John F. Aiken, claimant,) in a cause of subtraction of

wages, and damages, civil and maritime. The district court rendered a decree in favor of libelant. The claimant appeals. Reversed.

John D. Grace, for appellant.

Richard De Gray, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The appellee, Charles Smith, exhibited his libel in the district court against the steamboat Whisper in a cause of subtraction of wages, and damages, civil and maritime, and therein claimed that, having lately been employed as a roustabout on said steamboat, he had been assigned against his will to act as fall tender in connection with the hoisting and lowering of the boat's stages, which were very large and heavy, and were and could only be operated by steam power and a steam engine; and at the same time the mate of the said steamboat, without previous notice, selected and designated a boy from 13 to 15 years of age, and without experience, to run said engine by which said stages were to be operated; and in the third article of the libel it was alleged—

"That while said steamboat was on said trip going towards Donaldsonville aforesaid at a point in St. James Parish, at about 12 o'clock at night, she undertook to make a landing, when libelant was ordered to go to the steamboat's drum, hanging under her boiler deck forward and abaft of the steps, so as to lower the stage as the boat arrived at a bank; that, as she was at or near the shore, the first order was to lower the stage, which he did, having three turns of the fall around said drum, and the stage was lowered to a certain extent, and thereupon another order was given, and to raise the stage, and your libelant at once put more turns of the fall around the drum, that said stage might be raised by said steam engine; but that the boy in charge of the said engine, not being competent and experienced, and being unfit and incapable to discharge the duties of stage hoister, started the engine in the opposite direction, whereby libelant was caught in said fall, and carried partly around said drum, and, before the same could be stopped, was left suspended in the air with his head downwards, and had the first and second finger of his right hand cut off between the said fall and said drum."

For the injuries suffered, the libelant claimed the sum of \$2,500, and, in addition thereto, the sum of \$7.50 for wages. The claimant's answer, in substance, is to the effect that the libelant was hired as fall tender; that he was injured through his own fault and negligence, and without the fault of the steamboat Whisper or her owners; and that the amount due him for wages had been fully tendered to him and refused. On the hearing the district court found as a fact "that the injuries sustained by libelant while on board of the steamboat Whisper, and employed thereon as a mariner, resulting in a contusion of the thumb, index, and middle fingers of the right hand of said libelant, and the subsequent amputation of the said index and middle fingers, were caused through the fault and negligence and want of proper care of those in charge of the navigation of said steamboat Whisper," and thereupon ordered and decreed that the libelant should have and recover from the steamboat Whisper the sum of \$506.75, as follows: \$6.75, amount tendered by claimant

for wages due, and \$500 damages, with legal interest from judicial demand, and costs of suit. The claimant, having taken an appeal to this court, makes 11 assignments of error, amounting, in substance, to a complaint that the finding of the district court is against the evidence.

Taking the case as stated in the libel, it is by no means clear that the libelant did not contribute by his own negligence to the injuries he received. His duty as fall tender was to put proper turns of the fall around the drum while it was stationary, and then pay out or receive the slack of the rope according to the way the drum should turn. In performing this duty, it is difficult to understand how the fall tender could be caught in the fall and carried partly around the drum, whichever way it might turn, unless he was negligent either in handling the rope or in the position which he occupied. However this may be, his own evidence clearly shows that he was guilty of negligence at the time he received his injury. Letting alone the conflict generally apparent in his evidence, he fully admits on examination that, at the time he was injured, he was trying to throw the turns of the fall off from the drum while it was in motion:

"Question. If you had not attempted to change the rope on the drum, and let that rope run out, would you have been caught? Answer. I can't tell you about that. After the boat or by the boat springing, that made the full weight of the stage on me, and he running the wrong way. Q. That is not an answer to my question. I asked you very plainly, if you had not attempted to change the rope on that drum, and let it run out, would you have been caught? A. Oh, yes. * * * Q. Why did you take the rope off the drum? A. I holloed to the boy to reverse the engine. He ran the nigger engine the other way and let the stage down. He ran it backward. Q. And you tried to throw the turns off the drum? A. I got one of them off. Q. You tried to throw it off? A. One turn. Q. Did you not try to turn all of them off? A. No, sir. Q. What was your reason for throwing one off? Q. Because I thought as the engine was running the wrong way, and that was to give him a chance to reverse it. * * * Q. So that when they ran the engine this wrong way, notwithstanding that fact, if you had let that rope alone, you would not get your hand caught in trying to throw the rope off the drum? A. One turn I threw off. Q. Did you not want to throw them all off? A. No, sir. Q. Why did you want to throw one off, and not all? A. Because I thought I had one too much."

The evidence shows, and the libelant substantially admits, that the complaint in the libel that libelant was designated against his will to act as fall tender is not true, and that in fact he was hired expressly for the purpose of acting as fall tender.

We do not agree with the finding of the district court that negligence on the part of those in charge of the navigation of the steamboat *Whisper* caused the injury suffered by libelant. The evidence does show that a boy somewhere between the ages of 13 and 18 was employed to run the nigger engine used in hoisting the stages at various landings on the trip, and leaves it in doubt as to whether the boy so in charge of such engine was fully competent or not to generally manage the same. At the same time the evidence clearly shows that the manner in which the engine was handled did not contribute to the libelant's injury. Four intelligent witnesses, apparently without any other interest than that arising from being em-

ployed on the steamboat, and whose personal conduct in regard to the affair was in no wise blamable, testify that at the particular time the libelant was injured, and as generally the custom on board the boat when on a voyage, a wooden block was inserted and fastened in the slide in which moves the lever which operates the nigger engine, in such a way that the engine could only run one way, and could not be reversed. The witnesses testifying to this were the first mate, second mate, watchman, and captain of the watch, and there are two circumstances that corroborate their testimony,—one that the libelant was taking the fall off the drum at the time of injury, which would have been unnecessary if the engine had been reversible; and the other that a call was made to reverse the engine to release libelant from the drum, and the little boy said: "You can't do it. There's a stick in it." The only evidence to the contrary is that of libelant's partner, who testifies to the custom, but denies that the block was there on that particular occasion. If the wooden block or chock was in its place, then it made no difference whether the boy in charge of the nigger engine was competent, so far as injury could result to the libelant, for the boy could only run the engine one way; and whether it properly operated to hoist or lower the stage, and, in so doing, take in or pay out the slack of the rope, would depend entirely upon whether the turns were properly put around the drum; and that was entirely the business of the fall tender.

The whole evidence in the case satisfies us that the libelant contributed to his own injury, and does not satisfy us that the steamboat or her owners were guilty of any fault which contributed to said injury. A decree against them for damages could only be on the ground that they had employed an improper person to run the nigger engine, and while this improper person was running such engine the libelant was hurt. The amount due to the libelant for wages was offered to him before suit was brought, but was refused. In the claimant's answer the tender was renewed, but no legal tender of amount due, with costs to date thereof, has been made. The decree appealed from should be reversed, and the case remanded, with instructions to the district court to enter a decree for the libelant for the sum of \$6.75, and costs in that court, the costs of this court and of appeal to be paid by libelant; and it is so ordered.

THE CURLEW.

FRANKLIN CONSOLIDATED COAL CO. v. THE CURLEW.

(District Court, S. D. New York. July 9, 1892.)

MARITIME LIENS—SUPPLIES—PERSONAL CREDIT OF CHARTERERS.

When the libelant supplied coal at Baltimore for the British ship *Curlew*, to the charterers, who were her owners *pro hac vice*, at their place of residence, and without any reference to the ship as security, charging the charterers individually on their books, and making no claim against the vessel until after the charterers' failure, *held*, that the supplies were furnished

on the personal credit of the charterers, not on the credit of the vessel, and a libel against the vessel for the value of such supplies should be dismissed.

In Admiralty. Libel by the Franklin Consolidated Coal Company against the steamer Curlew for supplies. Libel dismissed.

J. Adriance Bush, for libelants.

Butler, Stillman & Hubbard, for claimants.

BROWN, District Judge. The supplies in this case were furnished at Baltimore. At the time they were furnished, the steamer was under a charter to Henry Bros. & Co., who were well-known resident merchants of that city. The terms of the charter were almost identical with those in the case of *The India*, 14 Fed. Rep. 476, affirmed 16 Fed. Rep. 262; and they amounted, therefore, to a demise of the ship, constituting the charterers owners pro hac vice. See, also, *The Bombay*, 38 Fed. Rep. 512. The dealings of the libelants were with the charterers in person, at their place of residence, and without any reference to the ship as security for the supplies. They were presumably furnished, therefore, upon the personal credit of the charterers. The latter had no right to charge the ship, and evidently had no intention to do so. There was nothing that authorized the libelants to suppose the ship was intended to be charged, or that they had any right to charge the ship. In fact they did not charge her. Upon their books, as well as in the bills rendered, Henry Bros. & Co. alone were charged individually. For the first portion of the bill a note was taken, and no claim was made upon the vessel until after Henry Bros. & Co. had failed.

It is evident that in this case both in law, as well as in fact, the supplies were furnished upon the personal credit of the charterers. The matter has been so frequently discussed in adjudicated cases, that nothing further need be said. See *The Aeronaut*, 36 Fed. Rep. 497; *The Stroma*, 41 Fed. Rep. 599, affirmed, 53 Fed. Rep. 281; *The Samuel Marshall*, 54 Fed. Rep. 396. The libelants were chargeable with notice of the relations of Henry Bros. & Co. to the ship. They knew that the firm was in business in Baltimore. Any inquiry would have shown that they were charterers. If they made no inquiry, they took the risk of the fact. They could not have supposed the firm to be officers of the ship; and if they did not mean to deal with them as owners, or on their personal credit, it was their duty to inquire what the connection of the firm with the vessel was. *Stephenson v. Francis*, 21 Fed. Rep. 715, 921. *The Samuel Marshall*, 49 Fed. Rep. 754, and cases therein cited.

The libel is dismissed, with costs.

THE WELLINGTON.

WOOD et al. v. THE WELLINGTON.

LEWIS et al. v. SAME.

(District Court, N. D. California. March 17, 1893.)

Nos. 10,516, 10,523.

1. SALVAGE—COMPENSATION—PRIOR AWARD.

The power of an admiralty court to award salvage should be exercised with great care, and, where a large award has been made to the master of the salving vessel for a highly meritorious service, an additional award to the mate or other persons, for substantially the same service, should not be thereafter made; such persons having remained silent while the master was prosecuting his libel, although, if they had been parties to the former action, a different distribution might have been made.

2. SAME—DISTRIBUTION—DELAY IN BRINGING SUIT.

When no gross sum has been fixed as an award to the officers and men of a salving vessel, the respective rates of wages are not necessarily a just measure of the awards to be made to certain salvors, who fail to sue until others have recovered their compensation.

In Admiralty. Libels by I. W. Wood and others and John Lewis and Louis O. Eckles against the British steamer Wellington, etc., (Joan O. Dunsmuir, claimant,) for salvage. A statement of the facts of the case will be found in *The Wellington*, 52 Fed. Rep. 605. Decree for libelants.

H. W. Hutton and Walter G. Holmes, for libelants Wood and others.

Beverly L. Hodghead, for Lewis and Eckles.

Andros & Frank, for claimant.

MORROW, District Judge. A salvage service was rendered by the steamer *San Pedro* to the steamer *Wellington* November 3, 1891. The owner of the *Wellington* voluntarily paid to the owners of the *San Pedro* \$10,000 for this service; but as no provision was made for the compensation of the officers and crew of the *San Pedro* for their services, either out of this sum or otherwise, William Robertson and nine of the crew filed a libel in this court July 13, 1892, against the steamer *Wellington*, claiming such compensation, and on August 1, 1892, Charles H. Hewitt, the master of the *San Pedro*, filed a separate libel against the salved vessel, claiming to have rendered services of a highly meritorious character in his capacity as master of the *San Pedro*. The two libels were consolidated and heard October 4, 5, and 6, 1892. The case was taken under advisement, and on October 20, 1892, a decree was entered in favor of Capt. Hewitt for \$2,500, and in favor of the other libelants for \$100 each. 52 Fed. Rep. 605. The officers and members of the *San Pedro* numbered 40 persons at the time of the salvage service. January 6, 1893, or 14 months after the service, and 2 months after the decree in favor of the first libelants, I. W. Wood, chief engineer, Therold Stein, second assistant engineer, Thomas Cleary, third assistant engineer, and seven seamen, joined in a libel, claiming sal-

vage compensation; and on January 23, 1893, John Lewis, the first mate, and Louis O. Eckles, second mate, filed their libel, claiming like compensation for their services on the occasion in question.

The amount of compensation to be awarded to these libelants is the question now submitted to the court; and it is urged, in favor of a liberal allowance to the two mates and the three engineers, that their services, like those of the master, were highly meritorious, and that their compensation should be on the same scale as the award made to the master. Indeed, it is claimed that the first mate was the real hero of the occasion, and that but for his conduct the Wellington might have been lost. The testimony in support of this claim is to the effect that after the steel hawser parted the master of the San Pedro shouted to the master of the Wellington that he would try him again the next morning; that the first mate of the San Pedro interposed, and suggested that the effort should be made at once; whereupon the 14-inch manilla hawser was brought up from the hold of the San Pedro, and after some skillful work was made fast to the Wellington.

In the former case the court took into consideration the fact that the owner of the Wellington had voluntarily paid to the owners of the San Pedro the sum of \$10,000 for the towage service of that vessel, and in viewing that transaction the court was of the opinion that the amount so paid was in accordance with the principles recognized by the courts in making salvage awards. The San Pedro was a powerful vessel, properly equipped for a towage service. The Norwegian steamer Marie had attempted to tow the Wellington the day before, and failed. The difficulty with her was a lack of proper equipment. She did not have a hawser of sufficient strength to stand the towage strain. If I remember correctly, five towlines parted before she gave up the effort, and abandoned the Wellington to her fate. It appeared to be a fortunate circumstance that the San Pedro was equipped with a new 14-inch manilla hawser. The rescue of the Wellington was undoubtedly largely due to that fact; and, had the court been called upon to make an award for the service rendered by the San Pedro, it would have had in view, not only the actual service rendered, but the encouragement that a liberal allowance would give to owners to so equip their vessels that they might be always ready to render a towage service under such circumstances. But, in considering the claim of the master of the San Pedro for a salvage compensation, his skill and courage as an officer were recognized as important factors in the service. There is no heroism in the power or operation of a steam engine, or in the strength of a ship's hawser. These agencies must be operated and directed by human intelligence to be effective. This intelligence was possessed by Capt. Hewitt, to an eminent degree, and it appeared from the evidence that he was sufficiently brave and skillful to be master of the situation. It is said now, in disparagement of his service, that he is 70 years of age; but how does that fact, if it be a fact, discredit his superior ability, as an officer, to direct the movements of his vessel on this occasion? His long experience would rather commend the soundness of his judgment in such an emer-

gency, and I am inclined to think that his familiarity with dangerous situations enabled him to secure the disabled steamer in the gale that was then prevailing. The testimony is conflicting as to what occurred immediately after the parting of the steel cable, but I see no sufficient reason in the evidence now before the court to depart from my former opinion as to the value of Capt. Hewitt's services; but, if I did, it is now beyond the power of the court to revise that judgment. Perhaps, if the libelants in the present case had been parties to the former action, a different distribution of the award might have been made; but they stood by, and allowed the master to prove his superior services, without objection, and without making a claim for themselves. The court was therefore justified in assuming that his claim was not questioned by any of the other officers or crew, but was admitted to be true. The power of the admiralty court to award for a salvage service is an exceptional power, to be exercised with great care, and in view of all the circumstances of the case. It would, therefore, manifestly be an abuse of that power to award to one claimant a large compensation for some supposed meritorious salvage service, and then, upon a subsequent libel being filed by another claimant, to make an additional award to him for the same, or substantially the same, service. In every case the court should carefully look into all the details, and, considering the relation each claimant bears to the service, fix the whole amount for which the salvaged vessel is to be made liable. I do not mean to say that a subsequent libellant might not show good cause for delay in asserting a particularly meritorious claim, but the testimony now before the court does not present such a case. It is said that the mates have been absent from the jurisdiction, but this is not a sufficient excuse for their silence for more than a year. They could have presented their claims without coming personally into court. In fact, the mate has pursued that course in presenting his present claim, and had his testimony taken by deposition.

It is urged, further, that the libelants should be awarded a sum in proportion to the wages they were receiving on board the *San Pedro*. It is true that courts sometimes resort to the rate of wages paid to the officers and the crew of the salvaging vessel for the purpose of determining a fair and equitable proportion of the award for each claimant, but this is not an established rule for every case. In the case of *A Lot of Whalebone*, 51 Fed. Rep. 916, this court made distribution of the salvage award to the officers and crew of the salvaging vessel in accordance with the terms of the agreement between the officers and men and the owners of the vessel as to the individual share each should have in the proceeds of the voyage. The nature of the services performed in that case was a reason for adopting this method of distribution. In the case of *The Sirius*, 53 Fed. Rep. 611, the court affirmed a contract for a salvage service, and afterwards the libellant and interveners in the case asked the court to make a distribution of this amount among the claimants. Here again the court considered the circumstances of the case, and awarded a portion of the sum to the officers and crew of the vessel according to their relations to the service performed, their extra work, and

their regular wages. In both of these cases all the claimants were in court, a gross sum had been fixed for the whole salvage service, and the circumstances favored the method for making distribution among the several claimants. In the case at bar the effort is to induce the court to proceed the reverse way, and, having determined that the master was entitled to a certain liberal compensation, it is urged that the mates and engineers should be compensated on the same liberal scale, and in proportion to their wages; but the circumstances of the present case do not justify such an award, and, besides, this method of procedure, once established, would inevitably lead to claims for salvage services being presented in succession by individuals, the most meritorious first, so as to secure the largest possible scale of compensation, by which others, to follow, might be determined. This would clearly be unjust, not only in the encouragement it would give for a multiplicity of suits, but in the promotion of false and exaggerated claims.

In the former case I awarded \$100 to each member of the crew who had presented his claim, and I am informed that the owner of the Wellington has settled with fourteen others of the crew on that basis. I will accordingly direct that a decree be entered in favor of the present libelants for the sum of \$100 each.

THE WILLIAM ORR.

THE MAGGIE S. ROBINSON.

(District Court, N. D. New York. March 16, 1893.)

1. COLLISION—TUGS AND TOWS—ABSENCE OF HELMSMAN.

The absence from his post of the helmsman of a canal boat in a tow does not render the boat at fault for a collision which the helmsman could have done nothing to prevent if he had been at his post.

2. SAME—PASSING IN NARROW CHANNEL.

The tug O., with tow, bound up the Hudson river, met the tug C., with tow, coming down, about a mile below the Troy bridge, in a narrow channel, with slow current, and on a clear day. Each tug in passing hugged the shore as closely as prudent navigation would permit, but the tug R., with tow, following the C., attempted to pass between the O. and the C., and collided with the O.'s tow. *Held*, that the R. was in fault in attempting to pass.

B. SAME—STOPPING—CHANGING COURSE.

Just before the collision the O. stopped, backed, and took in 250 feet of hawser; then, seeing that a collision was imminent, started ahead. The O. also changed her course after passing the R., thus drawing her tow towards that of the R. in midstream. *Held*, that the O. was also in fault.

In Admiralty. Libel by the owners of the canal boat W. H. Matthews against the steam tugs William Orr and Maggie S. Robinson for collision. Decree for libelants.

J. A. Hyland, for libelants.

G. B. Wellington, for The Orr.

C. D. Hudson, for The Robinson.

COXE, District Judge. The libelants, as owners of the canal boat W. H. Matthews, bring this action against the steam tugs Orr and Robinson to recover damages for a collision which was caused by the alleged negligence of both of the tugs. On the morning of July 26, 1890, the Matthews was being towed by the Orr from Albany to Troy. There were four boats in the tow, tailed one behind the other. The Matthews was the last, and was about 900 feet behind the tug. She was unloaded. When the Orr had reached a point about a mile below the Troy bridge where the river is about 500 feet wide she met the Robinson coming down the river with five canal boats in tow, arranged in two tiers, there being three in the first and two in the second tier. In passing each other the starboard boat of the Robinson's forward tier struck the boat immediately ahead of the Matthews, causing the bow of the latter to be deflected to starboard, thus producing a collision between her and the said boat of the Robinson's tow. The bow of the Matthews was injured considerably, the repairs costing \$95.21. She was delayed nine days. A reasonable allowance for demurrage is \$8 per day, or \$72 in the aggregate. The entire damage occasioned by the collision is \$167.21. No fault is imputed to the canal boat except that the helmsman was not on duty at the moment of the collision. The testimony for the libelants tends to show that he was at the helm, which he had put hard astarboard, and that nothing more could have been done by the canal boat to avoid the accident. It is, however, unnecessary to decide this question of fact, as the court is convinced that nothing the helmsman could have done would have prevented the collision.

The canal boat being free from fault, the question for the court to determine is whether it was the negligence of one or both of the tugs which caused the accident. There was just ahead of the Robinson another tug,—the Crandall,—with a tow of seven canal boats arranged in two tiers, there being four in the first and three in the second tier. A fourth tug,—the Manny,—with her tow, was going up the river. The day was clear and the approaching boats could easily see each other when half a mile, or more, away. The current in the river at this season of the year is slow, not being over two and a half miles an hour, but there was an ebb tide running. The first signal came from the Orr indicating that she wished to go to the left. This signal was assented to by the Robinson and the Crandall. The Crandall had started ahead of the Robinson, but the latter had overtaken her and at the time of the collision was either lapping the Crandall's second tier or was passing to the west of the Crandall and her tow. At all events there is no dispute that at the time of the collision the course of the Robinson lay between the courses of the other tugs. The evidence further establishes the fact that the channel is considerably narrower than the river and that the Orr was as near the west bank and the Crandall the east bank as prudent navigation permitted. The Robinson was manifestly in fault for attempting to pass the Crandall at this point. The Crandall started some 20 minutes ahead of the Robinson but had a much heavier tow than the Rob-

inson. The latter, long before the accident and when the boats were nearly a mile apart saw, or might have seen, the exact situation. Her duty to keep behind the Crandall was clear. It was a grave fault for her, in such circumstances, to crowd into a narrow channel between two passing tows when she could just as well have kept in the wake of the Crandall's tow. By taking the course she did she put the Orr into what the counsel for the Robinson aptly terms "a pocket." The Orr was not in fault for taking the west side of the channel. Her proposition to go to the left was agreed to by all.

Was she negligent in other respects? The court has read the testimony, and some portions of it several times, to reconcile, if possible, the contradictions and confusion which exist upon several material points. The court is unable, however, to reach a satisfactory conclusion as to the width of the channel at the point of collision; the position of the sand barge with reference to the same point; whether the Orr was ahead of the Manny or vice versa; whether the Crandall was in the center or on the eastern side of the channel; whether the Robinson was abreast of the Crandall's tow or was just lapping the last tier, and many other considerations which are important factors in determining the question of negligence as to the Orr. The testimony of the master of the Orr is not altogether clear, but there appears to be no doubt that when he was on the extreme western edge of the channel, just previous to the collision, he stopped, backed up and took in some 250 feet of hawser. Directly thereafter he saw that the "double-header" in his tow was going ahead and was about to hit the Robinson's tow, when he straightened up, pulled the boats clear, and started on again, the collision occurring almost immediately. It would seem that at such a time and in such an extremity this was a most hazardous maneuver, and that it may have contributed to the accident. Furthermore, the testimony indicates that after the tugs had passed, the Orr changed her course towards the center of the river, thus drawing her tow directly towards the tow of the Robinson. This unquestionably was unskillful seamanship. There is some evidence that it was necessary to avoid grounding, but the court is satisfied that it was an unwise proceeding. The impression produced by all the evidence is that the Orr was placed in a dangerous position, chiefly through the negligence of the Robinson, but that once there her own unskillful seamanship contributed to the disaster which befel the libelants' boat. It follows that the libelants are entitled to a decree against both tugs for \$167.21, with interest thereon from August 4, 1890, and costs.

THE J. E. TRUDEAU.

NEW ORLEANS & A. PACKET CO. et al. v. PICKLES.

PICKLES v. NEW ORLEANS & A. PACKET CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 16, 1893.)

No. 51.

1. COLLISION—BOAT AT PIER—VIS MAJOR—EVIDENCE.

A steamer descending the Mississippi, in trying to make a landing at the foot of Canal street, New Orleans, at 2:30 A. M., collided with and sunk a tug lying at her wharf. It was the custom of prudent navigators attempting to make a landing at that point to pass below it before turning towards the shore, in order to avoid a well-known and dangerous eddy. The steamer did not do so, and set up in defense the fact that she, without fault, had become unmanageable just before the collision by having her rudder clogged by some floating obstruction, the only evidence of which was the conflicting and uncertain testimony of the pilot, who made no complaint of any obstruction until after the collision. *Held*, that a case of *vis major* was not proved, and that the steamer was at fault. 48 Fed. Rep. 847, affirmed.

2. SAME—MEASURE OF DAMAGES.

Although no fixed rule of depreciation from first cost can be adopted as a safe measure of the value of steamboats, and the appellate court considers a better method of valuation to be the expense of replacing the lost vessel, allowing about one third new for old, yet, where the trial judge in his opinion adopts a rule of 10 per cent. depreciation per annum, the amount of damages based thereon should not be increased on appeal.

3. ADMIRALTY—PLEADING—AMENDMENT.

Where the libel for collision makes no prayer for interest on the amount awarded, such prayer may be made under admiralty rule 24, by an amended libel filed after all the issues except the amount of damages have been determined.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

In Admiralty. Libel by Thomas Pickles against the steamboat J. E. Trudeau, A. P. Trousdale, master, her tackle, etc. The New Orleans & Atchafalaya Packet Company, claimant and owner, intervened, and obtained a release on bond, of W. G. Coyle, R. W. Wilmot, and J. H. Menge, sureties. A decree was rendered for libellant. 48 Fed. Rep. 847. Both parties appeal. Affirmed.

J. P. Hornor and Guy M. Hornor, for New Orleans & A. Packet Co.
James McConnell and Frank N. Butler, for Pickles.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. Thomas Pickles exhibited his libel in the district court of the United States for the eastern district of Louisiana against the steamboat J. E. Trudeau, A. P. Trousdale, master, her tackle, apparel, and furniture, and against all persons lawfully intervening for their interest in said vessel, in a cause of collision, civil and maritime; and his cause of action was fully set forth in the second and third articles of his libel, as follows:

"(2) That on the morning of the 30th day of January, 1890, at about the hour of 2:30 A. M., and while lying and moored at the wharf in this city at the foot of Canal street, on the Mississippi river, and was staunch and strong, and properly equipped to enable said tug to engage in the trade aforesaid, the said steamboat J. E. Trudeau, on her way from the upper coast and down the rivers Mississippi and Atchafalaya, in which said steamboat was then engaged, and while said steamboat was near the said tug, the said steamboat did run into your libellant's said tug with great violence and force, causing said tug to sink then and there; in consequence thereof said tug became a total loss to your libellant; and that the sinking of said tug was caused by want of care, skill, and diligence upon the part of the officers and crew of said steamboat J. E. Trudeau, and was solely due to the fault and negligence of the officers and crew of said steamboat.

"(3) That, by the sinking of said steam tug Josie, libellant has sustained a loss amounting to the sum of six thousand dollars."

The New Orleans & Atchafalaya Packet Company, claimant and owner of the said steamboat J. E. Trudeau, intervened, and obtained a release of the same on bond in the sum of \$6,000, and thereupon filed its answer, the material part of which is as follows:

"That, as to the matters and things set forth in the second article of said libel, the same are not wholly true, as alleged, but the truth and fact is and was that on the morning of the 31st day of January, 1890, the said steamer J. E. Trudeau, being on a voyage to the city of New Orleans, in the Mississippi river, was descending said river and approaching New Orleans, as she usually did, on her regular weekly trips, and was approaching her landing just below Canal street, in the city of New Orleans, in her usual manner, and at a very ordinary rate of speed, and was duly manned and equipped, as required by law, with a sufficient crew and officers, a competent pilot and captain, the whole crew being on deck and on watch, and in their respective stations, when suddenly a log or some obstruction of that character got caught in the rudder of said steamboat J. E. Trudeau, and so blocked it that it became unmanageable, and the wheel could not be moved either one way or the other; that the pilot of the said steamboat immediately, upon perceiving this, rang the bell, and gave the order to stop and back said steamboat, and her engines were accordingly and immediately stopped and backed, but said steamboat was rendered uncontrollable by the accident to her rudder, as aforesaid, and was caught in the eddy which exists in the Mississippi river at and above the landing place of said steamer, and while said steamer was thus uncontrollable, by the effect of the force which she then had, and could not be checked, and by reason of said eddy, said steamboat J. E. Trudeau was unavoidably run upon said ferryboat Josie, and collided with her; that the said collision was the result of unavoidable and uncontrollable accident, which could not have been avoided by any act of the master or crew of said steamboat J. E. Trudeau, and that said accident was not caused by any want of care, skill, and diligence upon the part of the officers and crew of said steamboat J. E. Trudeau, but was solely due to said unavoidable accident; that all the machinery of said steamer J. E. Trudeau, including her steering gear, was in thorough good order, and she was provided with all the known appliances necessary for her own safety and for her proper navigation; that, as to the matters and things contained in the third article of said libel, claimant answers and says that the same are not true, and the damages alleged are greatly exaggerated."

After the taking of much evidence, the district court, on final hearing, adjudged the steamboat J. E. Trudeau in fault, and ordered a reference to the commissioner to report the damages. Thereafter the commissioner reported the amount of damages in the sum of \$6,000. Opposition was made to the said commissioner's report as excessive, and praying that the amount found by the commissioner should be reduced to the sum of \$1,680. Pending the hearing on the opposition

to the commissioner's report, the libelant, under a rule with notice, obtained leave from the court to file a supplemental libel, claiming interest at the rate of 5 per centum per annum from the time of the collision until paid, on whatsoever sum shall be allowed in the cause as the amount of loss sustained by libelant. On the same day the supplemental libel was allowed, the case came on to be heard on the report of the commissioner as to the damages sustained by libelant in the loss of the steam ferryboat Josie; and the court, considering the same, fixed the value of the steam ferryboat, at the date of her loss as aforesaid, at the sum of \$3,950, and thereupon rendered judgment condemning the New Orleans & Atchafalaya Packet Company and W. G. Coyle, R. W. Wilmot, and J. H. Menge, as sureties on the release bond, in the sum of \$3,950, with interest at the rate of 5 per centum per annum from the 31st of January, 1890, till paid, and costs of suit. From this decree claimant appealed to this court, assigning errors as follows:

"(1) That the judge of the district court erred in granting a new trial to the libelant after having decided the case on all its points in favor of the claimants.

"(2) That the judge of the said district court erred in sustaining the libel of libelant, and awarding damages against claimants.

"(3) That the judge of the district court erred in deciding that the weight of evidence showed that, opposite and above the point of landing which the Trudeau was endeavoring to make, there was a large and powerful eddy, well known to the navigators of the Mississippi river, and that the usual prudent course of descending boats, desiring to make a landing at this point, was to keep outside of the eddy, i. e. further towards the Algiers side of the eddy, a little below the point of landing, and then turn and proceed to the landing, out of the eddy, a little up stream.

"(4) That the judge of the district court erred in holding that there was a preponderance of testimony, and that the reasoning tended to show this mode of proceeding as being the safe and proper mode.

"(5) That the judge of the district court erred in holding that had the Trudeau kept outside of the eddy, and kept on to a point below Canal street, so that her turning would have been without the eddy, and her motion towards her landing would have been a little up stream, though her helm being incapable of governing the motion of the vessel, the vessel might nevertheless have been made simply by its revolutions to have prevented the Trudeau from running into the Josie.

"(6) That the judge of the district court erred in holding as a settled rule of law that in cases of collision it is the efficient controlling and management of the vessel charged with the fault which must be looked at; and that though her management at the very moment of, or for a few moments preceding, the collision, was faultless, nevertheless, if her anterior and controlling management contributed to the disaster, and was injudicious and lacking in skill or in observance of the known methods of navigation, either local or general, she is deemed to be in fault.

"(7) That the judge of the district court erred in refusing to grant to the claimants the new trial asked for by them.

"(8) That the judge of the district court, in finding the value of the steamer Josie, libelant's vessel, to be \$3,950, erred; the evidence showing that it was not worth more than \$1,250.

"(9) That the judge of the district court erred in allowing the libelant, without conditions, to amend his libel, after the final decision of the case, and all was over except the finding of the damages, by praying for interest on said damage, which libelant had neglected to do in his original libel; and said judge of the said district court also erred in allowing interest on the amount of damages allowed as prayed for in said amended libel.

"(10) That the judge of the district court erred in not holding that this was a case of inevitable accident, as he originally did, and in not dismissing the libel."

The libelant also appealed, and assigned as error that the preponderance of the evidence conclusively showed that the libelant was and is entitled to an allowance of at least \$6,000 for the value of the steam ferryboat Josie, with interest thereon, as prayed for, and costs of suit.

The assignments of error need not be considered seriatim. The case made by the libel and the answer is that the ferryboat Josie was entirely without fault; the collision resulted from the action of the steamboat J. E. Trudeau; and the issues are (1) whether, just prior to the collision, and suddenly, a log or some obstruction of that character got caught in the rudder of the steamboat Trudeau, rendering her unmanageable, and, if so, whether at the time of, and just previous to, the collision, the steamboat Trudeau was without fault in her equipment and navigation, and the burden of proof is on the claimant; and (2) the value of the ferryboat Josie, the burden of proof being on the libelant. With regard to the obstruction of the rudder by reason of a log or drift being caught therein just prior to the collision, we are dependent entirely upon the evidence of the pilot, Alcide Leigh, no other witness having any knowledge of any obstruction, save by inference or hearsay, and the steamboat showing immediately afterwards no sign of any obstruction or of injury resulting therefrom. The sworn statements of Leigh are so conflicting one with another, and, when not conflicting, are so vague and uncertain, that we are unable to place reliance upon them. Exactly when and where and how he discovered that his rudder was obstructed is uncertain. The course of the Trudeau in approaching the landing just prior to the collision is uncertain; and, as to the obstruction itself, one answer sufficiently shows how confused he was on that important issue:

"Question. Now, Mr. Leigh, what was the reason that the boat refused to mind her helm? Answer. Well, the reason I cannot say. The exact reason I can't say. What the exact reason of it was I can't say. There was something the matter. Exactly what it was— I know there was something the matter with the helm. What it was I can't swear to, but I know I couldn't manage my helm around as far as I ought to. I could pull the wheel over as far as she ought to have gone. I couldn't bring her over to starboard."

Certain it is that although this witness claims in some parts of his evidence that, at the time he found the rudder was obstructed, he was out in the stream outside of the eddy, the ship straight down the river, headed for the shipyard on the opposite side, and although the master of the J. E. Trudeau stood by the pilot house observing the course of the boat, in conversation with the pilot as to the steering, and noticed the sheering of the boat and the backing of the engines, it was not until after the collision that he made any report or complaint of any obstructions of the rudder, or of any difficulty in the working of the steering apparatus, for the master testifies:

"I was running about right until we got pretty close to Canal street ferry, and I saw the boat was sheering towards the shore, and I said to the pilot, I said, 'Hold her out;' and he said, 'She is hard out, sir.' Question. You told him to hold her out? Answer. Yes. Q. And he said what? A. He said,

'She is hard out, sir.' Q. He said, 'She is hard out?' A. Yes, sir. Q. Who was the pilot? A. Mr. Leigh. Q. The same one that testified in this case before? A. Yes, sir. Q. What was his reply? A. 'I got her hard up.' That is the way his wheel was in the starboard, and it was impossible to put it right to starboard; and I noticed she didn't go, and I told him he had better stop her, and he said he had rang the backing bell. Q. Well, tell us what happened after that. A. Then I saw that the boat was backing, when, at the same time, she started to sheer in towards this side, and at that time her head struck the eddy, and she sheered more rapidly, and she came in under a strong backing bell into this ferryboat, and struck her; and as she backed out some twenty feet he stopped her, and I asked him what that meant,—how did that happen,—and he says, 'I can't move my rudders either one way or the other. They are foul.'"

The evidence shows that on the left bank of the Mississippi river, extending from some distance above and below the Canal street ferry landing, there is a strong, powerful eddy, well known to all steamboat men, which renders the landing of steamboats either above or below the Canal street ferry landing exceedingly difficult, requiring both skill and caution to avoid injury. The preponderance of evidence is that the proper and prudent course of navigation of a descending steamboat intending to make a landing in the eddy just below the Canal street ferry landing is to keep well in or near the middle of the river until opposite to or a little below the landing place intended, and then round to and come in to the landing on the eddy. The evidence shows that this course was not pursued by the Trudeau, but, instead, she came down near the left shore, not much, if any, outside of the eddy, until she reached near the Canal street ferry landing, at which point she undoubtedly struck the eddy, then sheered, and refused to answer her helm, and before her headway could be overcome, though backing at full speed, collided with the Josie. The evidence with regard to the course actually pursued by the Trudeau is conflicting, but we find several undisputed points which, in connection with the other evidence, make it clear to us that the above was the course followed. Joe Phillips, first witness called for libellant, testifies that he was a night watchman employed by the Mississippi Transportation Company, watching barges at Julia street, less than a half mile above the Canal street ferry landing, and on the night of the collision saw the J. E. Trudeau pass down, and that she passed close to the barges, and he estimates the distance out about 50 yards. Alcide Leigh, the pilot in charge, admits that he intended to pass the Josie at the Canal street ferry landing about 25 or 30 yards; and also that, at the time he discovered his rudder was unmanageable, he was about 100 yards above the ferry wharf, and about 60 yards out in the river; and there is no doubt that, almost immediately after the master noticed the boat was sheering towards the shore, the collision followed. We think it clear, under all the evidence in the case, that the J. E. Trudeau was in fault in her navigation, and that the claimed obstruction of her rudder by reason of a log or driftwood was an afterthought of the pilot. At all events, the claimant has failed to prove a case of vis major.

The claimant complains that after the finding of the district judge that the J. E. Trudeau was in fault, and all issues had been determined, except as to the value of the Josie, the district judge permit-

ted the libelant to file an amended libel praying for interest. We see no objections to the amendment of the libel under such circumstances. The practice in admiralty is very liberal in allowing amendments to facilitate justice, permitting them even on appeal, unless they present new causes of action. Admiralty Rule 24; *The Charles Morgan*, 115 U. S. 69, 5 Sup. Ct. Rep. 1172. In this case, however, the amendment operated no prejudice whatever to the claimant, because the libel prayed for \$6,000 damages, and interest is in the nature of damages, and all that the court allowed in the case, principal and interest, could have been allowed without any amendment.

The evidence with regard to the value of the steam ferryboat *Josie* is of two sorts: (1) Opinions based on original cost, actual condition and merits at the time she was sunk, and the cost of replacing her; (2) calculations based on fixed percentages of depreciation per annum on her actual original cost. The opinions of witnesses, more or less informed, who do not resort to percentages of depreciation to ascertain the value, range from Capt. Trousdale's \$1,000 to Capt. Kelly's \$9,000, and really go very far to show that the *Josie* was actually worth \$6,000. The rule adopted by insurance companies and steamboat appraisers is shown to be based on annual depreciation from cost price of from 10 to 20 per cent. Some apparently experienced steamboat men testified that a steamboat depreciates in value from 10 to 20 per cent. every year for from two to four years, and thereafter, if retained in service and kept in proper repair, does not materially depreciate. We are of opinion that no fixed rule of depreciation per annum can be adopted as a safe criterion of the value of steamboats. The kind and quality of material originally used, the care and use, state of repair maintained, are all essential matters to be considered. The district judge adopted a rule of 10 per cent. per annum depreciation, and found the value of the *Josie* at the time of her loss to be \$3,950. If the present case were before us for original decision, we should be disposed to consider the evidence in all its aspects with a view to get at the expense of replacing the *Josie*, allowing about one third new for old, (the rule in general average;) but coming, as it does, on appeal, with the district judge's opinion, after having examined and considered all the evidence, and the general rule being not to increase damages on appeal, we are indisposed to increase the amount allowed in the district court. The decree of the district court is affirmed, with costs of this court and of appeal to be divided between appellants and cross appellant, and the costs of the district court to be paid by the New Orleans & Atchafalaya Packet Company.

DUFOUR et al. v. LANG.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1892.)

No. 64.

1. APPEAL—FINAL DECREE.

A decree, rendered at the suit of a stockholder, removing the liquidators of a corporation because they had interests adverse thereto, and appointing receivers having the powers and duties of liquidators in addition to the usual functions of receivers, is not a final decree as to the displaced liquidators from which they can appeal either in their official or individual capacities.

2. SAME—ASSIGNMENTS OF ERROR—FAILURE TO FILE APPEALS IN EQUITY.

The eleventh rule of the circuit court of appeals for the fifth circuit, requiring an assignment of errors in the court below, which shall form part of the transcript on appeal, is applicable to all cases of appeals in equity as well as in admiralty, and to writs of error; and a failure to file such assignment is good ground for dismissing the appeal.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Equity. Bill by Carl Lang against the Louisiana Tanning Company and 12 individuals composing the board of directors thereof. A supplemental bill made P. Cougot and Wentzel Zimmerman parties defendant, and alleged that they, with J. M. M. Dufour, had been elected liquidators of the company, and prayed that they be removed, and that receivers be appointed to liquidate the company's affairs. A decree was accordingly entered removing such liquidators and appointing receivers as prayed. The liquidators appeal therefrom. Appeal dismissed.

J. R. Beckwith, for appellants.

John D. Rouse, Wm. Grant, and Frank E. Rainold, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. On the 30th of April, 1892, the appellee, Carl Lang, a citizen of Indiana, on behalf of himself and of all others similarly situated, exhibited his bill of complaint in this case in the circuit court for the eastern district of Louisiana against the Louisiana Tanning Company and 12 individual defendants, alleged to then constitute the board of directors of said company, alleging that said company was incorporated for the declared purpose, as expressed in its charter, of purchasing unimproved real estate in the parish of Orleans, and such other vacant woodland as might be necessary for the purposes of the corporation, and of constructing, maintaining, and conducting a tannery for the tanning and manufacture of leather products, and such other articles of commerce as appertain thereto; that said company was duly organized; extensive and valuable works erected for the purpose of manufacturing leather and leather goods in the city of New Orleans; and in the fall of 1889 said corporation was in a situation to prosecute its legitimate business with great profit to the shareholders; that

the president and directors of said corporation, and other shareholders, whose names are unknown to complainant, are engaged in the butchering business in New Orleans, and have constantly on hand, as a product of said business, a large quantity of hides for sale; that they own a majority of the stock of the corporation, and since the adoption of an amendment of the charter, procured by the president and secretary of the company on the 21st of November, 1889, pursuant to a scheme to defraud the complainant, who is not in the butcher business in New Orleans, and others similarly situated, have confined the operations of said corporation to the selling of hides produced by and belonging to themselves, as a broker or commission merchant, charging for such services a mere nominal brokerage. The prayer of the original bill sought to restrain this course of trade, alleged to be unlawful as well as fraudulent, and to have the operations of the corporation restored to and confined to the purposes expressed in the original charter, and for all orders necessary to effect that object.

On the 11th of June, 1892, the complainant filed a supplemental bill against the original defendants, except Joseph Tujague, and against P. Cougot and Wentzel Zimmerman, who were not parties to the original bill, alleging that since the filing of the original bill the officers of said corporation had called a stockholders' meeting, and on the 1st day of June, by a vote of a sufficient number of shareholders, said corporation was dissolved, and put in liquidation, and that the defendants Pierre Cougot, J. M. M. Dufour, and Wentzel Zimmerman were elected liquidators, have qualified, and are now in possession of the books, records, and property of the company as such; that about the time of the filing of the original bill the officers and directors of said corporation made a note to Pierre Ader (at that time a director) in the sum of \$3,000, payable on demand, and at the same time granted a mortgage to secure the same, bearing upon all the real property of said company; that Pierre Cougot acted as the agent of said Ader in said transaction, and has filed a suit to foreclose said mortgage, and procured the issuance of a writ of seizure and sale thereon under which the sheriff has seized said real estate, and has advertised the same to be sold on the 25th day of June, 1892, to satisfy said note; that all of said actions of the officers and directors of said company were parts of a scheme and combination between them to wreck and destroy said corporation, and appropriate its assets and property to their own use; that the officers and directors are liable to account for all the profits made by them, and all they ought to have made out of the business of the corporation while under their control. The prayer is that a receiver may be appointed; that an account be ordered taken of the amounts due by the several defendants on account of all the matters complained of in the original bill and in the supplemental bill; that the assets of said company may be brought in and distributed; that said liquidators be ordered to deliver to said receiver the books and assets of the company and enjoined from interfering with the receiver in the performance of his duties. After notice to the parties of a rule to

show cause why the receiver should not be appointed, and an appearance for them by counsel presenting affidavits and argument, the circuit court, on the 24th June, 1892, ordered, adjudged, and decreed as follows:

"That the interests of the defendants J. M. M. Dufour and P. Cougot in the subject-matter of the litigation in this case, and their relation to the Louisiana Tanning Company, which is adverse to the interests of the shareholders thereof, renders them incompetent to act as liquidators of said dissolved corporation, and their election and appointment, as such, is hereby set aside; and the said Wentzel Zimmerman, the other liquidator, having expressed a wish to be relieved of his trust, is also set aside.

"(2) It is further ordered that Wentzel Zimmerman, selected by the court in the first instance, and Geo. W. Barbot, nominated by the complainants, and the defendants declining to nominate third receiver, Joseph H. DeGrange, also selected by the court, be, and they are hereby, appointed receivers of said Louisiana Tanning Company, to act as trustees thereof in place of said liquidators, with full power and authority to liquidate and settle the affairs of said dissolved corporation; to collect, get in, and receive the outstanding debts, claims, and moneys due to or on account of said corporation business; to receive and take possession of all the stock in trade, effects, and property of every nature and kind belonging to said corporation; to redeem, under the orders of this court, any and all property of said corporation now under seizure or otherwise detained by legal process, if they deem it best and for the interest of creditors and shareholders, upon such terms as may be prescribed by the court; to take possession of all books of account, papers, records, or writings belonging to said dissolved corporation; to sue for and recover, for the use and benefit of the creditors and shareholders, any and all sums of money for which any person may be liable to said corporation on any account; to sue for any property to which said company may be entitled, either legally or equitably; to sell any of the property and assets of said dissolved corporation under orders of this court, and give title thereto; and, finally, to settle and liquidate the affairs of said corporation, and pay its lawful debts, and divide any surplus that may remain among the shareholders, all under the direction of this court. And said receivers are hereby vested with all the powers and authority usually granted to receivers, as well as with those belonging to liquidators of dissolved corporations, in whose place and stead they are appointed.

"(3) It is further ordered that the defendants, and each of them, deliver over to such receivers all stock in trade, property, effects, books, papers, writings, and records of every nature and kind soever, in their possession or under their control, belonging to said Louisiana Tanning Company; and also all moneys, notes, drafts, bills, and other evidences of indebtedness due to said dissolved corporation.

"(4) That said receivers do each, within two days, execute a bond with the clerk of this court, in the usual form, in the penal sum of — dollars, with sufficient security, to be approved by such clerk, for the faithful performance of their duties as such receivers.

"(5) It is further ordered that said receivers from time to time make report to the court of all their doings in this behalf, and that either party to this cause, or said receivers, shall be at liberty to apply to the court from time to time for such further orders as may be necessary."

Thereupon the appellants, as individuals and as liquidators, prayed an appeal, and have filed a transcript of the record in this court, and seek to have said order of the circuit court reviewed and reversed as a final decree.

The appellees move to dismiss this appeal on the following grounds:

"(1) Because the decree appealed from herein is not final, and the court is therefore without jurisdiction to entertain the appeal. (2) Because appellants

have not filed an assignment of errors, as required by rule No. 11 of this honorable court."

In the progress of an equity cause, orders and decrees may be made which so affect the parties or the property involved in the suit as to require that such order or decree, to be reviewed at all by an appellate court with effect, should be appealed promptly, and not await the full disposition of the whole suit; and whenever this is the case the decree is held to possess such an element of finality as to bring it within the terms of the statute limiting the right to appeal only from final decrees. Many illustrations of the application of this principle are to be found in the United States Supreme Court Reports, and many of the features or elements by which such appealable finality is to be distinguished are defined in the opinions of that court.

In *Bostwick v. Brinkerhoff*, the United States supreme court say:

"The rule is well settled and of long standing that a judgment or decree, to be final, within the meaning of that term as used in the acts of congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case; so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject." 106 U. S. 3, 1 Sup. Ct. Rep. 15.

See *Grant v. Insurance Co.*, 106 U. S. 429, 1 Sup. Ct. Rep. 414. In *Forgay v. Conrad* the supreme court, in an opinion by Chief Justice Taney, say:

"When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal. * * * This rule, of course, does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, or to cases of like description." 6 How. 204.

The appellant's counsel cites on his brief to support this appeal: *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 108 U. S. 24, 2 Sup. Ct. Rep. 6; *Iron Co. v. Meeker*, 109 U. S. 180, 3 Sup. Ct. Rep. 111; *Thomson v. Dear*, 7 Wall. 342; *Cosby v. Buchanan*, 90 U. S. 490; *Stovall v. Banks*, 10 Wall. 583; *Railroad Co. v. Bradleys*, 7 Wall. 583; *Elliott v. Sackett*, 108 U. S. 132, 2 Sup. Ct. Rep. 375; *Canal Co. v. Beers*, 1 Black, 54. We do not deem it necessary or useful to review these numerous cases. The doctrine of all of them is in substantial accord with that of the cases above referred to in this opinion, and is to the effect that a decree is final for the purpose of an appeal when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. A correct analysis of the pleadings in this case, and of the decree from which this appeal is taken, shows that this case does not come within the rule or within its application as announced in those cases.

We are of opinion that the second ground on which the dismissal of this appeal is moved is also well taken. Appeals from the circuit courts shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error. Rev. St. § 1012. There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party. Rev. St. § 997. Our rule 11, (47 Fed. Rep. vi.) based on these provisions of the statute, requires the plaintiff in error or appellant to file with the clerk below, with his petition for writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. The first clause of subdivision 5 of rule 24 (Id. xi.) provides that when, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion. The counsel for the appellants insists that this rule can never have been intended to relate to any appeals except appeals from admiralty causes. There is, however, nothing in the language of the statutes or of our rules, or in the nature of the case, restricting the application of the rule to appeals in admiralty. The purpose of the rule is twofold: to advise the adversary as to what he is to defend, and to aid the appellate court in reviewing the case. It is so far not jurisdictional that the court may, in a proper case, entertain the appeal, and notice a plain error not assigned or specified; but we consider the better practice is to require a compliance with the rule in all cases of appeals in equity, as well as of writs of error in cases at law. We conclude, therefore, that the motion to dismiss this appeal is well taken, and should be granted, and it is so ordered.

HUMES et al. v. THIRD NAT. BANK.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1893.)

No. 88.

APPEAL—APPEALABLE JUDGMENTS—PARTIES—SEVERANCE.

The sureties upon a supersedeas bond, after affirmance by the appellate court, cannot have the judgment thereafter entered against them in the trial court reviewed on writ of error without joining the principal and all other defendants in the writ, or obtaining a severance or other equivalent proceedings giving them the right to proceed alone. *Hardee v. Wilson*, 13 Sup. Ct. Rep. 39, 146 U. S. 179, followed.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

Action by the Third National Bank of Chattanooga against Eugene C. Gordon. Judgment was given for plaintiff, and affirmed upon writ of error. 12 Sup. Ct. Rep. 657, 144 U. S. 97. On motion in the trial court, judgment was entered against defendant and his sureties upon the supersedeas bond, C. C. Harris and Milton Humes,

who thereupon sued out this writ of error. On motion by defendant in error to dismiss the writ for the nonjoinder of defendant below. Granted.

R. C. Brickel and W. A. Gunter, for plaintiffs in error.

William Richardson, (White & Martin, on the brief,) for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The Third National Bank of Chattanooga, in April, 1888, recovered in the circuit court of the United States for the northern division of the northern district of Alabama a judgment against Eugene C. Gordon in the sum of \$5,286.67 and costs. To reverse this judgment, Gordon sued out a writ of error to the supreme court of the United States, giving a supersedeas bond, with Milton Humes and C. C. Harris sureties thereon. In March, 1892, the supreme court affirmed the judgment. In May, 1892, the certificate of affirmance and the mandate of the supreme court in common form was issued. On the 12th of October, 1892, at the regular term of the circuit court, the Third National Bank of Chattanooga, having given previous notice, moved the court for judgment against the said E. C. Gordon and his sureties on said supersedeas bond, C. C. Harris and Milton Humes. To this motion, Harris and Humes appeared and interposed a demurrer, assigning three separate causes: (1) That this court is without jurisdiction to order the issue of an execution against these defendants, as prayed for in said petition or motion; (2) that the said motion or petition does not make a case of which this court can take cognizance; (3) that the statutes of the state of Alabama allowing damages on judgments affirmed on writ of error or appeal are not applicable to judgments affirmed by the supreme court of the United States. The demurrer was overruled, and, the motion coming on to be further heard, Harris and Humes proposed to interpose a plea of payment, suggesting that since the rendition of the original judgment payments on said judgment have been made to plaintiff to a large amount, exceeding one half of the said judgment. The plaintiff denied that any such payment had been made, and the court thereupon refused to permit the said plea of payment to be interposed, or to hear any evidence touching such payments. The plaintiff in the court below (the defendant in error here) then read in evidence the supersedeas bond executed by the defendants E. C. Gordon as principal and Milton Humes and C. C. Harris as sureties, and the mandate of the supreme court of the United States, showing the judgment of the supreme court as follows:

"On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, and interest until paid, at the same rate per annum that similar judgments bear in the courts of the state of Alabama; and that the said plaintiff recover against the said defendant E. C. Gordon for its costs herein expended, and have execution thereof."

And the following mandate:

"You therefore are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding."

—And thereupon, without any other evidence, the court rendered judgment, and directed issue of execution against the defendants Milton Humes and C. C. Harris, as sureties on said bond, for the principal and interest and costs as shown in said judgment; the formal judgment of the court being as follows:

"It is therefore ordered, adjudged, and decreed that the plaintiff, the Third National Bank of Chattanooga, recover of said defendants, E. C. Gordon, principal, and C. C. Harris and Milton Humes, sureties, the sum of seven thousand two hundred and four and eighty-five one hundredths dollars, being said judgment and the interest thereon from date rendered to this date, October 3, 1892, and a further amount of one hundred and twenty-seven dollars, the costs herein, being in all seven thousand three hundred and thirty-one and eighty-five one hundredths dollars, for which execution will issue."

Milton Humes and C. C. Harris, without obtaining any severance as to Gordon, applied for and obtained a writ of error to this court, assigning errors as follows:

"(1) The court erred in the judgment rendered. (2) The court erred in overruling the first ground of defendants' demurrers to plaintiff's said motion. (3) The court erred in overruling the second ground of defendants' demurrers to plaintiff's said motion. (4) The court erred in overruling the third ground of defendants' demurrers to plaintiff's said motion. (5) The court erred in not allowing the defendants to file and interpose to said motion a plea alleging that since the rendition of said original judgment payments on said judgment have been made to a large amount to plaintiff, exceeding one half of said judgment. (6) The court erred in not allowing the defendants to offer evidence showing that since the rendition of the original judgment in said cause payments on said judgment have been made to plaintiff to a large amount, exceeding one half of said judgment. (7) The court erred in sustaining the motion of the plaintiff, and entering up judgment against the defendants C. C. Harris and Milton Humes."

The cause coming on for hearing, the defendant in error filed a motion to dismiss the writ of error—

"Because the defendant E. C. Gordon, against whom there is a joint judgment with plaintiffs in error, has not joined in said writ of error, and no reason is shown in the record for his not doing so, nor does the record show that any request was made of him to join, or refusal on his part to do so."

We are of opinion that the motion to dismiss the writ of error is well taken. It is apparent on the face of the record that the judgment of the court below was a joint judgment against E. C. Gordon, C. C. Harris, and Milton Humes. It is immaterial that Gordon was principal and the others sureties. If a writ of error could bring that judgment to this court,—a question not free from doubt,—the long-settled practice requires that all of the joint defendants should join in the writ, or that there should have been a summons and severance, or equivalent proceedings, to entitle the plaintiffs in error to proceed alone, and the successful party below proceed to enforce his judgment against the defendant who does not desire to have it reviewed, and this court not be required to decide a second time the same question on the same record. The following cases

amply illustrate and fully settle the doctrine and practice here stated: *Owings v. Kincannon*, 7 Pet. 399; *Todd v. Daniel*, 16 Pet. 521; *Williams v. Bank*, 11 Wheat. 414; *Mussina v. Cavazos*, 6 Wall. 355; *Masterson v. Herndon*, 10 Wall. 416; *Feibelman v. Packard*, 108 U. S. 14, 1 Sup. Ct. Rep. 138; *Downing v. McCartney*, appendix to 131 U. S. 98; *Mason v. U. S.*, 136 U. S. 581, 10 Sup. Ct. Rep. 1062; and *Hardee v. Wilson*, (decided at the October term, 1892,) 146 U. S. 179, 13 Sup. Ct. Rep. 39,—in which all of the foregoing cases are cited and discussed, and the opinion concludes:

"The state of facts shown by the record brings the present case within the scope of the cases above cited, and it follows that the appeal must be dismissed."

On the authority of these cases, this writ of error must be, and is, dismissed.

WARNER v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 30, 1893.)

No. 96.

1. **WRITS OF ERROR—ALLOWANCE—INDORSEMENT OF THE PETITION AND WRIT BY JUDGE.**

An indorsement by the judge of the allowance of a writ of error upon the petition therefor is sufficient although the judge does not indorse his allowance upon the writ itself, but the better practice is to follow the usual course of making the indorsement upon both the petition and the writ.

2. **SAME—DUTIES OF CLERK.**

It is no part of the duty of a clerk of a federal court to procure the allowance of writs of error, and the approval of bonds for appeals and writs of error, and if parties intrust this matter to his voluntary action they have no right to complain of delay therein.

3. **SAME.**

Where a clerk prepares a writ of error, bond, and citation, and sends them to the judge, who signs them without inserting the date of his signature, the clerk has no authority on the return of the papers to erase the dates originally written therein, and insert the date of the actual signing; nor has he any authority to change the file marks on papers filed by him; but it would not be improper to add a memorandum, signed by him officially, of any facts which, as to him, might be or become material.

4. **CIRCUIT COURT OF APPEALS—ALLOWANCE OF APPEALS—POLICY OF THE LAW.**

The policy of the law creating the circuit court of appeals shows marked liberality in allowing appeals in all cases, and, on the other hand, requires a speedy prosecution thereof.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Action by Charles Warner against the Texas & Pacific Railway Company to recover damages for breach of contract. The court directed a verdict for defendant, and entered judgment thereon. Plaintiff brings error. Heard on motion to dismiss the writ of error. Denied.

H. Chilton, for plaintiff in error.

Wm. Wirt Howe and T. J. Freeman, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. The judgment to review which this writ of error was sued out was rendered on 11th of May, 1892. On August 29, 1892, the petition for the writ of error was presented to the judge of the circuit court who had presided in said court when said judgment was rendered, and was allowed by him in these terms: "The above petition for writ of error is hereby allowed. August 29, 1892. David E. Bryant, District Judge Eastern District of Texas;" and said petition, with said allowance written on it, and so signed by the judge, was filed in the said circuit court on August 31, 1892, and on the same day a writ of error in the prescribed form, duly signed and tested by the clerk of said circuit court, and sealed, but wanting the signature of the judge to the customary printed memorandum "allowed by," as shown in the form of such writs in common use, was filed by the clerk in said circuit court. On November 9, 1892, counsel for plaintiff in error, on the street in the town of Tyler, Tex., where said circuit court rendering said judgment had held its session, and where its records are kept, and where a deputy clerk of said court resides, handed said deputy clerk the bond for writ of error shown in the record, and requested said deputy clerk to make inquiry as to the solvency of the sureties, and to forward the bond and the writ of error and the citation in error to the judge, to be respectively approved, allowed, and signed by him. Some delay was incurred in making the requested inquiry, and when the papers were sent to the judge he signed the memorandum of the allowance of the writ and the approval of the bond without showing the date of the allowance of the writ or of the approval of the bond, and returned them to the said clerk by mail, accompanied by a letter dated November 16, 1892, which the clerk received 17th of November, 1892, and thereupon said clerk erased the date originally written in said writ, and the date originally indorsed on it, showing that it was issued and filed August 31, 1892, and inserted November 16, 1892, as the date of issuing said writ, and November 17, 1892, as the date of filing.

The policy of the law in the creation of this court shows marked liberality in allowing appeals from trial courts in all cases, and, on the other hand, requires a speedy prosecution of all appeals or writs of error. It is no part of the clerk's duty as clerk to procure the allowance of writs of error, and the approval of bonds for appeals or writs of error. This is the office of parties, or of their attorneys and solicitors. It is also clearly not the duty of the clerk, or his privilege, to change the writ of error, after it is allowed, by erasing and inserting a date, or by adding a date, any more than it is to make any other alteration in such papers. Nor may he, without the order of the proper court or judge, erase his own file mark on a paper which parties have procured to be filed. He may, and doubtless should, in some cases, add a new file mark or memorandum, signed by him officially, to show such facts in connection with his custody of the files as appears to him might be or become material. In the present case he might, without overstepping his duty, have noted on the writ what actually had occurred within his knowledge as to the signature of the judge on the writ of

error. We do not say that it was his duty to do this. We only say that to have done it would not have been improper. The parties have a right to appeal or sue out writs of error from all final judgments and decrees, and from certain interlocutory decrees, if that right is invoked in time, and in the prescribed form. A part of that prescribed form is for one of the judges of the trial court to allow the appeal or writ of error, and the appeal or writ of error is not "taken or sued out" until that allowance is obtained, (*Barrel v. Transportation Co.*, 3 Wall. 424; *Brooks v. Norris*, 11 How. 204; *Scarborough v. Pargoud*, 108 U. S. 567, 2 Sup. Ct. Rep. 877,) and parties and their attorneys sometimes incur serious hazard of losing their right of appeal by omitting to take the proper steps in due time, so that misconnections liable to occur may not prevent their obtaining the necessary allowance from a judge whose other duties take him to different and distant places in his district. The form of writ of error for taking a case from the circuit court to the supreme court which was prescribed many years ago under an act of congress, and which has been in use ever since, has on it a memorandum of allowance to be signed by the judge. Section 9, Act 1792; *Mussina v. Cavazos*, 6 Wall. 357. In actual practice the petition for writs of error is also indorsed "allowed" by the judge. The office of each is to show the fact that the writ is allowed, and it does not appear to us to be jurisdictional that the allowance should be indorsed on both, or on one rather than the other. It is well to proceed in order, and in a matter of general usage so long established parties could not complain if some strictness should be exercised in enforcing compliance with prescribed forms. In this case the plaintiff in error did not use reasonable diligence to get his bond approved in time and to obtain the customary indorsement on the writ of error. He relied on the clerk to do for him what the clerk was under no official obligation to do. He complains with no very good grace of the manner in which the clerk performed a purely voluntary service for his accommodation and at his request. As, however, our view of the law does not require us to sustain the motion to dismiss the writ of error for the irregularities suggested by it, and no apparent injury has been done the defendant in error, it is ordered that the motion be refused.

WARNER v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. March 13, 1893.)

No. 96.

1. STATUTE OF FRAUDS — VERBAL AGREEMENT NOT TO BE PERFORMED WITHIN
A YEAR.

Under the Texas statute of frauds, (Rev. St. art. 2464,) a verbal agreement which, by a fair and reasonable interpretation, and in view of all the circumstances existing at the time, does not admit of performance, according to its language and intention, within a year from the time of its making, is void.

2. SAME.

A verbal agreement, whereby a railroad company undertakes to lay a switch for the use of a sawmill owner, and to maintain the same as long

as he should need it, is within the statute when it appears that it was expected and understood between the parties that he would need it for many years.

8. SAME—PART PERFORMANCE.

Part performance of a verbal contract within the statute of frauds will not take the case out of the statute in an action at law, but is only ground for relief in equity.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Action by Charles Warner against the Texas & Pacific Railway Company to recover damages for breach of contract. The court directed a verdict for defendant, and entered judgment thereon. Plaintiff brings error. A motion to dismiss the writ of error was heretofore denied. 54 Fed. Rep. 920. Judgment affirmed.

H. Chilton, for plaintiff in error.

Wm. Wirt Howe and T. J. Freeman, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge. The plaintiff in error brought this suit against the defendant in error, alleging in his petition that in 1874 he made a contract with the Texas & Pacific Railway Company to the effect that, in consideration of his agreement to grade the ground and furnish the ties for a switch on said company's railroad at a point known as "Warner's Switch," it would furnish the iron, and complete and maintain such switch at that point for his benefit for shipping purposes as long as he needed it; that the switch was constructed in accordance with the contract, and maintained until the 19th day of May, 1887, when, on that day, it was wrongfully, and over the protest of the plaintiff, taken up and destroyed by certain persons, who were then operating the defendant's railway as receivers thereof by appointment of the United States circuit court in and for the eastern district of Louisiana; that the defendant has ever since neglected and refused to reconstruct and maintain the switch as it contracted and agreed to do; that by reason of the removal of the switch and defendant's refusal to maintain the same the plaintiff has been greatly damaged by the consequent depreciation of his property. The property was specifically described, and consisted of timber lands, timber privileges, sawmills, storehouses, etc., all of which, as alleged, had been acquired, at the time of the removal of the switch, for the purpose of carrying on the business of sawing lumber for market, and which was rendered much less valuable for the want of facilities for transporting his products and supplies.

This suit is for damages for the breach of the defendant's agreement. On the trial below, when the evidence as to the terms of the contract between the parties had been concluded, and on that issue alone, the court held that the contract was not a valid and binding one upon defendant, and instructed the jury to return a verdict for the defendant. To this action of the court the plaintiff in error excepted. The record in this case presents but a sin-

gle question for our decision, and that is, "Was the contract between Warner and the railroad company void under the statute of frauds?" Warner agreed to furnish the ties and grade the ground for the switch. This he did within one year. The railroad company agreed to maintain the switch for Warner's benefit, "as long as he needed it." This agreement it has broken. It was a verbal agreement, and upon it this action is founded. If this agreement was "not to be performed within the space of one year from the making thereof," the action cannot be maintained. The agreement is, in its terms as to duration, indefinite and uncertain; but if it is apparent that it was the intention of the parties that it was not to be performed within the space of one year from the time it was made, it would be void under the statute of the state of Texas known as the statute of frauds. Rev. St. art. 2464. That statute means to include any agreement which by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of its performance, according to its language and intention, within a year from the time of its making. *Browne, St. Frauds*, §§ 273, 283; *Heflin v. Milton*, 69 Ala. 356; *McPherson v. Cox*, 96 U. S. 416; *Packet Co. v. Sickles*, 5 Wall. 580.

The language used was, to maintain the switch "as long as he (Warner) needed it." What is a fair and reasonable interpretation of this language, in view of all the circumstances? What was the intention and understanding of the parties? To ascertain that we must look at all the circumstances and surroundings that led to the making of the contract. What were they? We find Warner breaking up and abandoning his milling business in other states, and concentrating his business in the state of Texas; after selecting the point at which he desired to locate, he purchased large tracts of timber land for the purpose of carrying on and maintaining his business in Texas; that the point of location was what was afterwards known as "Warner's Switch;" that at the time the agreement was made the representative of the railroad company who was acting for the company in the matter made various inquiries as to the amount of timber accessible to the proposed location, and as to Warner's experience in conducting mills; Warner stating that there was enough timber in sight to run a sawmill for 10 years, and that by moving back some 3 miles from the railroad there would be enough to run a mill for 20 years; and he says that he calculated to stay there as long as he lived. These facts and circumstances, connected with the making of the contract, clearly show that the intention of the parties at the time was that the switch was to be maintained permanently. They at least show that it was in the contemplation of the parties, and was their understanding, that Warner would need the switch for a much longer period than one year from the time the agreement to maintain it was made, and the proof is that it was in fact maintained for about 13 years. We think it appears affirmatively that the agreement was not to be performed within the space of one year, and that it was void. In a suit for breach of covenants in a void contract there

can be no recovery. *Crommelin v. Thiess*, 31 Ala. 412; *Shakespeare v. Alba*, 76 Ala. 356.

But the plaintiff in error contends that the performance by him within one year of his part of the agreement took the contract out of the statute of frauds. The answer to this contention is that part performance of a verbal contract within the statute of frauds has no effect at law to take the case out of its provisions, but is only a ground for equitable relief, and cannot be urged as a defense in a suit at law. *Browne, St. Frauds*, § 451; 2 Story, Eq. Jur. §§ 759, 1522, note 3; *Railroad Co. v. McAlpine*, 129 U. S. 305, 9 Sup. Ct. Rep. 286. We perceive no error in the ruling of the court below, and the judgment must be affirmed.

HART v. BUCKNER et al.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1892.)

No. 90.

1. **CIRCUIT COURT OF APPEALS — APPEAL FROM INTERLOCUTORY INJUNCTIONAL DECREE—REVIEW.**

On an appeal to the circuit court of appeals from an interlocutory order granting an injunction, the right of the complainant to other relief demanded by his bill cannot be considered when the same has not yet been passed upon by the court below; and the only question before the appellate court is the propriety of the injunction.

2. **MUNICIPAL CORPORATIONS — STREET RAILWAYS — RIGHTS OF LOT OWNERS — INJUNCTION.**

The rights of owners of lots abutting on a public street, even though they do not include the fee of the street, are property rights, the invasion of which without authority by an electric railway may be prevented by injunction.

3. **SAME — PARTIES.**

Where there is an unauthorized obstruction of a public street, all of the adjacent lot owners who sustain a special injury therefrom can maintain a suit for injunction, and no other parties defendant are required than the alleged trespasser.

4. **ELECTRIC STREET RAILWAYS — SALE OF FRANCHISE — POWERS OF COUNCIL.**

Laws La. 1888, Act No. 135, requiring that a sale of a street-railway franchise shall be made to "the highest bidder," means the highest bidder in money, and the sale of the franchise is invalid where the specifications call for, and the adjudication is made to the highest bidder in "square yards of gravel pavement." 52 Fed. Rep. 335, affirmed.

5. **SAME — INJUNCTION — LACHES.**

The interval between the sale of the franchise and filing of complainants' bill to enjoin the construction of the railway in front of their premises was one month and eight days, and the franchise itself was granted against the public protest of one of the complainants and of several other residents on the street. *Held*, that there was not such delay as amounted to an acquiescence in the grant, such as would preclude complainants from asserting their rights. 52 Fed. Rep. 835, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Equity. Bill by Newton Buckner and others against Judah Hart to enjoin the construction of an electric trolley railway in front of complainants' premises on Coliseum street, New Orleans. The

circuit court granted a motion for an injunction pendente lite, (52 Fed. Rep. 835,) and defendant appeals. Affirmed.

Statement by PARDEE, Circuit Judge:

By ordinance 5784, C. S., adopted November 17, 1891, the common council of the city of New Orleans ordained "that the comptroller give notice in a newspaper that he will, at public auction, in the council chamber, on the ____ day of ____, 1891, at the hour of twelve o'clock meridian, sell to the highest bidder the right of way for twenty-five (25) years, for street railway purposes, over the following streets, to wit: Commencing within 120 feet of the Canal street ferry landing; thence on the north side of Canal street, over the trunk line of the Canal and Claiborne Street-Railroad Company, to Carondelet street; along Carondelet street, over the track of the Crescent City Railroad Company, to Clio street; along Clio street to Constance street; along Constance street to Louisiana avenue; Louisiana avenue (north side) to Camp street; Camp street to Exposition boulevard, (or lower side of Audubon Park;) and returning along Camp street to Henry Clay avenue street, Henry Clay avenue street to Coliseum street, Coliseum street to Louisiana avenue street, (south side,) Louisiana avenue street to Laurel street, Laurel street to St. Mary street, St. Mary street to Constance street, double track on Constance street to Calliope street, Calliope street to St. Charles street; thence down St. Charles street, over the track of the Crescent City Railroad Company, to Canal street; and thence along Canal street, using the trunk line of the Canal and Claiborne Railroad Company, to the starting point at Canal street ferry landing. * * * All in accordance with map of said route and specifications in the office of the city engineer." In obedience to this ordinance, the comptroller published for three months, according to law, the following advertisement: "Public notice is hereby given that on Monday, March 28th, 1892, in the council chamber, at the city hall, at the hour of 12 o'clock M., will be sold at public auction to the highest responsible bidder the right of way for twenty-five (25) years, for street-railway purposes, over the following streets, to wit, [giving the description above mentioned;] * * * all in conformity with map of said route and specifications in the office of the city engineer, and ordinance No. 5784, C. S., adopted November 17th, 1891." After providing the method in which the road is to be constructed, the character of the rail and the ties, the character of the paving to be done in the streets through which the road ran, and the obligations to be assumed with reference to the paving, repair, and maintenance of the streets, the specifications, approved by city council, provided: "This line may be operated by any motive power now successfully applied in the United States, except steam. The speed shall not exceed twelve miles per hour, unless by ordinance of the council. Cars shall not stop except at the further side of crossings. * * * To enable bidders to estimate the cost of the paving, the city holds offers to deliver gravel to the purchaser of the franchise at a fixed rate and a fixed time. These offers can be seen at the office of the city engineer. Work of construction shall begin within two weeks after the date of the signing of the contract, and so completed as to be in operation within one year after the same date. A bond of \$50,000, approved by the mayor, shall be given to insure the commencement and completion of the work, and in a satisfactory manner, within the dates specified. The party or parties to whom the right of way is sold shall engage and contract with the city of New Orleans to construct a certain number of square yards of gravel pavement, according to the general specifications for such paving, and, together with accompanying Belgian blocks, bunting, curbs, counter curbs, and gutter bottoms, which shall be estimated for and computed in the number of square yards, and not to be charged for as an extra, or in addition to said square yards of paving, which shall be constructed on such streets and commencing at such points as the city council may hereafter designate." And by supplementary specifications, showing neither approval by city council nor date, it was provided: "The sale of this franchise, under the right of the city to reject any or all bids, shall be adjudicated to the party or parties who offer to build the greatest number of square yards of gravel pavement, including, without extra cost, paving, curb

planking, curbs, gutter bottoms, counter curbs, wings, Belgian block crossings, and bunting along the tracks and culverts, provided that such bid is not less than 60,000 square yards. The terms upon which the work of paving, etc., can be done are on file in the office of the city engineer."

At the date and place appointed in the advertisement Judah Hart appeared and bid the minimum fixed in the specifications; that is, 60,000 square yards of gravel pavement. This bid was duly reported to the council by the comptroller, and the council thereupon passed ordinance No. 6260, C. S., adopted April 12, 1892, directing the mayor to enter into a notarial contract with Judah Hart for the right of way for 25 years, for street-railway purposes, over the route designated in the advertisement, all in conformity with the map of said route and specifications in the office of the city engineer, and ordinance 5784, C. S., adopted November 17, 1891, and as per his bid of March 28, 1892. The parties thereupon went before the city notary on the 8th day of June, passed the notarial contract provided for by ordinance 6260, and gave a bond for \$50,000, required by the ordinance. On June 28, 1892, a large number of property holders on Constance street, between Felicity and Calliope streets, petitioned the council not to permit the laying of a double track on that street, as it was a very narrow street, and asking the council to order the removal of one of the tracks provided for in the franchise sold to Judah Hart to some other street. This petition was referred to the streets and landings committee, who referred the matter to a subcommittee. This subcommittee reported that the objection of the property holders on Constance street was well founded, and advised that one of the tracks be changed to Coliseum street from Louisiana avenue to Race street, and on Race street to Camp street, and on Camp street over existing tracks. The report of the subcommittee was taken up by the whole committee, and approved, and this committee thereupon reported an ordinance to the council, modifying the right of way of the franchise granted to Hart. This ordinance was adopted, and became ordinance No. 6595, C. S. It provides that "whereas, the route of the street railroad franchise adjudicated to Judah Hart under the provisions of ordinance No. 5784, C. S., provides for a double track on Constance street, from St. Mary street to Calliope street; and whereas, Constance street, between the points designated, is too narrow for the construction and operation of a double track, regard being had to the interests of the residents on said street; and whereas, it is to the interest of the city that the route of said railroad should be modified so as to take said double track off of Constance street, and to make one of said tracks run on Coliseum street from Louisiana avenue to Race street, and thence to Camp street; and whereas, the said Judah Hart is willing to accept the modification of said route as herein proposed: "Section 1. Be it ordained by the common council of the city of New Orleans, that the route of said railroad adjudicated to Judah Hart under the provisions of said ordinance No. 5784, C. S., be changed, amended so as to read as follows, to wit: * * *," giving one of the changed route, taking one of the tracks off of Constance street, and the removal of that track from Constance street and Laurel street to Coliseum street, from Louisiana avenue to Race street, through Race street to Camp street, and down a portion of Camp street over the tracks of the Crescent City Railroad. The whole body of the franchise above Louisiana avenue and below Race street remained entirely unchanged.

The second section of the ordinance provided that Judah Hart should signify his acceptance of this order by a notarial contract, signed by himself and the mayor before the city notary, and authorizing the mayor to enter into such contract with Hart, changing the route of the railroad. This ordinance was adopted on the 2d of August, 1892. While this ordinance was pending, to wit, on July 15th, certain property holders on Coliseum street, between Louisiana avenue and Race street, presented to the council a petition, protesting against the granting of the right of way to lay a railroad on that part of Coliseum street; the ground of their protest being that petitioners had at a heavy expense recently graveled the street; that it is the only street running through that part of the city, and the only one of the smaller streets left, not now defaced with railroad tracks; and averring that a great hardship would thereby be worked to the petitioners to have the said street, which they had recently been put to the expense of constructing, ruined, and that it

would be a great inconvenience to the general community which now uses the said street as a pleasure drive. In accordance with the provisions of the ordinance, the mayor and Judah Hart appeared before the city notary on the 9th day of September, and executed a notarial contract, embodying the terms of the ordinance.

Work was immediately commenced by Hart under these ordinances, and, as shown by the affidavit of M. J. Hart and the affidavit of G. A. Hopkins, prior to the 15th day of October, 1892, Hart had entered into contracts for the construction and equipment of the said property, amounting to the sum of \$363,050. Large amounts of materials provided for in said contracts had prior to that date been delivered by the contractors. Ten thousand dollars worth of gravel had been delivered and put in position. Eight thousand seven hundred feet of Camp street, from Louisiana avenue to Joseph street, had been graded, and cross-ties and track material delivered for the roadbed. Coliseum street had been graded for a single track from Louisiana avenue to Napoleon avenue, a distance of three thousand six hundred feet, and cross-ties and track material were delivered for the roadbed. Twelve thousand cross-ties had been delivered at the Carrollton avenue switch from the belt line to be put in the construction of the railroad, and track material for about seven miles of track had been put in position. Thousands of dollars had been spent in the excavation of the streets covered by the franchise, and nearly all the material for the overhead work and construction had been delivered by the contractors and put in place along the route of the railroad.

On the 17th of October, 1892, Newton Buckner and six other persons, claiming to be property holders on Coliseum street between Louisiana avenue and Race street, being that part of Coliseum street covered by the modification of the route provided for under ordinance No. 6595, C. S., filed a petition in the civil district court for the parish of Orleans, averring that they were owners of real estate on the designated portion of Coliseum street; that they had lately contributed large sums of money for the purpose of paving said Coliseum street with Rosetta gravel; that by reason of the paving, as well as by the fact that adjoining parallel streets are occupied by street-railroad tracks, said Coliseum street had become a throughfare much resorted to by the citizens of New Orleans as a pleasure drive, and that by reason of said paving the value of their property had been enhanced; that the city council had adopted ordinance No. 5784, directing the advertisement and sale of the street-railroad franchise therein mentioned; that the comptroller had advertised the said franchise for sale, but did not, as required by section 4 of act 135 of the Acts of Louisiana of 1888, publish the specifications of the franchise; that the comptroller did not, at the expiration of the delay, as required by ordinance No. 5784, and by the act of 1888, sell to the highest responsible bidder the franchise; but, instead of selling the same, pretended to accept, as the consideration of the franchise, an offer of Judah Hart to furnish the city of New Orleans not less than 60,000 square yards of gravel paving; that by virtue of ordinance No. 6260 the mayor and Judah Hart had entered into a pretended contract with reference to the said franchise; that, as said specifications had not been published as provided by law, and as the aforesaid franchise had not been sold at public auction to the highest bidder under the requirements and limitations of ordinance No. 5784, C. S., and Act 135 of 1888, the said offer of said Hart to acquire said franchise, and the said ordinances Nos. 5784, C. S., and 6260, C. S., and the pretended contract of the 8th of June, 1892, were absolute nullities, and devoid of all legal effect, and did not and could not convey to him the franchise. They further aver the passage of ordinance No. 6595, C. S., modifying the route as originally adjudicated, and that the franchise or right of way over the part of Coliseum street granted by the modification greatly exceeds in value the rights of way over those streets for which it was thus permitted to be substituted; but that in spite of this fact said change was by said common council ordained without consideration of the city of New Orleans, without publication, and without adjudication of said franchise, as required by Act No. 135 of 1888; that petitioners vainly protested to the common council against the change; that they are informed and verily believe that said Judah Hart, under this ordinance, intends to enter upon Coliseum street, between Louisiana avenue and

Race street, for the purpose of laying a roadbed and tracks for a street railway, the same to be operated by using as motor power the so-called "trolley system of electricity," and that, if permitted to do so, he will utterly ruin the paving of Coliseum street, thereby inflicting upon petitioners irreparable injury, besides depreciating the value of their property more than \$10,000; that the trolley system of electricity is an unmitigated nuisance, "pre-eminently dangerous to life, and destructive to peace and comfort," and that its adoption for a narrow street like Coliseum street, which has a width of about 25 feet, would prevent absolutely the safe use of said street by other vehicles, and would render the approach in carriages to petitioners' houses unsafe, if not impossible, and would destroy the quiet enjoyment of their homes. They pray for citation of Hart, and for judgment decreeing—First, that the alleged adjudication to Hart under ordinances Nos. 5784, 6260, and 6595, C. S., and the contracts of date the 8th of June and the 9th of September, 1892, to be illegal, null, void, and of no effect; second, perpetually enjoining Hart from entering upon Coliseum street between Louisiana avenue and Race street, for the purpose of constructing a street railway, under and by virtue of said ordinance and the said pretended contracts, and from disturbing the surface or paving of said Coliseum street between Louisiana avenue and Race street, or making any excavations or constructions therein or thereon in furtherance of the purpose of said ordinance and contract; and, third, praying for a preliminary injunction, in the event of such disturbance, during the pendency of this suit. Hart, being a citizen of New York, appeared, and removed this cause into the circuit court of the United States for the eastern district of Louisiana.

When the record was filed in the circuit court the complainants appeared and filed an amended and supplemental bill, setting forth the bringing and removal of the suit, and reaverring all the matters contained in their petition; and further averring that, as front proprietors of property on Coliseum street, between Louisiana avenue and Race street, the railroad proposed to be constructed by defendant and operated by the trolley system of electric cars, by reason of its impairing the pavement on said street and obstructing the highway and the approach to their residences, and by its noise and danger, will be a nuisance specially affecting and injuring irreparably them, and each of them, in their comfort and convenience and rights of property; further averring that under the charter of the city of New Orleans the council had no power to grant authority to said Hart to construct and operate a road by means of the trolley system of electricity. They further show that Hart had entered upon a portion of the street since the filing of the suit in the civil district court, and they pray for a preliminary injunction to restrain him. Notice was given, the matter was heard, the circuit court granted the injunction, and Hart, under section 7 of the act, approved March 3, 1891, has appealed to this court.

On the hearing of the injunction the complainants offered no affidavits in support of the allegations of their petition and amended bill, except the affidavit of one of the complainants, Newton Buckner, as to the truth of the averments of the petition and bill themselves. The defendant offered the affidavit of the city engineer and that of M. J. Hart, together with maps of Coliseum street and Constance street, to show that Coliseum street between Race street and Louisiana avenue was 25 feet wide from outer curb to outer curb, and that there was a space of 9 feet and 2 lines on each side of the railroad track between the center of the rail and the outer curb, leaving ample space on each side of the track for the use of the general public and the passage and standing of vehicles; and showing that the double track on Constance street would leave only 4 feet and 2 lines between the trend of the rail and the exterior curb,—a space entirely too narrow to permit the standing or passage of a vehicle. The affidavit of Brown, city engineer, M. J. Hart, and G. A. Hopkins, engineer, together with the profiles of Coliseum street, and the specifications for the construction of the railroad on that street, tend to show that the taking up of the gravel pavement, the laying of Belgian block between the tracks, and a bunting of the same on each side of the rail, and the renewal of the gravel on the street in accordance with the specifications, will make the street better, more substantial, and more durable

for public use than before. The affidavits of R. T. Macdonald and E. J. Hathorne show that the trolley system is not a nuisance, and that it is not dangerous to life or property.

The following are the assignments of error on appeal: "(1) That the court erred in holding that the city council had no right or power to change the route of said road from Constance and Laurel to Coliseum street, from Louisiana avenue to Race street, without three months' advertisement and adjudication; (2) that the court erred in holding that the adjudication of the whole franchise at a price to be paid in gravel pavement was void; (3) that the court erred in holding that the complainants had any right or authority, under the allegations of their bill, and in the absence of the city of New Orleans as a party in the record, to raise the questions covered by assignment in error No. 2; (4) that the court erred in holding that the complainants were not estopped, under the facts set forth in the affidavits, from raising any objection to the construction by the defendant of the railway in question under his grants from the city of New Orleans."

Edgar H. Farrar, (B. F. Jonas and Ernest B. Kruttschnitt, on the brief,) for appellant.

Harry H. Hall and W. Wirt Howe, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, (after stating the facts.) The order appealed from enjoins the defendant from entering upon Coliseum street, between Louisiana avenue and Race street, for the purpose of constructing a street railway, and from disturbing the surface or the paving of said Coliseum street, or from making excavations or constructions therein or thereon, by virtue of certain city ordinances and contracts recited. The propriety of this order is all that is before us for review. Whether the appellees, complainants in the court below, are entitled to all the relief prayed for in their original and supplemental bills must first be determined in the court below, before this court can review on appeal. The contention of appellees in this court and in the court below, as stated by their counsel in the elaborate brief filed, is as follows:

"This suit is brought by complainants, not as taxpayers complaining of a fraudulent or illegal contract prejudicial to the said complainants in common with all other citizens, but by them as owners of realty whose peaceful enjoyment thereof is illegally threatened. They aver that defendant has no right to enter upon the streets aforesaid, for the purpose of constructing his railroad. He answers that he has, by virtue of the authority granted to him by ordinances 5784 and 6595. Complainants reply that, in so far as said ordinances pretend to authorize the trespass complained of, they are illegal, and they pray to have them so declared by the court. They do not ask that, as between the city and defendant, the so-called 'contract' be annulled; but they say when defendant attempts by virtue of them to invade respondents' rights that they are illegal, and do not justify the invasion. They do not attempt to invalidate any of Mr. Hart's so-called 'rights,' except in so far as they are used by him as pretended authority for laying his tracks on Coliseum street between Louisiana avenue and Race street."

Owners of lots abutting on or adjacent to a public street of a city, even if not owners of a fee in the street, have the right of access and the right of quiet enjoyment, and such rights are property which may be protected by injunction when invaded without legal authority. Dill. Mun. Corp. § 587b; Dudley v. Tilton, 14 La. Ann.

283; *Schurmeier v. Railroad Co.*, 10 Minn. 82, (Gil. 59;) *Wetmore v. Story*, 22 Barb. 414; *Pettibone v. Hamilton*, 40 Wis. 402.

Where there is an unauthorized obstruction or closing of a public street, all the adjacent owners who sustain by such obstruction a special injury can maintain a suit for injunction against the party or parties making the obstruction. *Dudley v. Tilton*, supra; *Pettibone v. Hamilton*, supra; *Griffing v. Gibb*, 2 Black, 519. In such a suit no other parties defendant than the alleged trespasser are required. *Railroad Co. v. Ward*, 2 Black, 485. In the case under present consideration, it seems that all the necessary parties, if not all the proper parties, are before the court.

The asserted right of appellant to invade Coliseum street was only acquired one month and eight days prior to the institution of the suit for injunction. It was granted by the council of the city of New Orleans, against the public protest of one of the complainants to the suit and other residents and property holders on Coliseum street. As we gather from the record, the actual invasion of Coliseum street between Louisiana avenue and Race street took place since the commencement of the suit, and then was apparently for the purpose of raising the question of right. Until the actual or attempted invasion of the street, the property holders thereon were not required to go into the courts to attack a pretended right which, until their street was invaded, in no wise affected them, except in common with all the other property holders and taxpayers of the city. Considering the public protest of the property holders, the short period elapsing between the acquisition of the right and the institution of the suit, and that the complainants were not specially called upon to act until their street was actually invaded, we are of the opinion that there has been no acquiescence, no standing by, nor sleeping upon rights, to any such extent as would equitably estop the plaintiffs from maintaining their legal rights.

The transaction between the city of New Orleans and the appellant by which appellant acquired all the rights that he has to a street-railroad franchise on Coliseum street was one of barter and exchange; i. e. a street-railroad franchise was exchanged for a certain amount of public work and material in the nature of gravel paving to be thereafter constructed on the streets of the city. The specifications as to the street-railroad franchise disposed of were reasonably definite and certain. Those with regard to gravel paving to be furnished were, perhaps, definite enough as to character and composition, but were indefinite as to a very important element of cost,—the street or streets upon which the work was to be done being left to the after-determination of the city council. The expense of building, say 60,000 square yards of gravel pavement in the streets of New Orleans, largely depends upon the location of the streets, the excavations or filling necessary, and the distance from the main line and switches of the Illinois Central Railroad. The nature of the exchange offered by the city was such as to necessarily limit competition, and to a marked degree. No one, however desirous he may have been of acquiring the street-railroad franchise offered by the city council, could safely bid for the same,

unless he was also willing and ready to deal in gravel, and undertake the business of paving streets with gravel; and certainly no contractor engaged in the business of street paving could have bid on the contract to the advantage of the city unless his means permitted him to buy, own, and operate a street-railroad franchise.

Complainants in the court below (the appellees here) contend that the said transaction was and is absolutely null and void, because entered into without authority on the part of the city council, and in contravention of the express limitations imposed upon the city council in the charter of the city and by subsequent acts of legislation. They say (1) that the city of New Orleans has no authority under its charter to authorize a street-railroad to be operated with electric power as a motor; (2) that the use of the overhead "trolley" system is a nuisance; (3) that the street-railroad franchise disposed of to appellant was not advertised according to law; (4) that the franchise, as to Coliseum street, between Louisiana avenue and Race street, was not advertised at all; and (5) that under the act of 1888 the city of New Orleans is prohibited from disposing of a street-railroad franchise otherwise than for cash and to the highest bidder. Any one of these objections, if well taken, sustains the propriety of the order appealed from.

The charter of the city of New Orleans (Act No. 20, Acts La. 1882) expressly declares that the said city—

"Is hereby created, incorporated, and established as a political corporation by the name of the city of New Orleans, with the following powers, and no more."

Section 8 of the said charter (paragraph 13) declares that the city council shall—

"Have the power to authorize the use of the streets for horse and steam railroads, and to regulate the same; to require and compel all lines of railway or tramway in any one street to run on and use the same track and turntable, and compel them to keep conductors on their cars, and compel all such companies to keep and repair the streets, bridges, and crossings through or over which their cars run."

And section 21 provides that—

"All contracts for public works or for materials or supplies ordered by the council shall be offered by the comptroller at public auction, and given to the lowest bidder who can furnish security satisfactory to the council; or the same shall, at the discretion of the council, be advertised for proposals to be delivered to the comptroller in writing, sealed, and to be opened by such comptroller in the presence of the finance committee of the said council, and given to the persons making the lowest proposals therefor, who can furnish security satisfactory to the council: provided, that the council shall in either case have the right to reject any or all of the bids or proposals."

At the same session of the legislature, it was provided—

"That hereafter, whenever the city of New Orleans, through her proper authorities, shall contract with private corporations or individuals for the sale or lease of public privileges or franchises, such as the right of way for street railroads or for other public undertakings within her legal power and control, the price paid for the sale or lease of public privileges or franchises shall be applied by such city in the performance of work of public improvement of a permanent character, such as paving of streets, embellishing parks," etc. Act 81, Acts La. 1882.

By Act 135, (Acts La. 1888,) entitled "An act further defining the powers and duties of the council and officers of the city of New Orleans, and imposing additional limitations thereon," it is provided in the first section—

"That neither the council of the city of New Orleans, nor any committee thereof, nor any of the officers of said city, shall have power to bind the city by any contract for any public work, or for the purchase of any materials or supplies for any of the departments of the city government, unless there shall have been previously passed a resolution authorizing the said contract or the said purchase, and unless the said contract for public work or for the furnishing of said materials and supplies shall have been let by the comptroller to the lowest bidder, as provided in section 21 of said charter: provided, however, that in cases of emergency the officers of the various departments may make bills for supplies of materials not exceeding fifty dollars; but in all such cases immediate report in writing of the making of such bill shall be made by the head of the department to the mayor, setting forth the reason of its action, which report shall be laid by the mayor before the council, and receive the approval of that body before the said bill is ordered paid."

And in the second section—

"That on the first of January and July of each and every year each and every head of every department of the city government shall lay before the council an estimate of the supplies and materials (within the limitation of the appropriations made in the budget for his department) that may be needed in his department during the current six months; and the said council shall approve or modify, in its discretion, said estimate, and shall thereupon direct the comptroller to advertise and adjudicate the contract to furnish said supplies and material, or so much thereof as may be needed, to the lowest bidder, as provided in section 21 of the city charter."

And in the fourth section—

"That said council shall not have power to grant, renew, or to sell or to dispose of any street-railroad franchise, except after at least three months' publication of the term and specifications of said franchise, and after the same has been adjudicated to the highest bidder by the comptroller, as provided in section 21 of the city charter."

The intention of the legislature in enacting the foregoing provisions is apparent. The powers given to the city council under the charter are to be strictly construed. In all purchases of public work, supplies, and material full notice and free competition are required, and the contracts therefor are to be given to the lowest bidder. In any disposition of a street-railroad franchise, either by grant or renewal, a full publicity of exactly the franchise to be disposed of, with free competition, and every adjunct to secure the best price, is required. No room is left, if the statutes are complied with, for secrecy, jobbery, favoritism, or the exercise of political and private influence, conceded by counsel to be the mischief sought to be remedied, particularly by the act of 1888 entitled "An act further defining the powers and duties of the council and officers of the city of New Orleans, and imposing additional limitations thereon."

An examination and comparison of these acts in the light of the conceded legislative intention lead to the further conclusion that in the purchase of public works, supplies, and material, or in the disposition of street-railroad franchises, the contract of sale

is alone permitted to the city council. The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself. Civil Code La. art. 2439. It is only by a sale in public market that the free competition exacted by the statutes can be obtained. In order to purchase at public auction and from the lowest bidder, and to dispose of at public auction to the highest bidder,—almost of necessity, it seems,—the measure of value must be in current money. The act of 1882, quoted above, distinctly infers a price or sum of money to be obtained from the sale or lease of street-railroad franchises, and directs the application thereof. The act of 1888 clearly implies in every section quoted that the city council is to purchase public work and material and dispose of street-railroad franchises for current money. The judge of the circuit court, on this point, says:

"It seems to me that where a bid is invited in corn or wine or any goods, wares, or merchandise it necessarily more or less circumscribes the freedom of the competition, for there is more or less difficulty in obtaining any article, even to those who have the money. It is not enough that the city needs the article; the article itself must also be as easily obtainable as money. The substitution of anything for money itself would naturally give an advantage to those who had that article, and who know how or where and upon what terms it could be purchased, and would make the sale less calculated to absolutely secure the highest price, and thus defeat the object of the statute. Section 4, (Act No. 135 of the Acts of 1888,) above referred to, requires that the sale shall be to the highest bidder by the comptroller, as provided in section 21 of the city charter. That section, which is found on page 25 of the Acts of 1882, requires that the sale shall be offered by the comptroller, at public auction, and given to the lowest bidder. Now, it seems to me clear that, considering the object the legislature had in placing this prohibition upon the common council, requiring the long advertisement of three months, and sale at auction of railroad franchises, they meant that the sale should be for that which would least restrict the number of purchasers, as well as for the amount of the bid, and therefore meant that it should be for money; and that the sale of the entire franchise to the defendant, having been for gravel pavement, and not for money, is invalid." 52 Fed. Rep. 837.

This reasoning is very cogent.

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void." Dill. Mun. Corp. § 89.

As has been noticed above, the transaction between the city of New Orleans and the appellant, disposing of a street-railroad franchise, was one of barter and exchange, necessarily limiting competition. The authority to make such a transaction is not granted in express words in the charter, nor is it necessarily or fairly implied in or incident to the powers expressly granted; nor is it essential to the declared objects and purposes of the corporation, but,

on the contrary, as has been shown, it is in conflict with the legislative intent as declared in the charter and in the subsequent legislation referred to. At all events, there is a fair, reasonable doubt concerning the power of the city council to enter into the transaction complained of, and the same should be resolved against the corporation, and the power denied. "Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed." Rev. Civil Code La. art. 12. The other nullities alleged against the rights of appellees need not be considered. It follows that the order appealed from should be affirmed, and it is so ordered.

DOE v. WATERLOO MIN. CO.

(Circuit Court, S. D. California. March 27, 1893.)

No. 183.

1. MINES AND MINING—PATENTS—RIGHT TO FOLLOW DIP.

The patentee, and even the mere possessor, of a mining claim, under license from the government, has a right to all minerals lying vertically beneath the surface of his claim, subject only to the right of the lawful possessor of a neighboring claim having parallel end lines to follow any lode, the apex of which lies within his claim, on its dip within the limits of infinite planes vertically projected through such end lines. An unlawful possessor has no such right to follow the dip. *Montana Co. v. Clark*, 42 Fed. Rep. 626, disapproved. *Duggan v. Davey*, (Dak.) 26 N. W. Rep. 887, approved. *Reynolds v. Mining Co.*, 6 Sup. Ct. Rep. 601, 116 U. S. 687, distinguished.

2. SAME—END LINES—PARALLELISM—PATENT CONCLUSIVE.

Where the end lines of a surface location of mining lands, as fixed and declared in the government patent, are parallel, the patentee's right to follow the dip beyond his side lines cannot be defeated by showing that in the original location of the claim the end lines were not parallel. The patent while unrevoked is conclusive on this point. *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 6 Sup. Ct. Rep. 1177, 118 U. S. 196, and *Mining Co. v. Tarbet*, 98 U. S. 463, distinguished.

3. SAME.

The patentee's right to follow the dip exists by virtue of Rev. St. § 2322, whether the express grant of such right is contained in the patent or not.

4. SAME—ABANDONMENT OF PART OF CLAIM.

Where a mining claim as located does not have parallel end lines, but the United States surveyor in surveying it draws in one end line so as to make them parallel, the rejection of such survey by the locator will not deprive his assignee, upon thereafter accepting the survey, and obtaining a patent in accordance therewith, (abandoning the portion of his claim not included in the survey,) of his right to follow the dip beyond his side lines within the vertical planes drawn through the parallel end lines of the survey.

5. SAME—WHAT CONSTITUTES A LODE.

Where mineral deposits are separated into three well-defined parts, traceable for a great distance in their length and depth, and having distinct foot and hanging walls, each part is a separate vein, within the meaning of the mining laws giving the right to follow the dip of a vein beyond the side lines of the claim, although there are many ore-bearing cracks and seams running out from each vein, and sometimes extending from one to the other. *Eureka Con. Min. Co. v. Richmond Min. Co.*, 4 Sawy. 302, distinguished.

In Equity. Bill by John S. Doe against the Waterloo Mining Company to enjoin respondent from entering under the surface of complainant's claim and extracting ore from a certain lode there situated. Decree for complainant.

Mesick, Maxwell & Phelan and Mesick & Waters, for complainant.

W. F. Herrin, and A. H. Ricketts, for defendant.

ROSS, District Judge. The Silver King is a quartz lode mining claim situate in the Calico mining district of San Bernardino county, Cal., for which, at the time of the commission of the acts for which this suit is brought, the defendant held a certificate of purchase, followed, since the bringing of the suit, by a government patent which the defendant by supplemental answer has set up. The Oriental No. 2 and the Red Cloud are also quartz lode mining claims, lying immediately south of and adjoining the Silver King, for which the complainant, at the time of the commission of the acts complained of, held certificates of purchase from the United States. The purpose of the suit on complainant's part is to enjoin the defendant from entering under the surface of the Oriental and Red Cloud claims, and mining and extracting ore from what defendant claims to be a continuation of a lode having its apex within the surface lines of the Silver King claim. The Silver King was originally located by T. C. Warden, for himself, John King, and some others, on the 6th day of April, 1881; and as thus located its end lines were not parallel. There was a divergence of the west end line of 259 feet in the direction of the dip of the ore bodies. In 1882, with the intention of making application for a patent for the claim, Warden and his associates caused it to be surveyed by United States Deputy Surveyor Dunlap who, in making his survey, drew in the southwest corner of the claim so as to make the end lines parallel, thus leaving out of the survey a triangular piece of the original location. In all other respects the survey was made in accordance with the original location, and the lines and corners of the survey were plainly and distinctly marked on the ground. With the action of the surveyor, in thus leaving out of the claim a triangular piece of the original location, Warden and his associates were dissatisfied, and they declined to accept the survey, or to make any application for a patent based upon it. But in 1884 they sold and conveyed their interest in the claim to Bradley, Metcalf, Sanger, and others, the grantors of the defendant, and thereupon Bradley and his associates adopted the Dunlap survey, caused him to again go over the lines of his survey and monuments, and thereupon, and on the 21st of September, 1885, filed their application in the proper United States land office for a patent based upon that survey, and describing the ground included therein as the "Silver King Claim." On the 20th of July, 1887, the defendant herein, as grantee of Bradley and his associates, was permitted to enter the claim, and on the 10th of January, 1891, the government issued to the defendant its patent for the claim in accordance with the lines of the Dunlap survey. The certificates of purchase for the Oriental No. 2 and Red Cloud

claims were issued to the complainant on the 24th of September, 1887, based upon surveys thereof made June 4, 1887, in accordance with relocations of those claims made by complainant on the 9th of May, 1887. When the original locations of the Oriental No. 2 and the Red Cloud were made does not appear.

Three questions have been presented, and ably and elaborately argued by counsel, and upon one of which a large mass of testimony has been taken.

The first is presented by the defendant, and is to the effect that the certificates, which it is conceded are to be regarded, for the purposes of this case, with like force and effect as patents, held by the complainant, confer upon him no right to anything except the surface of the ground within the surface lines of the claims, and such veins, lodes, or ledges as have their apex within such surface lines, and that the holder of such certificates has no cause of complaint against any one who enters and mines, even without any right in himself, under the surface of such lode claim, so long as he leaves the surface undisturbed, and does not interfere with any vein, lode, or ledge having its apex within the surface lines of such claim or claims. To this I cannot assent. It is true it was so decided in *Montana Co. v. Clark*, 42 Fed. Rep. 626. But the opposite conclusion was reached in what I consider the better reasoned case of *Duggan v. Davey*, (Dak.) 26 N. W. Rep. 887. It is entirely true that whoever takes a grant of a lode claim takes it subject to the provision of the statute reserving to locators of other mining claims the right to follow under its surface, for the purpose of extracting the ore therefrom, any vein, lode, or ledge, the top or apex of which lies within the surface lines of such other location. Rev. St. § 2322. But until some one comes clothed with that reserved right, the holder of a government patent or certificate has, I think, the just and legal right to say, "Hands off of any and everything within my surface lines extending vertically downward." The mere possessor of a mining claim under license from the government would have that right; a fortiori, the holder of a conveyance from the government. For it must be remembered that the extralateral right conferred by the statute is but an incident of a valid lode location. By the express language of the statute the right given is to "the locators of all mining locations," etc. Without such location the incidental extralateral right does not exist. It could not therefore exist in a stranger to the paramount source of title. While the real object of grants of the nature of those under consideration is the mineral, the statute makes provision, as stated in *Duggan v. Davey*, for the disposition of "lands valuable for mineral." "It is the 'lands' in which mineral deposits are found which are 'open to purchase.' It is 'land' claimed and located for valuable mineral deposits which is the subject of application for patent, and where patent of the United States issues it is for the 'land' at so much per acre."

Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and pos-

session at common law. That seems to have been the view of Judge Hallett in *Mining Co. v. Fitzgerald*, 4 Morr. Min. Rep. 385, where he says:

"Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as a part of some lode or vein having its top or apex in other territory. In other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one else shall show by preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere."

This must also have been the opinion of the supreme court in *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177, otherwise the judgment in that case could not have been affirmed; for the defendant there offered to prove, among other things, that the vein, lode, or ledge it admitted it had followed from the Stone claim into and under the surface of the Gilt Edge claim, and in and upon which it admitted it was mining, had its apex within the surface lines of the Stone claim, and—

"That the vein, lode, or ledge on its dip, within vertical planes drawn downward through the end lines of the vein, lode, or ledge, so existing and found within the Stone surface mining claim, and continued in their own direction, namely, in the direction of the dip of the vein, lode, or ledge, passed through, out of, and beyond the east vertical side line of the Stone surface claim and location into lands adjoining, to wit, into and under the said Gilt Edge surface claim."

—To which plaintiff objected on the ground that the proffered proof would not be a defense to the action, nor tend to establish a defense thereto, and that, by reason of the surface form or shape of the Stone claim, its owners had no right, under the laws of the United States or otherwise, to follow the lode alleged to exist therein in its downward course beyond the lines of the claim and into the plaintiff's claim, and that no part of the Gilt Edge claim, or the mineral or lode within it, was within vertical planes drawn downward through the end lines of the Stone claim, and continued indefinitely in their own direction. The lower court sustained the objection, and excluded the evidence offered, to which ruling the defendant excepted. The supreme court held that, in view of the facts of the case, the defendant did not have the extralateral right conferred by the statute, and affirmed the action of the lower court excluding the proffered proof. But if, as is contended here, any stranger could pursue such a vein, lode, or ledge upon the theory that it constituted no part of the claim under the surface of which it was found, defendant in that case would have been entitled, even though a stranger to the paramount source of title, to have pursued the vein, lode, or ledge, and the judgment of the lower court must have been reversed for refusing the proof that was offered.

There is nothing in conflict with this in the previous case of *Reynolds v. Mining Co.*, 116 U. S. 687, 6 Sup. Ct. Rep. 601. It was there held that where a vein or lode is known to exist under the surface included in a patent for a placer claim, and is not in the claimant's possession, and is not mentioned in the claim on which the patent

issues, the title to such vein or lode remains in the United States, unless previously conveyed to some one else, and does not pass to the placer patentee, who thereby acquires no interest in such vein or lode, and cannot maintain ejectment therefor. The provisions of the statute in respect to lode and placer claims are different, and those differences are founded, as pointed out in *Reynolds v. Mining Co.*, on the well-known difference in the character of the two classes of mineral deposits. In the case there the holder of a patent for a placer claim sought to recover possession of a vein which was known to exist under its surface at the time of the application for the patent, and of which the applicant was not in possession, and which was not referred to or mentioned in the application of the claimant or in his patent. The court held that, under such circumstances, such vein was excluded from the placer patent because of that provision of the statute relating to placer claims which declares in effect that under such circumstances "the application shall be construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of the vein or lode." But, where no such vein or lode is known to exist at the time that the patent is applied for, the patent even for a placer claim will carry all valuable mineral and other deposits which may be found within the boundaries thereof. 116 U. S. 696, 6 Sup. Ct. Rep. 601. In *Cheesman v. Shreve*, 37 Fed. Rep. 36, Judge Brewer, now an associate justice of the supreme court, held that, where parties enter beneath the surface within the side lines of a lode claim patented to others, they are *prima facie* trespassers, and must justify their entrance, or they will be restrained. I am of opinion, therefore, that the certificates of purchase issued by the government to the complainant make a *prima facie* case for him, and that the burden is upon the defendant to justify its entry and mining beneath the surface of complainant's claims, by showing—First, such a location of the Silver King as under the law entitles it to follow any vein, lode, or ledge having its apex within its surface lines, outside its side lines extended vertically downward; and, second, that the acts of mining committed and threatened to be continued by it under the surface of complainant's claim were and are upon a vein, lode, or ledge having its apex within the surface lines of the Silver King claim, and which in its dip downward passes outside of the side lines of that claim, extended vertically downward, and into and beneath the surface of complainant's claim, and which lies between vertical planes drawn through the end lines of the Silver King, continued in their own direction.

In the original location of the Silver King, as has been said, the end lines were not parallel, there being a divergence of 259 feet at the southwest corner, in the direction of the dip of the ore bodies; and, that being the case, it is earnestly insisted on the part of the complainant that the defendant has no right to follow any vein, lode, or ledge having its apex within the surface lines of the Silver King, outside of the side lines of that claim extended vertically downward; that whether or not the extralateral right conferred by the statute exists depends entirely upon the fact whether or not the end lines as originally located were parallel, and that for that

purpose regard cannot be had to the lines of the claim as patented by the government. The cases of *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177, and *Mining Co. v. Tarbet*, 98 U. S. 463, are relied upon as conclusively sustaining that position. Those cases undoubtedly determine that a locator is bound by the lines of his surface location; and the former further determines that where, as in the present case, the location was made after the passage of the act of May 10, 1872, it is "essential to the existence of any right in the locator or patentee to follow his vein outside of vertical planes drawn through the side lines" that the end lines of such surface location be parallel. But by neither of those cases, nor by any other case that has been cited, has it been determined that, where the end lines of the surface location as fixed and declared in the government patent are parallel, the extralateral right given by the statute can be defeated by showing that, according to the original location of the claim, such surface end lines were not parallel. If the rights conferred by the patent can be defeated by showing a want of parallelism of the end lines in the original location, it is difficult to understand why the patent may not likewise be defeated by showing that the original location was void because its boundaries were not properly marked upon the ground, or because no vein, lode, or ledge was discovered within them, or because the statutory requirement in respect to the posting of the notice of location was not complied with, or because of an omission on the part of the locator to comply with any other provision of the statute regarding the location of such lode claims. All such matters I understand to be absolutely concluded by the patent so long as it stands unrevoked. If questions relating to the boundaries of the location, the marking of them, the discovery of a vein, lode, or ledge within them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the claim as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based. Authorities to this effect in both federal and state courts are so numerous as to render it, I think, unnecessary to cite them.

The patent in question was based, as has been said, upon a survey made in 1882 by United States Deputy Surveyor Dunlap, upon the request of Warden and his associates, and they rejected it because the drawing in of the southwest corner of the claim as originally located, in order to make the end lines parallel, left out of the claim a triangular piece of the ground. But they subsequently, in 1884, conveyed their interest in the entire claim to Bradley and his associates, and those purchasers adopted the survey as correctly representing the boundaries of the claim, and, after causing the surveyor to again go over the boundaries and lines of his survey, made application to the government for the purchase and patent of the whole claim according to those monuments and boundaries; and it was upon such survey and application that their grantee, the defendant here, was permitted to enter the claim, and upon which

the patent was based. The lines of the claim as surveyed by the surveyor were plainly marked on the ground, and the monuments which marked them were thus adopted by the owners of the claim as correctly defining its boundaries. No rights of third parties having intervened, it surely could not have been necessary for the owners to take down the monuments that marked the lines, and erect them over again. The drawing in of the southwest corner of the original location in order to make the end lines parallel, and which change was thus adopted by defendant's grantors and by defendant, did not take in any ground not included in the original location. It did not take anything that belonged to any one else; on the contrary, it left out of the claim a triangular piece of the ground. No good reason is perceived why the lines of the claim could not be thus changed, so as to comply with the statute requiring the end lines to be parallel, nor any reason for holding that a patent based upon such a survey is not conclusive upon the government as well as the patentee as to the boundaries of the claim; and if conclusive upon the government, so also upon any of its grantees acquiring rights subsequent to those of such patentee. In *Mining Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055, it was claimed, among other things, that the St. George claim included 200 more feet along the lode than the law allowed, and for that reason it was contended the location was void. Upon that point the court said:

"We hardly think it needs discussion to decide that the inclusion of a larger number of lineal feet than two hundred renders a location, otherwise valid, totally void. This may occur, and often must occur, by accident of the surveyor, or other innocent mistake where there exists no intention to claim more than the two hundred feet. Must the whole claim be made void by this mistake, which may injure no one, and was without design to violate the law? We can see no reason, in justice or in the nature of the transaction, why the excess may not be rejected, and the claim be held good for the remainder, unless it interferes with rights previously acquired. It appears by the facts found that one hundred and forty feet of the east end of plaintiffs' location is lost to them by the superior right of the Tip Top claim, leaving only sixty feet of excess, and this, if it were necessary, might be excluded by the government at the other or western end of the claim when it comes to issue the patent, which would leave plaintiffs only six hundred feet in one body in regular form. This also would interfere with no prior rights, and would give plaintiffs the benefit of their claim to the extent of two hundred feet for each locator."

Holding, as I do, that the patent is conclusive evidence as to the true location of the Silver King claim, and as the end lines of that claim as thus established are parallel, the right on the defendant's part to pursue any vein, lode, or ledge having its apex within those surface lines in its downward dip outside of the side lines of that claim extended vertically downward, and within vertical planes drawn down through those patented end lines continued in their own direction, follows, whether effect be given to the express grant of that right contained in the patent or not; for the statute itself gives it. Rev. St. § 2322. It is therefore not necessary to decide whether the question in respect to defendant's extralateral right was or was not properly cognizable by the officers of the land department. If it was, it was in this case found to exist, and was

expressly granted by the patent to the defendant. If not, it followed by virtue of the statute as an incident of the parallelism of the end lines of the granted claim.

It remains to be determined whether the acts complained of by the complainant were committed and are threatened to be continued upon a vein, lode, or ledge having its apex within the surface lines of the Silver King claim, and which in its dip downward passes outside of the side lines of that claim, extended vertically downward, and into and beneath the surface of complainant's claims, and which lies between vertical planes drawn down through the end lines of the Silver King, continued in their own direction. Upon this point, as has been said, a large mass of testimony has been taken. The contention of the complainant is that in the ground in controversy there are a number of separate and distinct veins, each subject to separate ownership; on the part of the defendant, that these veins are included in and are but a part of a lode, and that the first location upon its apex or any part of its apex carries the right to the entire lode from foot wall to hanging wall within the end lines of the claim. If the lode exists as claimed, the conclusion contended for by the defendant would undoubtedly follow; but I feel bound to give it as my judgment upon the evidence that it does not exist.

It is endeavored to liken the ground in controversy to the great Eureka lode. I do not see the resemblance. The zone that was there the subject of contention, and which was held to be a single lode, was thus described by Mr. Justice Field:

"We find the zone is contained within clearly defined limits, and that it bears unmistakable marks of originating, in all its parts, under the influence of the same creative forces. It is bounded on its south side for its whole length, at least so far as explorations have been made, by a wall of quartzite of several hundred feet in thickness; and on its north side, for a like extent, by a belt of clay or shale, ranging in thickness from less than an inch to seventy or eighty feet. At the east end of the zone, in the Jackson mine, the quartzite and shale approach so closely as to be separated by a bare seam, less than an inch in width. From that point they diverge, until, on the surface in the Eureka mine, they are about five hundred feet apart, and on the surface in the Richmond mine, about eight hundred feet. The quartzite has a general dip to the north, at an angle of about forty-five degrees, subject to some local variations, as the course changes. The clay or shale is more perpendicular, having a dip at an angle of about eighty degrees. At some depth under the surface, these two boundaries of the limestone, descending at their respective angles, may come together. In some of the levels worked, they are now only from two to three hundred feet apart.

"The limestone found between these two limits—the wall of quartzite and the seam of clay or shale—has, at some period of the world's history, been subjected to some dynamic force of nature, by which it has been broken up, crushed, disintegrated, and fissured in all directions, so as to destroy, except in places of a few feet each, so far as explorations show, all traces of stratification; thus specially fitting it, according to the testimony of the men of science to whom we have listened, for the reception of the mineral, which, in ages past, came up from the depths below in solution, and was deposited in it. Evidence that the whole mass of limestone has been, at some period, lifted up and moved along the quartzite, is found in the marks of attrition engraved on the rock. This broken, crushed, and fissured condition pervades, to a greater or less extent, the whole body, showing that the same forces which operated upon a part operated upon the whole, and at the same time. Wherever the quartzite is exposed, the marks of attrition appear. Below the quartzite no one has penetrated. Above the shale the rock has not been

thus broken and crushed. Stratification exists there. If in some isolated places there is found evidence of disturbance, that disturbance has not been sufficient to affect the stratification. The broken, crushed, and fissured condition of the limestone gives it a specific, individual character, by which it can be identified and separated from all other limestone in the vicinity.

"In this zone of limestone numerous caves or chambers are found, further distinguishing it from the neighboring rock. The limestone, being broken and crushed up as stated, the water from above readily penetrated into it, and, operating as a solvent, formed these caves and chambers. No similar cavities are found in the rock beyond the shale, its hard and unbroken character not permitting, or at least opposing, such action from the water above.

"Oxide of iron is also found in numerous places throughout the zone, giving to the miner assurance that the metal he seeks is in its vicinity.

"This broken, crushed, and fissured condition of the limestone, the presence of the oxides of iron, the caves or chambers we have mentioned, with the wall of quartzite and seam of clay bounding it, give to the zone, in the eyes of the practical miner, an individuality, a oneness as complete as that which the most perfect lode in a geological sense ever possessed. Each of the characteristics named, though produced at a different period from the others, was undoubtedly caused by the same forces operating at the same time upon the whole body of the limestone.

"Throughout this zone of limestone, as we have already stated, mineral is found in the numerous fissures of the rock. According to the opinions of all the scientific men who have been examined, this mineral was brought up in solution from the depths of the earth below, and would therefore naturally be very irregularly deposited in the fissures of the crushed matter, as these fissures are in every variety of form and size, and would also find its way in minute particles in the loose material of the rock. The evidence shows that it is sufficiently diffused to justify giving to the limestone the general designation of mineralized matter,—metal-bearing rock." *Eureka Case*, 4 Sawy. 312.

Between the wall of quartzite which formed the boundary of that zone on the north side and the belt of clay or shale which formed its boundary on the south side, there was no other distinct wall or boundary of any character, and the intervening limestone being so broken up, crushed, disintegrated, fissured, and permeated in all directions with minerals, it was held to constitute a lode in the eyes of the practical miner, and within the meaning of the acts of congress upon the subject, whether it answered the geological definition of a lode or not.

But the physical facts in respect to the ground here in question are widely different. The acts complained of by the complainant were committed, and are threatened to be continued, by defendant, upon a vein having its apex within the surface lines of the Oriental No. 2 and Red Cloud, and at a point thereon under the surface of the Oriental No. 2 claim. This vein is spoken of by the witnesses and referred to by counsel as the "South Vein." Within the surface lines of the Silver King claim is the outcrop of another somewhat parallel vein spoken of and referred to as the "North Vein;" and between the two is another, also having its apex within the lines of the Silver King claim, spoken of and referred to as the "Middle Vein." All of these veins are on the southerly flank of the Silver King mountain, the country rock of which is liparite. All of them have been extensively mined, and they have been carefully examined by a number of learned gentlemen who have given special study and attention to mining engineering, and who have been examined as expert wit-

nesses in this case; among them, Mr. John Hays Hammond, for the defendant, who thus gives his views of the history of the geology of the Silver King mountain:

"Referring to the Exhibit P, [a map prepared under the direction of the witness,] we see the portion colored blue, and designated upon the map by the word 'liparite,' the rock that constitutes the mass of the King mountain. Superimposed upon this mass of liparite are the tufaceous deposits represented or designated 'brown tufa,' 'white tufa,' and 'trass,' respectively. Included between the liparite and the material designated 'brown tufa' is the Silver King lode. Overlying the ore of the Silver King lode, designated upon the map as 'birdseye' capping, there is a material which throughout the eastern end of the King mine forms a capping of the ore of the lode. Denudation has removed this capping of 'birdseye' from the western portion of the Silver King claim. The material which composes the formation which I have designated as 'birdseye' likewise forms a septum underlying the brown tufa, which tufa forms the hanging wall proper of the lode. Then follows, going south, the white tufa, and then a tufaceous deposit to which I have applied the name 'trass.' Then, as the last of this series of rocks of clastic origin, or, for short, clastic rocks, is the shale formation.

"The first period in the geological history of the King mountain was the accumulation of the tufa deposits to which I have just referred. These tufaceous deposits were the ejectments from the craters of volcanoes, or from fissures connecting with the seat of volcanic activity. The period of eruption was not a continuous one. There was an intermittency between the volcanic eruptions from which resulted the tufa deposits above represented on sketch 'P.' The most important of these tufa deposits is that of the indurated brown material locally known as 'mud.' This material or mud shows evidences of the action of water subsequent to its deposition as a tufa, in that there is a well-marked stratification of the deposit.

"The width of this deposit of brown tufa or mud, where erosion has not denuded a part of the formation, is from 200 to 400 feet. Overlying this formation is a deposit designated 'white tufa.' This deposit is separated from the deposit of brown tufa by a plane of division, called by geologists 'the plane of contact' between the two formations. The white tufa is further distinguishable from the brown tufa by the absence of stratification, and by the difference of color. The width of this deposit is from about 200 to 300 feet, where not removed by erosion. There may be a further difference in these deposits, and that is a difference as to origin. The brown tufa indicates or at least strongly suggests, from its color, its derivation from basic volcanic rock, while the white tufa would seem to indicate its origin from the acidic volcanic rocks. Overlying the white tufa is the tufaceous material designated as trass, in which occurs the ore of the silver monument.

"The second period in the geological history of the King mountain was the period of uplift or elevation. The tilted position of the strata of the brown tufa evidences this uplift.

"Immediately following and referable to the elevation of the King mountain, through the readjustment of the mountain mass, occurred the fissuring and faulting of a certain portion of the liparite mountain.

"Referring to sketch map 'O' the line, B, B, will indicate the position of the first and main fault plane, the result of the readjustment above referred to.

"As a result of the formation of this fissure or fault plane there was sliced off, as it were, a segment of the liparitic mass of the mountain, included within the lines, B, B, and A, A. As a secondary fault plane we have the fissure represented by the line A, A.

"Contemporaneous with this faulting occurred the formation of the connecting fissures and of the fissures which I shall call the 'interjacent' fissures of the lode.

"Further, there occurred the formation of innumerable smaller fissures which traversed the lode in all directions. These fissures, designated as the 'connecting' fissures and as the 'interjacent' fissures, as well as the smaller

fiissures just referred to, do not at any place penetrate the foot wall or the hanging wall of the lode.

"By this dynamic force to which the origin of the fissures is to be ascribed, there occurred a most thorough and extensive fracturing of the segment of liparite now known as the 'Silver King Lode,' and to which I shall refer as the 'Silver King Lode.'

"Then followed the fourth period in the geological history of the King mountain. Into the shattered and fissured zone, thus prepared, came the infiltrating mineral solutions, which penetrated and permeated the entire fractured zone where interstitial spaces admitted of the passage of the mineral-bearing solution.

"A further phenomenon connected with this period of mineralization was the kaolinization of certain portions of the lode where fissuring admitted of the entrance of the solutions which decomposed the feldspar of the liparite. A further feature connected with and evidence of the fracturing to which I have referred, is the formation of the 'vughs' or 'druses' which are now found in the zone. The absence of mineralization where druses occur, or where kaolinization has taken place, is compensated by these latter vein features. The mineralization thus effected resulted in the formation of the foot wall and hanging wall veins, as well as of the connecting veins, the interjacent veins, and the smaller metalliferous veinlets, which latter form a more or less reticulated mass within the zone.

"That completes the synopsis of the geological history of the King mountain and of the ore deposits within the zone."

This witness further testified that there is a very distinctive lode within the Silver King mine, dipping to the south at an angle of 70 degrees, and having a northwesterly and southwesterly strike. Being asked to give its boundaries, he answered:

"The lode is bounded upon the north by the rock known as 'liparite.' This rock constitutes the mass of the King mountain. It is a rock of volcanic origin, closely related to trachyte, containing more quartz than trachyte, however. It is bounded upon the south by the indurated material locally known as 'mud,' the origin of which I have described in connection with the history of the geology of the King mountain. This indurated mud forms the hanging wall of the lode, the liparite constituting the foot wall of the lode."

The difference between the materials forming the asserted lode and those forming its foot-wall country and its hanging-wall country, respectively, are thus stated by Mr. Hammond.

"The differences are apparent and even striking. Take the typical representatives of the three formations you have referred to. In the first place, there is a marked difference between the foot wall liparite and the hanging wall brown tufa or indurated mud. The difference is represented or expressed by the contrast in color, by the difference in hardness, and by the lack of stratification in the liparite upon the King ground, as compared with the stratified character of the indurated mud. The difference between these formations that I have just described is so great as to be observable by the physical character alone of the rock. The difference between the material composing the lode and the material forming these walls is likewise apparent, in that there is a lack of mineralization, or there is a characteristic lack of mineralization in the rocks forming the foot wall and the hanging wall of the lode. Physically there is a difference, in that the lode material evidences a more or less complete disintegration and kaolinization. The lode material shows, further, a difference from the other two formations we are considering in its fissured character. Another difference is the characteristic occurrence of vughs within the lode. As far as my examination goes, I have seen no vughs without the lode."

It is, of course, impossible to refer in detail to the evidence in the case. It shows that what the defendant claims to be the north-
v.54f.no.6-60

erly boundary of the asserted lode is the foot wall of the north vein, and that its southerly boundary is the hanging wall of what the complainant claims to be the separate and entirely distinct south vein already mentioned.

Respecting these veins and the adjacent ground, Mr. Louis Janin, a gentleman whom the respective counsel concede to be possessed of much learning and experience in such matters, testified on behalf of the complainant:

"The silver bearing veins of Calico, San Bernardino county, situated on the southerly flank of Silver King mountain, one or more of which course through the mining claims of the plaintiff, one or more of which course through the mining claims of the defendant, are true fissure veins entirely in a liparite country rock, continuous in their course and regular in their dip. They have well-defined walls, and are independent of one another. The outcrop or apex of one of these veins is within the surface boundaries of the Red Cloud and Oriental No. 2 locations. The alleged trespass was upon this vein. This vein is separate, distinct, and independent of all veins in the vicinity. There is no mineral lode or mineralized body of rock within well-defined boundaries or any boundaries of which this vein is but a part. That is the result I came to. That is the result I came to from my original examination, and it was confirmed by my subsequent examination, and it is my present opinion."

Being asked to describe the features of this Red Cloud and Oriental No. 2 vein, of which he was speaking, the witness answered:

"Well, one of the striking features, and one of the most important features, of this vein, is that it outcrops, as shown on Exhibit 31 for the complainant, from the point marked 'D, D,' to and including the shaft some distance beyond. I believe it is not precisely continuous between those points, but it is proven to be so by tunneling underneath the surface. That is a striking feature, but that has already been dwelt upon at some length in the previous testimony. * * * I propose now to go a little beyond the ground covered by the croppings, or that which we know to exist between the King Sixth tunnel and a point below the croppings at the point, D, D, and take in the continuation of the vein as far as I have traced it underground, and perhaps farther. At the point, D, D, the croppings disappear, I believe; or, if they do not, if they continue their course, they cross the north boundary line of the Red Cloud location. Then they are covered up by some brown liparite breccia, which lies on the surface of the ground, and, indeed, to a considerable depth beneath the surface, and appear once more in what is known locally as the 'Mammoth Claim.' I am speaking of the vein, or the croppings, marked 'E, E,' 'F, F,' on Exhibit 31, (south vein.) That is all that one sees of it on the surface. On the sixth level of the Red Cloud and Oriental it is traced easterly from the Oriental shaft a long distance, and also 130 feet below on the Wall street tunnel, to a point where the tunnel cuts out of the vein, and passes into what is called the mud. It is also— That goes on still further east than the sixth level. And westerly this vein has been traced upon this sixth tunnel up into the Red Cloud sixth tunnel, and along to the end of the drift, which is not marked on this map, nor is it marked on the larger map, Exhibit 22. As I said, I traced it from the Oriental shaft, and, indeed, from the King sixth tunnel, on this sixth level all along,—the sixth level of the Red Cloud,—to a point marked 'Q, Q, Q, Q.' I have traced it by following the wall, the foot wall. Coming back, I went up on the vein to the upper level, which is called, I believe, 'Barber Tunnel, 5th Level.' Going westerly, I followed the vein to the end of that tunnel to the west, on Exhibit 22. That was as far as I could follow it on the fifth level, and it was as far as I could follow it on the sixth; that is to the point Q, Q, Q, Q. But afterwards, going on the Mammoth ground into the Red Cloud third level, or afterwards going on the Mammoth ground, I have followed the same vein from the croppings down to the Red Cloud lower tunnel; by the various tunnels that were run in between

the croppings and the Red Cloud lower, where I found it strong and continuous throughout its depth, and have followed it in various drifts there, not represented on this illustrative sketch, easterly and westerly. Now, on the third level of the Red Cloud, I have followed it out easterly about a hundred feet or so, to a point which is nearly opposite the end of the Barber fifth level, but somewhat above it. I have also followed the Mammoth vein on the easterly drift from the fourth level of the Red Cloud to a point which is very near the point marked 'R, R, R, R,' on the Barber tunnel fifth level. So that there can be no possible doubt as to this Mammoth vein being the same vein which I followed, and called 'Oriental Vein.' They have not been connected, because the two works belong to different companies; that is, at least, I suppose, the reason. So that we have followed this vein from the sixth tunnel level along the sixth level, and in the Red Cloud works, with the croppings included, for a distance of some 2,000 feet. And in depth I have followed it from the croppings down,—at least, so much as I could see of it at the croppings, and in the upper level, and in the sixth level of the Oriental, and also in the Wall street level,—I followed it to that distance in depth. It also continues down to the tenth level, as has been testified here in court. But I did not go down to the lower level there myself, simply because it was too difficult for me. So that gives me a total depth, in round numbers, of 350 feet, through which depth the vein had been found and followed, and the wall continuous and distinct. The same is the case wherever I know its depth—that is, on the western end as marked on this illustrative sketch—from the croppings down to the Red Cloud lower tunnel, a distance on the vein of about 510 feet, or 490 feet perpendicularly. So here is a vein that we have followed from 350 to 500 feet in depth in various sections along its length, and which we followed along its length for some 2,000 feet, showing croppings wherever it was possible for croppings to be shown; that is to say, where the vein was not covered, where the ground was not covered by this brown liparite breccia, or by detritus. The vein itself has the very strong and distinctive features of a foot wall that is continuous. The vein filling is to the south,—that is to say, towards the hanging wall side,—with occasional breaks on the foot wall side, where it shows some jasper at least, and I presume it was a portion of the vein filling once. So it is easy to trace throughout this whole length of 2,000 feet on the surface, and also in depth. I therefore consider it to be a very continuous strong vein, so far as it is worked and goes. The vein is like all other fissure veins, or rather it is a fissure faulting plane, because it shows some evidence of movement, and the hanging wall rock is somewhat broken. At the Oriental shaft on the upper level the foot wall is very highly polished. Indeed, it shows slickensides very plainly, and this shows there must have been some movement. How considerable, I cannot tell. But the result of the movement has been the breaking of the hanging wall to a certain extent, and then, when the vein was filled between its original walls, the vein fillings in solution overflowed somewhat and impregnated or surrounded the particles of broken country rock of the hanging wall. In other words, the hanging wall itself carries some ore. Of course, it being a fissure vein it once had two distinct and decided walls. The one being broken and fractured, very naturally contains some mineral. I said that occasionally I found some vein matter back of the wall. That is true, I think, of a portion of the vein in the immediate vicinity of where the shaft and the sixth level intersect one another. But the main feature is all the time that the vein lies on the foot wall, and is continuous throughout. Sometimes, the vein is exceedingly narrow; at least, it looks so to me; and other times it broadens out so that the vein fillings occupy some 8 to 12 feet. I cannot conceive of any possibility of any one's doubting that it is a continuous, well-developed, strong fissure vein. It has occupied a faulting plane, with the natural result of occasional little breaks in the wall. It has a regular dip to the south. By 'regular' I mean, of course, with such variations as one always finds in mines. At the easterly end the dip is quite steep,—about 70 to 73 degrees,—and perhaps a little steeper. As one goes westerly, the dip changes; becomes flatter. In some places it is about 54; my recollection is of its having been so determined. And still further west I found it to be 45. By regularity in the dip, I mean it does not shoot off suddenly, and dip back again, like a broken zone of rock in the

country, or like an irregular body. It has a continuous, well-defined dip,—regular; what all miners would call regular. Therefore, I say, I consider that a very regular, well-defined fissure vein."

Having stated that the Oriental or south vein was an independent vein having no connection with the middle or north veins, and being asked to state what examination he had made to determine that fact, Mr. Janin answered:

"In order to determine whether or not this vein was independent, after having traced it throughout its length, as far as I could, and in depth as far as I could, or found convenient, I then went in front of the vein, and examined this brown tufa, which has been called 'mud,' by means of all the tunnels which penetrate through this brown tufa and into the vein, and passing the vein and other veins, and going to the north of them. In other words, along this two thousand feet of length I have examined quite a number of cross cuts and tunnels which cross these various veins. So that I have seen the vein in many places, seen the country in many places, both behind the vein and in front of the vein. I have also had assays made of the country rock. This was purely for my own satisfaction, and I don't know whether it has been in evidence or not. I have paid no attention to it. But I had assays made of the country rock on the Wall street tunnel level from the vein back as far as that tunnel had been carried in up to the face of the tunnel. And I will say the same of the Oriental tunnel level. I think I had assays made of all the ground in front as well as back of the ledge. That was to see whether the inspection which I had made with my eyes was indorsed more or less by assays taken at regular intervals. In the same way I had samples taken all along the King sixth level, some of which I have had assayed, and others not. Those which were omitted were merely those which came out of the brown mud. Therefore, I have seen this country, as I said, in many cross cuts. And the result I have already stated, namely, that the vein has a well-defined foot wall throughout its whole length, and that the vein filling does not penetrate the foot wall except occasionally, and I mean just occasionally. But it does lie between the hanging wall and the foot wall, and sometimes the hanging wall is broken, is not well defined, and is more or less impregnated, or the broken fragments of the wall are interlaced by vein matter. I have found nowhere any indication of any irregular body of ore, or any impregnation, or any stock works, or anything else which has attached itself to this vein, so that, extending backwards and over any considerable length, it may be said to be a part of it. * * * Well, I have described what I saw in the immediate vicinity of the vein in question, the Oriental vein. I would like to mention by the letters, if it has any letters. It is the vein 'E, E,' 'F, F,' as marked on Exhibits 31, 28, 29, and 30. I have described now what I found directly in contact with the vein, and I will say that I moreover went into the Silver King Mining Company's claim on the sixth level, and followed back the veins there as far as developed on that level, namely, I found one, which is the most northerly vein, with works continuous for a long distance. Then I found one, which has been spoken of here as a 'divergent,' and which is marked on Exhibit 22 as 'A.A.A,' 'B.B.B,' [middle vein.] The one I before mentioned [the north vein] is marked 'X,X,' 'Y,Y.' I examined them along the sixth tunnel,—I mean on the sixth level. I have examined all the cross cuts between those veins just mentioned and the Oriental vein or the vein E, F."

Being asked to describe the north and middle veins, the witness answered:

"I first of all examined the surface and the croppings on the surface by passing over them repeatedly in different directions, and also inspection by particular examination,—that is, of both of those veins, over part of their length; and then my next examination was chiefly confined to the sixth level, as I said before. I find those veins possessing almost precisely the same characteristics as the Oriental vein marked 'E,' 'F,' on the sections; that is to say, I look upon each of them as a fissure vein, as occupying a faulting

plane; that they show the evidence of this in the broken state of their country rock, just precisely as in places the vein E, F, does. I find that they have a strongly marked foot wall, each of them; the north vein having a much better defined one than the one marked 'A,A,A,' and 'B,B,B,' [middle vein;] but both of them having what miners call, or should call if they don't, a well-defined foot wall which they can trace and have traced. I find that both these veins have their ore resting on their foot wall, breaking at times into the hanging wall, and have been worked accordingly, sometimes mere stoping along the veins, sometimes branching out into the hanging wall as far as the ore would pay; the ore represented more or less by parallel stringers of ore, and other times by a brecciated mass of ore cemented, you might say, by sulphate of baryta, which is a gangue of these veins. I might state that again. The gangue of these veins—that is to say, that which is between and is included within the walls—is heavy spar or baryta, sometimes jasper, intermixed with a little chloride of silver and bromide. I find that these veins have regular walls, and that these walls penetrate to the lowest workings continuously, and are regular; that they have about the same dip, taken in a general sense, as the vein E, F, and I find that they are perfectly distinct from one another. I find that every ore body which has been worked is in direct connection with the foot wall of the vein which is nearest to it, unless, of course, there may be little broken fragments between the two veins where they approach very close to one another. I find that in all respects, omitting local peculiarities, the three veins may be described in one and the same manner. Then I notice that between them—between the vein A,A,A, B,B,B, which is nearest to the vein E, F, in a number of cross cuts in the country, in all of which I have been, and all of which I have examined—I find as good a separation between these two veins as any man could desire, and as good a separation as is usual to happen between veins which are so close together, namely, there are occasionally some parallel streaks of spar, which has no mining importance so far as I have been able to determine. I have determined that fact, not only by my own inspection,—not only by asking workmen, which I always make a point of doing,—but I have also found out that that was a fact from the actual developments on both those mines, namely, the Silver King and Oriental No. 2 mine, and the Red Cloud mine. Long before experts ever got to this ground, and without any fears of geology or geological reasonings, the miners have gone into these works, have penetrated the walls on both sides, and have hunted there with very keen scent for all the ore that was to be had. They have struck the ore on or along these foot walls, they have followed them with their works, they have found the ore there, and nowhere else. Occasionally they have gone back of that wall or the foot walls in a number of places to hunt for ore, and found nothing but little seams. They have gone in front of the vein A,A,A, and B,B,B, and found nothing but little seams. Wherever you trace them these veins are distinct and independent, and cannot be confounded with one another or with any intervening body of ore. Now, in order to correct any misapprehension, I will say immediately that I know of little divergents, as they are called, that is, little offshoots from the vein, which give the appearance as if there has been stoping a little ways in the hanging wall of the different veins. That I include as part and parcel of the main fissure vein, only they are called usually by different names than 'divergents,'—called 'feeders' or 'followers' or 'spurs;' and wherever I have found any of these apparently independent stopes I have found always reason to believe that it was connected with the fissure vein; and, as I was saying, the miners have found that to be the case themselves. They are the ones that study the mine daily, and, no matter whether they call tufa 'mud,' or liparite 'birdseye,' they understand the differences in the formation, and they follow it just as well as any of us can do in a few weeks' labor. So I have determined those veins to be separate and distinct by my own personal examination of all the cross cuts, of all the drifts on the sixth level, by their croppings, by the workings of the miners, which I will take any time rather than their asseverations. I think the works on the mine will settle or prove exactly the existence of the ore, and exactly how it occurs. Therefore I have come to the conclusion, from my examination of all those neighboring veins, that this ore deposit along the

walls of the veins marked 'E,' 'F,' is entirely distinct from any other formation in the country."

As has been already said, the evidence in the case is too voluminous to render it practicable to review it in detail. While there is not a great deal of conflict in the testimony respecting the facts, the conclusions reached by the expert witnesses for the complainant and defendant, respectively, are directly opposed. In my opinion, the evidence, taken as a whole, shows that the north, south, and middle veins each have distinct and well-defined boundaries, and that each of them has sufficient length, sufficient depth, and sufficient breadth to constitute a true and independent fissure vein. Towards the easterly end of the Silver King claim, the middle vein closely approaches the north one, and it may be that they join; but it seems to me clear that the north and south veins are entirely separate and independent of each other. There cannot be any doubt, in view of the evidence, that the foot wall of the south vein is a perfectly distinct, well-defined boundary which has been actually traced for 2,000 feet in length, and for from 350 to 500 feet in depth; and yet this boundary lies between what the defendant claims as the boundaries of the asserted lode. So, too, the middle vein has distinct, well-defined foot and hanging walls, and the north vein a distinct, well-defined hanging wall as well as foot wall. It is true that, throughout the liparite rock included between the foot wall of the north vein and the hanging wall of the south vein, there are innumerable cracks and seams, some of them running out from the respective veins, and some of them extending from one vein to the other; and the rock in places is much broken and crushed. But there is no such general breakage and crushing, nor is there any such general and irregular impregnation of it with mineral, or any such irregular disposition of the ore bodies, as was the case with the crushed and disintegrated limestone in the Eureka Case. Here, the great bodies of ore are in and along the large veins that course through the ground in question in substantially parallel lines. There, there were, in the first place, no such veins with well-defined foot and hanging walls between the boundaries of the lode, and the mineral was there disseminated almost everywhere throughout the broken, crushed, and disintegrated mass of limestone. No such general and irregular diffusion of mineral through the ground here in question can, I think, be justly affirmed. Many of the little seams and cracks undoubtedly lead to ore, but I think they are properly referable to one or the other of the fissure veins, having been but the overflow of the mineralizing vapor or water when, in the course of nature, it came up from the depths below, filling the fissures that had been previously made in the rocks. Just when, and the order in which, those fissures were made and the sources from which they were filled with the vein matter, no one, in the nature of things, can exactly know. The scientific gentlemen who have been examined as experts differ in their theories respecting those matters, although they agree that it all occurred within the same geological period, which, however, may have extended, as one of them said, a million of years. The evidence, in my

opinion, does not show that the same force of nature operated upon the whole mass here claimed as a lode, and at the same time. The more reasonable theory, I think, is that adopted by complainant's expert witnesses, that the fissure veins mentioned were made at different times and that each of them had its own and independent source of supply of vein matter.

By stipulation of the parties the question of damages was withdrawn from consideration in this case, and a line agreed on, to the east of which the present controversy should be confined. The decree, which must be for the complainant, will be so limited.

HAYNE v. GOULD.

GOULD v. HAYNE.

(Circuit Court, S. D. California. February 13, 1893.)

No. 176.

1. TENANCY IN COMMON—PARTITION—OLIVE RANCH.

Where two persons contract to maintain and cultivate an olive ranch, contemplating, not a division of the property, but its building up, operation, and sale as a whole, but making no distinct or specific agreement to that effect, one party may enforce a division, under Code Civil Proc. Cal. § 763, providing that the court must order a partition "unless the property is so situated that partition cannot be made without great prejudice to the owners;" and the fact that defendant is a lawyer practicing in a distant state, having no knowledge of farming or olive culture, and that plaintiff would be unable to buy in the property if it should be sold as a whole, are unimportant in the determination of the question, for the situation of the property, not the circumstances of the parties, must control.

2. SAME—OLIVE RANCH—DIVISIBILITY.

Where an olive ranch is so large that it can be divided into two large orchards, such as to justify the building of works for either the manufacture of oil or the pickling of the olives, one of two tenants in common can enforce partition, under Code Civil Proc. Cal. § 763, which secures this right unless great prejudice to the owners would result because of the situation of the property.

3. SAME—EXPENSES—MISTAKEN ESTIMATE.

One of two tenants in common agreed to share the expense of a house, to be built by his cotenant at an estimated expense of \$400. Owing to a mistake in the estimates of the material man and damage by a storm while building, the house actually cost \$700. *Held*, that upon partition, the expense should be equally shared, and the house be regarded as the property of both parties.

4. SAME—ACCOUNTING—INTEREST.

An agreement between two tenants in common of an olive ranch provided that one of them should pay the other a certain sum for a failure to plant certain trees. The debtor under this agreement began a suit for partition, thereby putting it out of his power to fulfill the contract. *Held*, that upon partition he should be charged with that sum, with interest from the date of the commencement of the suit.

5. SAME.

One of two tenants in common of an olive ranch, who agrees with his cotenant to give his whole time and attention to the cultivation of the ranch, and who thereafter enforces a partition, should be charged with one half of his profits in real-estate dealings carried on by him while the

agreement was in force, and causing his absence from the ranch for considerable periods of time.

6. SAME—NECESSARY EXPENSE.

A suit for the partition of an olive ranch was brought by one of its two tenants in common, who, pending the suit, incurred necessary expenses in caring for the ranch. *Held*, that the cotenant should be charged with one half such expenses, with interest from the time of the respective payments, although he had given notice that he would not hold himself responsible for running expenses.

7. SAME—AGREEMENT TO SHARE—EXPENSE OF FENCING.

An agreement by two tenants in common to share the expense of fencing includes the expense of a survey necessary to determine the boundary of the land.

In Equity. Bill in a superior court of California by W. Alston Hayne, Jr., against Charles W. Gould, for partition of property owned by the parties as tenants in common. Defendant removed the cause to this court. Heard on bill, answer, and replication, and cross bill, answer, and replication. Decree for partition.

B. F. Thomas, (S. M. White, Edward J. Pringle, and Robert Y. Hayne, of counsel,) for Hayne.
Jarrett T. Richards, for Gould.

ROSS, District Judge. On the 26th of September, 1885, the plaintiff, who owned 160 acres of land in the Santa Ynez valley, about 45 miles from the city of Santa Barbara, and had contracted for the purchase from D. O. Mills of an adjoining tract of 80 acres, and also owned a large olive nursery, and certain personal property consisting of farm stock and implements, entered into a written contract with the defendant, who was a lawyer, engaged in the practice of his profession in the city of New York, but who was at the time on a visit to his brother and other relatives residing at Santa Barbara, by which the defendant was to acquire an undivided one-half interest in the above-mentioned real estate and personal property, and in the olive trees, to be planted as afterwards to be stated, by paying therefor \$7,795 in this wise: Upon the approval of the title to the lands by competent counsel, defendant was to pay to Mills or his agent the unpaid purchase money due from plaintiff to Mills, with interest, estimated to be about \$1,300, and upon the recording of the deed from Mills to plaintiff the latter was to execute to defendant a deed for one undivided one half of all of the real estate, whereupon defendant was to pay to plaintiff \$4,000, less the amount previously paid by him to Mills. During the planting season of 1886, plaintiff was to set out upon the land at his own expense 5,000 olive trees of the age of three years, and, when those trees should be so planted, defendant was to pay plaintiff the further sum of \$2,545, making payment in full for the undivided one-half interest in the real estate, 5,000 olive trees and the personal property, a schedule of which was annexed to the agreement. The agreement further provided that, during the planting season of 1887, plaintiff should furnish an additional 5,000 olive trees to be set out on the lands, and for an undivided one-half interest in those trees defendant was to pay plaintiff \$1,250, and also

one half of the expenses incurred by plaintiff after such trees should be loaded on proper vehicles for transportation to the lands. Plaintiff was to give his undivided time and attention to the business of cultivating and managing the lands as a farm and olive orchard, and, in consideration thereof, defendant agreed to pay the wages of a hired man and his board, such board being estimated at the rate of \$3.50 a week. Plaintiff was to be at liberty to engage a cook for the farm, one half of whose wages (such, however, not to exceed \$10 a month) was to be paid by the defendant. Plaintiff was to keep accurate and particular books of account of the whole business of the farm, and to render defendant quarterly statements thereof. Defendant was to be chargeable with no expense of the management of the farm, except for the cost of erecting a suitable fence, until after the first orchard of 5,000 olive trees should be set out as specified in the agreement. Defendant, upon receipt of the quarterly statements from plaintiff, was to promptly "discharge any and all indebtedness, incurred as hereinbefore expressed, which may be due from him to said Hayne; and, per contra, should the quarterly statements show a credit balance, or should any profit accrue, said Hayne agrees to pay said Gould one half thereof."

The foregoing is the substance of the written agreement entered into between the parties September 26, 1885. The evidence shows that the plaintiff was indebted at the time, but that he assured the defendant that the money to be paid by him for an undivided half interest in the property would enable plaintiff to discharge his indebtedness, and that he would not again go into debt. In discussing the venture, at or about the time of making the agreement, plaintiff spoke to defendant about a piece of adjoining land owned by Mills which it would be well for them to acquire, to be used as a farm and pasture in connection with the olive ranch. Defendant replied that he knew Mills, and could, he thought, deal to better advantage with him in New York than plaintiff could here, and would during the winter arrange for its purchase. Plaintiff also, about the same time, expressed the wish to build a cheap house on the property for his own use, and defendant agreed to bear half the cost of such a house, the estimated cost of which, according to the testimony of defendant, was \$200, according to the testimony of defendant's brother, who acted as agent for defendant in respect to the property, \$300, and according to the testimony of plaintiff, \$450. The payments stipulated to be made by the defendant in and by the agreement of September 26, 1885, and slightly modified by a subsequent agreement afterwards to be noticed, were by defendant made, and he received a conveyance from the plaintiff of an undivided one-half interest in the property. On the 29th of December, 1885, plaintiff and defendant entered into a "nursery contract," by which Hayne agreed to provide and plant in proper condition, in the spring of 1886, olive cuttings to the number of at least 30,000, and not to exceed 50,000, on the land belonging to him or provided by him in Montecito, or on the ranch of Gould and Hayne in Santa Ynez, or partly on the one ground and partly on the other, and to care for and cultivate the cuttings for two years

after the planting, and until they should be ready for transportation and sale, Gould agreeing to pay for the cuttings at the rate of 2½ cents for each cutting, the payments to be distributed as follows: First, after the cuttings should be fully set out, Gould to pay one half of the whole sum due from him; and one year after the first payment to pay half of the balance due from him; and two years after the first payment to pay the entire balance due from him; the cuttings to belong to Gould and Hayne, share and share alike. The agreement further provided that at the expiration of two years after the year of the planting, should there be remaining in the nursery any small scattered trees, Hayne should have the privilege of removing them and setting them out in a new nursery.

Plaintiff proceeded with the setting out of the 5,000 trees and the cultivation and management of the ranch. Owing to the mistaken estimates of the material man, and to the fact that a storm of rain washed away a part of the adobe walls of which the house spoken of was in part built, it transpired that its cost amounted to \$700, and this excess of cost over the plaintiff's estimate gave rise to the first dispute between the parties, and resulted in much acrimonious correspondence between them, and in a refusal of the defendant to pay more than \$150 towards the construction of the house, which sum he paid. The next trouble that arose between the parties came from the fact that plaintiff, in violation of his own suggestion to defendant to acquire for their joint benefit the adjoining tract of Mills, contracted to purchase that tract for himself, giving his promissory notes therefor, in further violation of his promise to defendant not to go into debt, and proceeded to work this newly-acquired land with the teams of plaintiff and defendant. Against this conduct on the part of plaintiff the defendant protested. Plaintiff replied that he had not understood the matter as had the defendant, and that he entered into that contract of purchase in order to provide for his brother, Benjamin Hayne. The controversy between plaintiff and defendant growing out of this matter was settled by a tripartite agreement, in writing, entered into March 11, 1886, between plaintiff and defendant and Benjamin Hayne, which agreement recites that—

"Whereas, said Gould and said W. A. Hayne, Jr., own in common a certain tract of land sometimes known as the 'Puerta del Sol Ranch,' in Santa Ynez, Santa Barbara county, state of California, together with the houses and improvements thereon, and certain personal property, such as teams, plows, implements of husbandry, etc., etc., and it is the present intention of said Gould and said W. A. Hayne, Jr., to cultivate and plant the said tract of land, with a view to making it an olive ranch; and whereas, said W. A. Hayne, Jr., has agreed to buy a certain other tract of land contiguous to the tract first above mentioned, said second-named tract being sometimes known as the 'Mills Piece,' and containing two hundred and seven acres of land, or thereabouts; and whereas, said W. A. Hayne, Jr., in pursuance of his intention of buying said Mills piece, has received from the present owner of said piece an agreement for a deed thereto, and has given therefor four notes of the face value of \$600 each, or thereabouts: Now, therefore, for the purpose of settling certain controversies between the parties hereto, and for other good and valuable considerations, the parties hereto agree as follows: Said W. A. Hayne, Jr., agrees to convey to said Charles W. Gould all his right, title, and interest under the contract for the deed of said land known as the 'Mills Piece,' and

said Gould agrees to take the transfer and conveyance of said right, title, and interest to the deed for said Mills piece from W. A. Hayne, Jr., provided that a sound title can be secured to said Gould of and to said Mills piece; and said Gould further agrees, provided that a sound title can be given him as aforesaid under the agreement made by said W. A. Hayne, Jr., to buy said Mills piece, to acquire said title. Said Benjamin Hayne agrees to and with the said Gould to forthwith cultivate and improve the said Mills piece, for the purpose of converting it into an olive ranch. And to this end the said Benjamin Hayne agrees to devote his whole time, attention, and energy; and when said Hayne shall have set out on said Mills piece five thousand three year old olive trees, in good condition, living and thriving, said Gould agrees to convey to said Benjamin Hayne one half of his interest in and to the contract for the deed to said Mills piece, to be assigned and conveyed to said Gould by said W. A. Hayne, Jr., as hereinbefore specified. Said W. A. Hayne, Jr., and said Gould also agree to permit said Benjamin Hayne to use the house and personal property now situated on said Puerta del Sol Ranch, for the purpose of cultivating and improving the Mills piece and the olive trees thereon to be set out."

By the tripartite contract defendant also agreed to advance money to the amount of \$200, to pay for a fence around the land described in it to facilitate Benjamin Hayne in its proper care and cultivation. It was further provided that defendant should not become liable for any other expense connected with the improvement of that tract of land (excepting the taxes thereon) until after Benjamin Hayne should set out 5,000 three year old trees, as provided for, and shall have received a conveyance from defendant of an undivided one-half interest in the property. The tripartite agreement contained other provisions not necessary to be mentioned here.

Another written agreement, made between plaintiff and defendant on the 24th of September, 1886, recites that—

Whereas, the plaintiff, by the agreement of September 26, 1885, agreed to furnish, for the purpose of planting upon the ranch in that agreement described, five thousand olive trees of the age of three years, during the planting season of 1887, "and whereas, said Hayne cannot furnish said trees, it is now agreed between the parties hereto that in lieu thereof the said Hayne shall furnish olive trees for the purpose of planting on the said ranch, of the age of two years, and shall set out on said ranch during the planting season of 1887 three thousand of said trees; it being understood and agreed, nevertheless, that in case said Hayne shall be able so to do, he shall be at liberty to plant trees of the age of three years, the intent of this agreement being that said Hayne shall select the best of his trees, whether of the age of two years or three years. And in consideration of the premises said Hayne agrees to pay said Gould the sum of \$687.50, and to liquidate this amount by devoting twenty per cent. of said Hayne's profits from the said ranch to the payment thereof until said sum shall be wholly paid, no interest thereon to be charged or collected by said Gould; and in case said ranch be sold on or before January 1st, 1889, said Gould agrees to accept, on or before January 1st, 1889, \$500, in full payment of said sum of \$687.50," etc.

Shortly after this the defendant, on learning that plaintiff had incurred a small blacksmith bill in the name of Gould and Hayne, protested against it, and demanded that the quarterly statements provided for by the contract should be accompanied by vouchers showing payment by the plaintiff, as a condition to the payment by defendant of his share of the expenses. This demand, and refusal on defendant's part, brought about a protracted and heated correspondence between the parties, in which, among other things, defendant complained

of plaintiff's repeated absences from the olive ranch, his engaging in other business, and his subsequent failure to give his undivided time and attention to cultivating and managing the ranch. This controversy terminated by the acceding of plaintiff to defendant's demand for the production of vouchers, and defendant's payment of his share of the expenses of the ranch up to the time of the commencement of this suit, which was commenced before the trees had reached a stage of profitable bearing. Upon its institution the defendant notified plaintiff that he would not bear any further expense in connection with its cultivation and maintenance, and forbade the contracting of any debts on his account.

The suit was commenced in one of the superior courts of this state by the filing of a complaint alleging, in substance, that the plaintiff and the defendant are the owners in fee simple, and seised and possessed as tenants in common, of the property in controversy, containing 240 acres of land, with a house thereon, for which house the plaintiff paid \$550 and the defendant only \$150. It prays for a partition, and that the division be so made that the portion upon which the house is situated be allotted to plaintiff, and for general relief. The case was on motion of the defendant transferred to this court. And here the defendant filed an answer to the complaint admitting that plaintiff and defendant are owners in fee, and seised and possessed as tenants in common, of the premises described in the complaint, and that each is the owner of an equal undivided one half thereof. The answer avers that the house was erected for the common benefit of the parties to the suit, and that plaintiff is not entitled to any preference of allotment by reason thereof, and that the property is so situated that partition cannot be had without great prejudice to the owners. The answer also contains certain affirmative allegations, the substance of which is as follows: It avers that prior to the defendant's connection with the property, the plaintiff was the owner in fee of a portion thereof, and had a contract of purchase for the remainder, and was also the owner of certain personal property; that in this condition of affairs the plaintiff and the defendant entered into an agreement, whereby the plaintiff was to plant a specified number of olive trees upon the property, and the defendant was to pay a certain sum of money, and was to become the owner of one half of the real and personal property; and that the plaintiff and defendant should, as and for a joint and common enterprise, employ and improve and develop the real property in and for the culture and commerce of olives; that the plaintiff should give his undivided time and attention to the business of cultivating and managing the lands as a farm and olive orchard, the proper current expenses of conducting the farm and orchard to be borne by plaintiff and defendant. It further avers that it was understood and agreed, and was an inducement to and one of the considerations of the defendant's embarking in the enterprise, that the property should be developed, improved, and conducted in the culture of olives as a joint enterprise, and that plaintiff should be and remain, until the property was sold, the associate of the defendant in that enterprise; that the property was

laid out and improved and the orchard planted as a single enterprise, and not with a view to a partition or division of it, and that it would be inequitable and in violation of the agreement to allow a partition to be had. The answer further avers that the defendant has faithfully performed his part of the agreement, and has advanced the necessary funds by means of which the title to the portion of the property held under the contract of purchase was perfected, and has done everything which he was required to do; but that plaintiff failed to perform his part of the agreement, and, in particular, that he has failed to furnish and set out the number of trees called for in the agreement; that he has not given his undivided time and attention to the cultivation of the lands as a farm and olive orchard, but, as defendant is informed and believes, has engaged in other business at different times for long periods at a place remote from the property, at great personal profit to himself, and to the loss and injury of the defendant and to their joint enterprise. The prayer of the answer is that the plaintiff's application for partition be denied, and that defendant be dismissed, with costs. To this answer a replication was filed by the plaintiff.

The defendant also filed a cross bill against the plaintiff. The cross bill alleges in substance the same matters which are averred in the answer, and in addition annexed thereto a copy of the agreement of September 26, 1885. It alleges that that agreement was, at plaintiff's request, and because he was not able to perform it, modified as to the number of trees to be planted, and in certain other particulars, by the subsequent agreement of September 24, 1886, which is also annexed to the cross bill. It avers that upon the institution of the partition suit the defendant served a written notice upon the plaintiff that the relation between them was terminated, and that any express or implied agency in or about incurring expense or costs concerning the property was revoked, and that defendant would not bear any further expense, nor pay further expenditures in relation to the property, nor make any further payment under the contract, and would hold the plaintiff responsible as bailee for all personal property on the place. The cross bill further avers that it is necessary that an accounting be had between the parties, and all their various differences adjusted in one suit in this court; and, among other things, prays that their affairs be wound up and adjusted, and that the sum to be found due to the defendant on the accounting be made a lien on the property, and that the property should be sold under the order of the court. The answer of the plaintiff to the cross bill admits that he entered into the agreements mentioned in the cross bill, but denies that the modification of the original agreement was because he was not able to perform that agreement, and avers that it was because certain parts of the ground were not suitable for the culture of olives, and because certain of his two year old trees were larger and better than some of his three year old ones. The answer to the cross bill then avers that plaintiff fully performed the original agreement as modified by that of September 24, 1886. It avers that, according to the true intent and mean-

ing of the original contract, occasional absences from the property were not forbidden; that the true intent and meaning of the agreement was that plaintiff should give as much time and attention to the property as was necessary or proper for the proper cultivation thereof; that the defendant is an attorney at law, and that he drew up the agreement, and that he assured plaintiff, who was ignorant of such matters, that such was the proper construction of such agreement, and that plaintiff relied upon such assurance, and relying thereon, and upon the faith thereof, was occasionally absent from the property; and that defendant is estopped from complaining of the absences of plaintiff. In regard to such absences the answer to the cross bill further avers that after the execution of the original contract the defendant agreed by parol that the plaintiff might be absent from the property for any period that he wished, not exceeding six months at any one time, provided that during such absence he would leave his brother Benjamin Hayne, who was residing on the property, and cultivating an adjoining place in connection with that, in charge of the place; that plaintiff relied upon the parol agreement, and acted upon the same, and, whenever he was absent, left his brother Benjamin in charge of the place; and that by reason thereof the defendant is estopped from complaining of such absences. In further regard to plaintiff's absences, the answer to the cross bill avers that subsequent to the execution of the original contract the parties entered into the nursery agreement hereinbefore mentioned for raising olive cuttings in Montecito, (about 50 miles from the property in controversy,) which contract required the plaintiff's presence in Montecito from time to time, and which was therefore a waiver pro tanto of the provision in the original contract. In further regard to the plaintiff's absences, the answer to the cross bill avers that the defendant knew of them, and made no objection thereto, (except on one occasion,) but acquiesced therein, and that he ought not now to be heard to complain thereof; that plaintiff's absences were only occasional, and that he gave as much time and attention to the cultivation of the place as was necessary or proper for the cultivation thereof in the manner required by the contract; and that during his absences the property received as much and as good attention as if he had been continuously present; and that the same has always been and is in excellent condition.

The answer to the cross bill denies that plaintiff engaged in any other business, without the consent of defendant, for long or any periods of time, or that any loss thereby resulted to the property. It admits that for a few weeks he entered into an arrangement with one D'Urban to sell real estate on commission, but that all he was to do was to impart certain information to D'Urban, which took no appreciable amount of time, and that even this arrangement lasted only a few weeks, and that hardly any business was done under it. It denies that defendant performed his part of the contract in any particular, but avers that he refused for a whole year to pay any part of the current expenses of the place, that he refused to pay his part of the cost of a survey, which was a necessary preliminary to fencing, and that he only paid a small portion of the

expense of the house built on the place for the benefit of the parties, and which was necessary for the property. It denies that there was any agreement that the property should be developed as a joint enterprise further than as appears from the original and modified contracts of September 26, 1885, and September 24, 1886, respectively, or that plaintiff should remain the associate of defendant until the property should be sold, or that the property should be disposed of as a whole, or that any such agreements or understandings were inducements and considerations for the defendant's embarking in the enterprise; and denies that there was any other agreement than the ones admitted, and pleads the statute of frauds as to any other agreement. It denies that the property was laid out or improved as a single enterprise, and not with a view to a partition or division, or that it is more valuable as a whole, or that a partition cannot be had without prejudice to the parties. It avers that plaintiff is without means to purchase the property should a sale be ordered, and that the defendant knows this, and seeks to have a sale for the purpose of depriving plaintiff of his interests in the property without adequate compensation. It avers that (except for the period of a year) the defendant paid the quarterly statements of the expenses of the property up to the commencement of the partition suit, and pleads that the account of such expenses is a settled account and ought not to be opened. It admits that since the commencement of the suit the defendant served upon the plaintiff a notice that the agency was terminated, and that he would pay nothing further on account of the expenses of the place, and avers that he has not paid anything further, and that to save the place from ruin and decay the plaintiff has ever since the commencement of the suit been compelled to pay, and has paid, the entire expenses of the property. It admits that there is some personal property, and offers to divide the same. The prayer of the answer to the cross bill is for a partition of the real and personal property, and that cross complainant be decreed to pay his share of the expenses of the house and of the survey, and his share of the expenses of the property pending the litigation, and for the adjustment of all of the matters of difference between the parties, and for costs, and for general relief. To this the usual replication was filed.

Upon a careful consideration of the record in the case, I do not think that the conduct of either party to the controversy commends itself to a court of equity. The attempt on the part of plaintiff to acquire the adjoining tract of Mills for himself, and not for himself and defendant, and the use of their joint teams thereon for his individual benefit, was a gross violation of fair dealing. Nor did the plaintiff give his undivided time and attention to the olive ranch, as in and by the original contract he agreed to do, for the evidence shows that he was not infrequently absent for considerable periods at a time, and for a brief time was connected with a man named D'Urban in the real estate business, from which plaintiff realized the sum of \$30. The nursery agreement between

plaintiff and defendant, of December 29, 1885, however, contemplated absences by plaintiff from the olive ranch, and, as the evidence shows that the latter was kept well and properly cultivated and cared for, there is perhaps no just cause of complaint by defendant for such absences of plaintiff therefrom as the evidence shows, except the slight time spent by him in the pursuit of the real-estate business. The claim set up on the part of the defendant that he was induced to embark in the enterprise by plaintiff by glowing representations made by him of the profits of olive culture, thereby implying that advantage was thus taken of him by the plaintiff, has no just foundation. The defendant was a man of much larger business experience than the plaintiff, and, before entering into the agreement, sent his brother, who was a resident of Santa Barbara, to examine the property, and upon his favorable report defendant entered into the contract. He did so with his eyes open, and the pretense that advantage was thus taken of him in the inception of the enterprise is groundless. Nor is there any foundation for the claim put forth on behalf of the defendant that one of his motives for engaging in the venture was the freeing of the plaintiff from debt. There is nothing in the record to justify this pretension. Defendant paid his money for an undivided one-half interest in the property which he received; he paid it for his own benefit, and not for that of the plaintiff. His action, too, in regard to the house and fence is not commendable. It is true the cost of the house exceeded by a few hundred dollars the plaintiff's estimate of it, but this was based, as the evidence shows, upon a mistaken estimate of the material man, and a rain storm added to the cost materially by washing away a part of the adobe of which the house was partly built. Moreover, it appears that after it was built the defendant visited the ranch, and so far from making objection to the size of the house, of which complaint is now made by him, suggested an additional porch. Its cost, under the circumstances disclosed by the evidence, furnishes, in my opinion, no just ground of complaint on the part of the defendant, and his refusal to pay more than \$150 towards its construction was and is inequitable. So, also, defendant's refusal to pay his share of the \$15 paid by the plaintiff to the surveyor to accurately locate the line for the erection of the fence provided for in the written agreement of the parties. The erection of the fence was for the equal benefit of both parties, and the agreement to construct it included everything necessary to be done for its proper construction. It was not only proper, but highly important, that before building it the exact line that separated the land in question from the adjoining land should be ascertained, and the evidence shows that the services of the surveyor were necessary for that purpose. Then, too, the complaint on the part of defendant that none of the olive cuttings provided to be planted by the nursery contract of December 29, 1885, were set out on the ranch is unjust, for that contract was subsequently modified under date of March 11, 1886, by limiting the number of cuttings to 30,000, and providing that all of them should be set out "on land in Montecito belonging to Benjamin Hayne." There is

therefore no just cause of complaint on defendant's part that none of the cuttings were planted on the ranch, and the statement in his testimony that plaintiff "never set them out in Santa Ynez because he could not give his personal attention to them in Santa Ynez, with convenience," is not only without foundation in fact, but is an unworthy attempt to make it appear, contrary to the facts, that plaintiff's absences from the ranch were so frequent and of so long duration that he could attend the nursery with more convenience at Montecito than at the ranch. There are other evidences of a want of candor and fairness about the testimony of the defendant; notably that in answer to the inquiry on behalf of the plaintiff whether his brother George H. Gould was not his agent in respect to the property in question, to which his answer was:

"My brother George H. Gould has always been most kind in looking after my interest in Santa Barbara; and while I should not venture to call a voluntary kindness an agency, I am glad to express my appreciation for his generous assistance, which has been freely given whenever necessity arose."

The fact is that George H. Gould was his agent in respect to the property, as distinctly appears from the testimony of George H. Gould, in which he says:

"Soon after—I think in the month of October, 1885—my brother returned to New York, he left me in the position of agent of his, and I have maintained that position ever since."

It further appears from the record that, for nearly two years before the commencement of this suit, George H. Gould held a full written power of attorney from the defendant in respect to the property in question. I repeat, therefore, that by the record in the case neither party to the controversy is presented in a favorable light.

Looking at the whole record I entertain no doubt that at the inception of the venture, and at the time of the making of the several contracts spoken of, neither party contemplated a division of the property, but the building up and operation or sale of it as a whole. There was, however, no distinct or specific agreement to that effect; and the mere contemplation of the parties in respect to the venture into which they entered is not sufficient ground upon which to deny to one of the tenants in common a partition of the property if it is of such a nature as to admit of such division without great prejudice to the owners. It is by the Code of Civil Procedure of California provided as follows:

"If it be alleged in the complaint, and established by the evidence, or if it appear by the evidence, without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof; otherwise, upon the requisite proof being made, it must order a partition. * * *" Section 763, Code Civil Proc.

It is manifest that the circumstance that the defendant is engaged in the practice of his profession in a distant state, and has no practical knowledge of farming or olive culture, is unimportant, as is the pecuniary inability of the plaintiff to buy the property in the event it should be directed to be sold as a whole. The sit-

uation of the property, and not the personal circumstances of the parties, unconnected with their interests therein, is the question that must control the court in determining whether there should be a division or sale of the property. The evidence is far from showing that the land in question is so situated that it cannot be divided without great prejudice to the owners. On the contrary, I think it shows that there is no difficulty in the way of making a fair partition of it, quantity and quality relatively considered. The tract is a large one, and the number of trees so great as to make two very large orchards, according to the testimony of Mr. Cooper, a gentleman of large and long experience in olive culture, and such as justify the establishing of works necessary for either the manufacturing of oil or the pickling of the olives. The circumstance that through one corner of the tract a small stream of water runs will, of course, be given due consideration in making the partition.

For the reasons stated, the court is of the opinion that the real property in question should be decreed to be partitioned equally between the plaintiff and defendant, quality and quantity relatively considered. I think it inequitable, however, to grant the prayer of the complaint that the portion of the land upon which the house is built be awarded to plaintiff because of the improvements. The defendant should be decreed to pay one half of the cost of the house, less the \$150 already paid by him therefor, with legal interest from the date when such payment should have been made, and the house regarded as equally the property of both of the parties. In the accounting between the parties which must be had, the plaintiff must also be charged with the \$687.50 stipulated to be paid by him in and by the agreement of September 24, 1886, for his failure to plant the trees provided for by the original contract. Plaintiff having put it out of his power to pay that sum as provided for in the contract by the commencement of this suit, the amount must be deemed due from him from the time of its commencement, with legal interest from that time. There must also be an accounting of the personal property owned in common by plaintiff and defendant in connection with the realty, a sale of such personalty, and a division of the proceeds equally between the parties. The defendant is also equitably entitled to one half of the amount realized by plaintiff out of the real-estate business, with legal interest from the time of its receipt, as his undivided time and attention was by the terms of the contract to be devoted to the common venture, except as subsequently otherwise consented to by defendant. Reference has already been made to the absences of plaintiff from the ranch necessarily implied by the obligations imposed upon him by the nursery agreement entered into between the parties. The tripartite agreement provided that the plaintiff's brother Benjamin Hayne should live on the property in question in the suit, while cultivating the adjoining tract for himself and defendant, and both plaintiff and his brother testified that the defendant expressly consented that plaintiff might absent himself from the ranch when occasion required, provided his brother was left in

charge. This testimony of plaintiff and Benjamin Hayne, while denied by that of the defendant, finds some corroboration in the testimony of defendant's brother, George H. Gould, who, when asked, "Well, do you remember of your brother saying to Mr. W. Alston that he was perfectly willing for him to be absent from the place, provided Ben Hayne was left in charge?" answered, "I do not recollect anything as general as that. No, sir; in fact, I do not recollect in detail what was said on the subject." I also think it equitable that account be taken of the expenses necessarily incurred by the plaintiff in caring for the orchard since the commencement of the suit, and that of the expenses so incurred the defendant be charged with one half, with legal interest thereon from the time of the respective payments. In respect to the accounts already settled between the parties, neither the pleadings nor proofs are sufficient to justify the reopening of them. There must be a reference to the master to state the account, and an interlocutory decree in accordance with the views above expressed. It is so ordered.

HAYNE v. GOULD.

GOULD v. HAYNE.

(Circuit Court, S. D. California. February 13, 1893.)

No. 175.

1. TENANCY IN COMMON—PARTITION—OLIVE RANCH.

By a written agreement, made in 1886, one of two parties was to acquire the title to a certain tract of land, and the other was to cultivate it as an olive ranch, and within a stipulated time plant a certain number of trees thereon, and receive in consideration thereof title to a one-half interest in the land as tenant in common. The first party, after seeing the land in 1888, made a written agreement to complete his payments, to acquire title, and convey to the other party a one-half interest, reciting therein the fulfillment of the other party's agreement to plant trees. The first party's agent thereafter inspected the trees, and the one-half interest was then conveyed to the second party, who subsequently brought suit for partition. *Held*, that the first party's testimony that he made the conveyance of the half interest because he was deceived, and led to believe that the second party had complied with his agreement, was unavailing as a defense in the partition suit.

2. SAME—DISPUTED TITLE.

Where the title to a part of certain land held by tenants in common is merely possessory, while the title to the rest is undisputed, partition should not be granted on the complaint of one tenant, but a sale and accounting should be ordered. Code Civil Proc. Cal. § 763.

3. SAME—ACCOUNTING—NECESSARY EXPENSES OF TENANT IN POSSESSION.

A suit for the partition of an olive ranch was brought by one of its two tenants in common, who, pending the suit, incurred necessary expenses in caring for the ranch. *Held*, that the cotenant should be charged with one half such outlay, although he had given written notice that he would not be responsible for running expenses.

In Equity. Bill in a superior court of California by Benjamin S. Hayne against Charles W. Gould for partition of property owned by the parties as tenants in common. Defendant removed the cause to

this court. Heard on bill, answer, and replication and cross bill, answer, and replication. Decree for a sale of the premises.

B. F. Thomas, (Stephen M. White, Edward J. Pringle, and Robert Y. Hayne, of counsel,) for Hayne.

Jarrett T. Richards, for Gould.

ROSS, District Judge. The property involved in this suit, and of which partition is sought by Benjamin Hayne, is that described in the tripartite agreement referred to in the companion suit of Hayne v. Gould, 54 Fed. Rep. 951. It is known as the "Mills Piece" of land, containing about 207 acres, and for which W. Alston Hayne, Jr., held a contract of purchase at the time of the execution of the tripartite agreement between W. Alston Hayne, Jr., Charles W. Gould, and Benjamin Hayne. That agreement was as follows:

"Memorandum of agreement made this eleventh day of March, one thousand eight hundred and eighty-six, between Charles W. Gould, W. Alston Hayne, Jr., and Benjamin Hayne, witnesses:

"Whereas, said Gould and said W. A. Hayne, Jr., own in common a tract of land sometimes known as the 'Puerta del Sol Ranch,' in Santa Ynez, Santa Barbara county, state of California, together with the houses and improvements thereon, and certain personal property, such as teams, plows, implements of husbandry, etc., etc., and it is the present intention of said Gould and said W. A. Hayne, Jr., to cultivate and plant the said tract of land with a view to making it an olive ranch.

"And whereas, said W. A. Hayne, Jr., has agreed to buy a certain other tract of land contiguous to the tract first above mentioned, said second-named tract being sometimes known as the 'Mills Piece,' and containing two hundred and seven acres of land, or thereabouts.

"And whereas, said W. A. Hayne, Jr., in pursuance of his intention of buying said Mills piece has received from the present owner of said piece an agreement for a deed thereof, and has given therefor four notes of the face value of six hundred dollars each, or thereabouts.

"Now, therefore, for the purpose of settling certain controversies between the parties hereto, and for other good and valuable considerations, the parties hereto agree as follows:

"Said W. A. Hayne, Jr., agrees to convey to said Charles W. Gould all his right, title, and interest under the contract for the deed of said land known as the 'Mills Piece,' and said Gould agrees to take the transfer and conveyance of said right, title, and interest to the deed for said Mills piece from W. A. Hayne, Jr., provided that a sound title can be secured to said Gould of and to said Mills piece; and said Gould further agrees, provided that a sound title can be given him as aforesaid, under the agreement made by said W. A. Hayne, Jr., to buy said Mills piece, to acquire said title.

"Said Benjamin Hayne agrees to and with the said Gould to forthwith cultivate and improve the said Mills piece for the purpose of converting it into an olive ranch; and to this end the said Benjamin Hayne agrees to devote his whole time, attention, and energy; and when said Hayne shall have set out on said Mills piece five thousand three year old olive trees in good condition, living, and thriving, said Gould agrees to convey to said Benjamin Hayne one half of his interest in and to the contract for the deed to said Mills piece, to be assigned and conveyed to said Gould by said W. A. Hayne, Jr., as hereinabove specified.

"Said W. A. Hayne, Jr., and said Gould also agree to permit said Benjamin Hayne to use the house and personal property now situated on said Puerta del Sol Ranch, for the purpose of cultivating and improving the Mills piece and the olive trees thereon to be set out.

"Said Gould also agrees to advance money to the amount of two hundred dollars to pay for a fence around said Mills piece, in order to facilitate the said Benjamin Hayne in the proper care and cultivation; but said Gould is

not to bear nor become liable for nor to be chargeable with any other expense whatever in the cultivation or connected with the improvement of or the care of said Mills piece, excepting only the annual taxes thereon, until after the said Benjamin Hayne shall have set out five thousand three year old trees as above specified, and shall have received a conveyance or transfer of the one-half interest in the property obtained by said Gould under the contract for the deed as above specified. And said Benjamin Hayne agrees to fence said Mills piece, and to give his note on demand for one half of the cost of said fence.

"And said Benjamin Hayne further agrees to set out five thousand good, thriving, living, three year old olive trees on said Mills piece during the planting seasons of 1886, 1887, and 1888, twenty-five hundred of said trees to be set out during the seasons of 1886 and 1887, and twenty-five hundred—being the remainder of the total five thousand trees—during the season of 1888. It being agreed, however, that if the planting seasons of 1887 and 1888, or either of them, should prove rainless, the quota of trees to be planted during those years, or either of them, may be planted in the following year; but unless the planting seasons of 1887, 1888, and 1889 should all prove rainless the five thousand trees as above specified are to be all set out before the close of the planting season of the year 1889. And if said Benjamin Hayne fails to plant the said five thousand trees as above specified within the time limited, then it is agreed by and between the said Benjamin Hayne and the said Gould that the said Benjamin Hayne shall vacate and quit the premises known as the 'Mills Piece,' and render up to said Gould quiet and peaceable possession of the same, and any and all improvements made thereon during the occupancy thereof by said Benjamin Hayne shall remain and belong absolutely to the said Gould, and all rights to the conveyance of said land or any part of it, or of the contract for the deed thereof, or any part of said contract for the deed thereof, from said Gould to said Benjamin Hayne, shall cease and determine, and the said Gould shall be discharged from each and every obligation to and with the said Benjamin Hayne accruing or arising under or by virtue of the provisions of this contract.

"This last provision is not in the nature of a forfeiture, but is intended by said Gould and by said Benjamin Hayne partly to enable said Gould to take peaceable and quiet possession of the said Mills piece, and partly to pay said Gould liquidated damages for the failure of said Benjamin Hayne to keep and perform the conditions of this contract.

"And it is further agreed between the said Gould and the said Benjamin Hayne that, until the five thousand olive trees as aforesaid shall be fully set out upon said Mills piece, the said Benjamin Hayne shall use his time and devote his energies to the cultivation of said Mills piece, to the exclusion of any engagements that will interfere with his continual care and supervision of said olive orchard, and shall receive as a salary, and not otherwise, the one half of any income that results from his cultivation and care of the said Mills piece; but in case no income or profit results from the care and use of said Mills piece by the said Benjamin Hayne, the said Benjamin Hayne is not to be entitled to any claim or demand whatever against the said Gould for salary or expenses.

"After said Hayne shall have received from said Gould a conveyance of half the Mills piece as herein contemplated, the expenses of running the ranch are to be divided share and share alike."

This suit also was commenced in one of the superior courts of the state, and was, on motion of the defendant, transferred to this court. The answer of the defendant admits the averment of the complaint that the parties are tenants in common of the property. It alleges a contract between the parties by which plaintiff should set out 5,000 good, thriving, three year old olive trees, and that when plaintiff should have set out 5,000 trees in good condition, living, and thriving, defendant would convey one half of the property to him; that after such conveyance defendant would bear one half the running

expenses of the place. It avers that, plaintiff being unable to comply with this contract, the same was modified at his request so as to permit rooted cuttings to be planted in place of trees. It avers that it was understood and agreed at the time of the making of the contract, and that it was one of the considerations and inducements therefor, that the same should be a common enterprise and speculation of plaintiff and defendant; that the property should be developed and improved as a whole; and that the property was so developed and improved and the trees planted by plaintiff with the common consent of plaintiff and defendant, as and for a single orchard or plantation, and not with reference to future segregation; and that it was with a similar understanding that the defendant consented to modify the contract in respect to the rooted cuttings. It avers that afterwards defendant conveyed one half of the property to the plaintiff; and that the understanding that the property should thereafter be developed and improved and disposed of by plaintiff and defendant in common was an inducement to and one of the considerations of the conveyance; and that the institution of this suit was in violation of the understanding. It avers that it is uncertain whether a portion of the land which is in the possession of the parties, and which is a part of the orchard, is embraced within the boundaries of the land described in the complaint, and that a judicial proceeding independent of this action would be necessary to determine positively whether such portion is within such boundaries, and to quiet and establish perfect title in plaintiff and defendant. It avers that the property is such that partition thereof cannot be had without great prejudice to the owners, and that a sale of the property ought to be adjudged. The prayer is that the plaintiff's prayer be denied, and that the defendant be dismissed, with costs. To this answer the plaintiff filed a replication.

The defendant also filed a cross bill containing substantially the same averments as his answer. The prayer of the cross bill is that a sale be made of the property, and that, in case it be found that the disputed portion is not part of the property owned by the parties, the defendant be decreed to pay to plaintiff half of what would be the enhancement in value of the premises, concerning whose boundaries there is no uncertainty, had the olive trees on the excluded strip been planted and were now growing upon it, and that such sum be made a lien on plaintiff's share; and for general relief.

The answer of the plaintiff to the cross bill denies that plaintiff ever made any contract or agreement with the defendant other than the written contract mentioned in the answer. It denies that plaintiff was not able to perform the written contract, or that he requested any modification of it; but avers that after he had fully performed it, and had set out the required number of trees, which were living and thriving when set out, some of them died without any fault of the plaintiff; that defendant refused to give plaintiff a deed until he replaced the trees which had died; and that for the sake of peace, and for no other purpose, he submitted to that exaction; and that thereupon the defendant's agent wrote him a letter, (which letter is what is referred to in the cross bill as the modification of the

contract,) and that plaintiff subsequently replaced all the trees which had died, as exacted by defendant; and that subsequently defendant gave him a written acknowledgment that he had performed all his contract, and subsequently gave him his deed. It denies that it was ever understood or agreed that the enterprise should be a common enterprise or speculation, further than as appears from the written agreement, or that the property should be or was developed or improved as a common enterprise, or for a single orchard, or without reference to a segregation, further than is shown by the writings themselves, or that such pretended agreement was an inducement to or consideration of the written contract; and plaintiff pleads the statute of limitations as to any such agreement, and denies that the partition suit was in violation of any agreement or understanding. It avers that whatever olive trees were planted upon the uncertain portion were so planted with the knowledge and consent of the defendant, and that defendant is estopped from now complaining of such planting. It denies that partition cannot be had of the property without great prejudice to the owners, or that a sale is necessary; and avers that plaintiff is without means to purchase if a sale be ordered, and that complainant is well able to purchase the whole. That there is not much demand for property of that character; that a forced sale would result in a sacrifice of the property; and that the defendant knows these facts, and seeks to have a sale for the purpose of depriving plaintiff of his interest in the property without adequate compensation. It avers that since the commencement of this suit the defendant gave plaintiff a written notice that he would no longer be responsible for the running expenses of the place; and he further avers that it was necessary, to save the property from ruin and decay, that the property should be cultivated in the same manner as it had been cultivated, and that by reason of the defendant's refusal to pay anything the plaintiff will be compelled to pay the whole expenses of running the place pending the litigation. The prayer is that the cross bill be dismissed, and that defendant be compelled to pay his share of the running expenses pending the litigation, and for general relief. To this answer the cross complainant filed the usual replication.

There is much testimony in the record as to whether the plaintiff complied with the provisions of the tripartite agreement in respect to the planting of the trees provided for, and it is strenuously urged on the part of the defendant that he did not. But that question is set at rest by the written acknowledgment of that fact made by the defendant on the 9th of August, 1889, at which time, upon plaintiff's request, he signed the following:

"The persons who signed this writing, viz. Chas. W. Gould and Benjamin Hayne, having, together with W. A. Hayne, Jr., made an agreement, which is dated March 11th, 1886, by which Benjamin Hayne was to do certain things in relation to the cultivation and improvement of certain property called the 'Mills Piece,' for the purpose of converting it into an olive ranch, and by which Charles W. Gould was to acquire the title to the said Mills piece, and convey one half of it to Benjamin Hayne upon his compliance with his above-named agreement as to the cultivation and planting of trees: Now it is agreed that Benjamin Hayne has complied with his agreement as to the cultivation and

planting of trees, and that Charles W. Gould has paid three of the four notes which were to be paid by him in order to acquire the title to said property; and he agrees to pay the remaining note when it shall become due, and thereupon to obtain a deed for the said property, and at once convey one half of it to said Benjamin Hayne.

Charles W. Gould.

"Dated August 9th, A. D. 1889."

In December following the defendant conveyed to the plaintiff an undivided one half interest in the property. The statement made by defendant in his testimony that he made that conveyance because he "was deceived, and led to believe that he [plaintiff] had complied with his agreements," is unavailing. He admits that he saw the property in the summer of 1888, and says that he was then "shocked" to learn the actual condition of things. Being so shocked, he was at least put upon notice, and must be presumed to have subsequently satisfied himself of the plaintiff's performance of his agreements in respect to the cultivation and planting of trees, for he in writing acknowledged that fact on the 9th of August, 1889, as has been above shown. It further appears that the month before such acknowledgment the defendant's agent and brother, George H. Gould, made a personal inspection of the trees.

As in the case of *Hayne v. Gould*, 54 Fed. Rep. 951, so in this case I am satisfied from the record that, at the time of entering into the agreement, neither party to it contemplated a division of the property here in question, but the building up and operation or sale of it as a whole. There was in this case, however, as in that, no distinct or specific agreement to that effect; and as there stated, the mere contemplation of the parties in respect to the venture into which they entered is not sufficient ground upon which to deny to one of the tenants in common a partition of the property if it is of such a nature as to admit of partition without great prejudice to the owners. The evidence shows that the property can be readily divided without prejudice to the interests of the owners therein, unless the circumstances relating to what is termed "the disputed piece" constitute a valid objection to such partition. That piece is a strip of land containing twenty-three and twenty-four one hundredths acres, upon which the plaintiff planted 700 of the olive trees provided to be planted by the tripartite agreement. The evidence shows that the defendant consented to such planting, but it is impossible to determine in this case whether the twenty-three and twenty-four one hundredths acres are or are not a part of the tract described in the tripartite agreement, and in the complaint herein. The case shows that, when defendant obtained the deed from Mills, the fence on the western boundary of the premises described in the complaint, which was the eastern line of the inclosure of the San Carlos de Jonata Rancho, ran some distance east of the present fence, and on or near what would be the true western line of the premises described in the complaint, measuring from the nearest government survey monument, following the courses and distances of the field notes of the government survey, and taking into consideration the area specified in the patent. The field notes, however, call for the eastern boundary line of the San Carlos de Jonata, and what that true line is is a question in dispute.

Plaintiff moved the fence back to where he claimed the true patent line to be, thus inclosing the additional twenty-three and twenty-four one hundredths acres, and with defendant's consent planted 700 of the olive trees thereon. Unless the line so claimed is the true one, the additional land so included is held only under a possessory title. Equity, I think, will not justify a partition by which one of the parties to the suit may be awarded, as a portion of the land to which he is entitled, a substantial tract, which may afterwards turn out not to be a part of the common tract to which the parties have title. There would be no equity, but much injustice, in that. See *Emeric v. Alvarado*, 64 Cal. 580, 2 Pac. Rep. 418. For this reason there must be a decree directing a sale of the property, and a division of the proceeds. The defendant is, I think, in equity chargeable with one half of the expenses necessarily incurred by the plaintiff in caring for the trees upon the property since the commencement of the suit. While one tenant in common cannot charge his cotenant with the expenses of a venture or a speculation concerning the property, he has a right to make such expenditures as are necessary to preserve the property from destruction. Such expenditures are for the common benefit. *Freem. Coten.* §§ 174, 175. Thus, if he expends money in redeeming the property from sale, he has an equitable lien on the interests of his cotenants for their several proportions. *Calkins v. Steinbach*, 66 Cal. 118, 4 Pac. Rep. 1103. Nor is it important that the expenses accrued after the commencement of the suit. A court of equity has the inherent power to preserve from destruction the property in litigation before it, and expenditures which the court can previously authorize, it may subsequently sanction, if in themselves proper. *Roberts v. Eldred*, 73 Cal. 394, 15 Pac. Rep. 16; *In re Estate of Moore*, 88 Cal. 4, 25 Pac. Rep. 915.

A reference will be made to the master to take an accounting of the expenses necessarily incurred by the plaintiff in caring for the property, one half of which will be charged to the defendant, and made a lien upon his interest in the property; and a decree will be entered in accordance with the views above expressed.

CANTINI et al. v. TILLMAN et al.

(Circuit Court, D. South Carolina. March 1, 1893.)

1. INTOXICATING LIQUORS—MANUFACTURE AND SALE—STATE REGULATIONS.

There is no inherent right of a citizen to sell intoxicating liquors by retail, and the South Carolina statute of December 24, 1892, entitled "An act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this state, except as herein permitted," is, in its general scope and purpose, within the police power of the state.

2. SAME—CONSTITUTIONAL LAW.

In view of the operation of the act of congress of August 8, 1890, (26 St. at Large, p. 313,) providing that any liquors imported into a state shall immediately become subject to its police laws, even while in the original packages of importation, which act is valid as a regulation of commerce, the South Carolina statute above referred to is not in contravention of

- Const. U. S. art. 1, § 10, forbidding the states to pass any laws impairing the obligation of contracts, or, without the consent of congress, to levy any imposts or duties on imports or exports, except such as are necessary for executing its inspection laws. In *re Rahrer*, 11 Sup. Ct. Rep. 865, 140 U. S. 545, followed.
3. **SAME—DISCRIMINATION.**
Nor is the act in contravention of the constitutional provisions (article 4, § 2, and the fourteenth amendment) forbidding any state to discriminate against citizens of other states or citizens of the United States.
4. **SAME—DUE PROCESS OF LAW.**
Nor is the act in contravention of the provision of the fifth amendment, forbidding the taking of property without due process of law, and the taking of private property for public use without just compensation. *Transportation Co. v. Chicago*, 99 U. S. 635, and *Mugler v. Kansas*, 8 Sup. Ct. Rep. 273, 123 U. S. 659, followed.
5. **SAME—ITALIAN TREATY.**
Under articles 1 and 2 of the treaty between the United States and Italy, Italian subjects have no greater rights to carry on trade and traffic in liquors within a state than a citizen of the United States has.
6. **CONSTITUTIONAL LAW—TITLES OF LAWS.**
Section 20, art. 2, of the constitution of South Carolina requires that every act or resolution shall relate to but one subject, and that shall be expressed in its title. *Held*, that the act passed December 24, 1892, entitled "An act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this state, except as herein provided," containing provisions for the regulation of the traffic, conforms to this section, as the "regulation" of the traffic is the "prohibition" of it, except in accordance with certain rules.
7. **SAME—AMENDMENT OF BILL.**
It is a settled rule of parliamentary law in South Carolina that, so long as the enacting words remain in a bill, it can be amended to any extent, even by striking out all after the enacting words, and by inserting other words; and, when a bill passed by the house is thus amended by the senate, such amendment may be concurred in by the house without the three readings required on the original passage.

In Equity. Bill by Geromio Cantini and Anania Cantini against Benjamin R. Tillman and W. T. C. Bates, governor and treasurer, respectively, of South Carolina, to enjoin them from carrying out and executing the provisions of the law relating to the manufacture and sale of intoxicating liquors, passed August 8, 1890, by the state legislature. Bill dismissed.

The bill contained the following averments:

"(1) That your orators are subjects and aliens and citizens of the kingdom of Italy, and have been since the year 1874, and now are, copartners under the firm name of G. & A. Cantini, residing in the said city of Charleston, and there doing business or trading as importers and vendors of spirituous, vinous, and malt liquors, among other things, and also have been, and now are, taxpayers of the state of South Carolina.

"(2) That the defendants, the said Benjamin R. Tillman and W. T. C. Bates, are residents and citizens of the said state of South Carolina, and are officers of the said state, to wit, the said Benjamin R. Tillman is governor, and the said W. T. C. Bates is treasurer.

"(3) That the general assembly of the state of South Carolina has recently, to wit, on or about the 24th day of December, 1892, attempted to pass an act entitled 'An act to prohibit the manufacture and sale of intoxicating liquors as a beverage within this state, except as herein provided,' which was approved December 24, 1892, and a copy whereof, marked 'Exhibit A,' is hereto annexed as part and parcel hereof, and to which your orators ask to be

allowed to refer as fully and as often as they may desire or deem necessary,¹ and that the said general assembly at the same time passed an act entitled 'An act to raise supplies and make appropriations for the fiscal year commencing November 1, 1892,' whereby a tax of five and one half mills (an increase of the tax levied in former years) is levied for the 'purpose of meeting appropriations to defray the current expenses of the government for the fiscal year commencing November 1, 1892, and to meet such other indebtedness as has been or shall be provided for in the several acts and joint resolutions passed by this general assembly at the regular session of 1892, providing for the same,' and whereby said tax is made 'due and payable from the 15th day of October to the 31st day of December, 1893.'

"(4) That your orators are informed and believe that the said Benjamin R. Tillman did, within thirty days from the approval of the said act first above mentioned, appoint a commissioner, as required by section 2 thereof, but that said commissioner declined the said appointment, and that the said Benjamin R. Tillman has not yet appointed another, and is about to and will make such appointment unless restrained by competent authority. That your orators are informed and believe that the said W. T. C. Bates is about to and will expend the sum of fifty thousand dollars, or some part thereof, as appropriated and provided for by section 18 of said act first above mentioned, unless restrained by competent authority.

"(5) And your orators aver and charge that the said act first above mentioned is unconstitutional, null, and void as follows, to wit: (a) Because the said act is in violation of and repugnant to section 10, art. 1, of the constitution of the United States of America, as well as the treaty between the United States of America and the kingdom of Italy, proclaimed November 23, 1871, which said treaty is now in force, and is to be found at large at pages 845 et seq. of the 17th volume of the United States Statutes at Large. (b) Because the said act is in violation of and repugnant to section 2, art. 4, of the constitution of the United States of America, as well as to article 14 of the additions and amendments to the constitution of the United States of America, and also section 12, art. 1, of the constitution of the state of South Carolina. (c) Because the said act is in violation of and repugnant to the third clause of section 8, art. 1, of the United States constitution. (d) Because the said act is in violation of and repugnant to article 5 of the additions to and amendments of the constitution of the United States of America. (e) Because the said act is in violation of and repugnant to section 21, art. 1, of the constitution of the state of South Carolina. (f) Because the said act is in violation of and repugnant to section 21, art. 2, of the constitution of the state of South Carolina. (g) Because the said act is in violation of and repugnant to section 20, art. 2, of the constitution of the state of South Carolina. (h) Because the said act is in violation of and repugnant to section 18, art. 2, of the constitution of the state of South Carolina.

"(6) And your orators further complain and say that, if the said act first above mentioned be carried into operation and enforced, your orators will be damaged irreparably, and to an amount not less than five thousand dollars.

"To the end, therefore, that the said Benj. R. Tillman, as governor aforesaid, may be perpetually restrained and enjoined from appointing a commissioner as provided in section 2 of the act first above mentioned, and that the said W. T. C. Bates, as treasurer, as aforesaid, may be perpetually restrained and enjoined from expending the sum of fifty thousand dollars, or any part thereof, as appropriated and provided for in section 18 of the said act first above mentioned, and that they be restrained and enjoined accordingly likewise pending this suit, and that your orators may have such other or further relief, or both, as to this honorable court shall seem meet and proper, and the nature of the case may require, may it please your honors to grant unto your orators a writ of injunction, and also a temporary order of injunction, as above set forth, and also a writ of subpoena, to be directed to the said Benjamin R. Tillman and W. T. C. Bates, commanding them at a certain day, and under a certain penalty, to be and appear before this honorable court,

¹ See note at end of case, where the act will be found in full.

and to make full, true, and direct answer to all and singular the premises, (answer under oath being hereby expressly waived,) and further to stand to, abide, and perform such order, directions, and decree herein as this honorable court shall deem meet and agreeable to equity and good conscience."

Von Kolnitz & Bacot, for complainants.

SIMONTON, District Judge. This is a proceeding to test the constitutionality of an act of the general assembly of South Carolina, commonly known as the "Dispensary Act." The purpose of the act, as expressed in its title, is to prohibit the manufacture and sale of intoxicating liquors as a beverage within this state, except as herein provided. There can be no doubt that the purpose thus expressed in this act is lawful. The supreme court of the United States, in *Crowley v. Christensen*, 137 U. S. 91, 11 Sup. Ct. Rep. 15, say:

"By the general concurrence of opinion of every civilized community, there are few sources of crime and misery to society equal to the dramshop, where intoxicating liquors in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week, on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the state is fully competent to regulate the business, to investigate the evils, or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state, or of a citizen of the United States. As it is a business attended with danger to the community, it may, as has been already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rests in the discretion of the governing power. * * * It is a matter of legislative will only."

The act in question, in its first section, declares—

"That from and after the first day of July, A. D. 1893, the manufacture, sale, barter, or exchange, or the keeping or offering for sale, barter, or exchange, within this state, of any spirituous, malt, vinous, fermented, or other intoxicating liquors, or any compound or mixtures thereof, by whatever name called, which will produce intoxication, by any person, business firm, corporation, or association, shall be regulated and conducted as provided in this act."

As we have seen, this is within the police power of the state, and is a matter of legislative will only. The general scope and purpose of the act being thus lawful, are any of its provisions in violation of the constitution of the United States?

The proceedings allege that the act is in violation of, and repugnant to, section 10, art. 1, of the constitution of the United States. This section has numerous provisions. Those which are sought to be applied to this case are the clauses forbidding any state to pass any ex post facto law, or law impairing the obligation of contracts, and the provisions forbidding a state, without the consent of con-

gress, to levy any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. The prohibition as to ex post facto laws applies only to crimes. *Watson v. Mercer*, 8 Pet. 88; *Railroad Co. v. Nesbit*, 10 How. 395; *Locke v. New Orleans*, 4 Wall. 172; *Carpenter v. Com.*, 17 How. 456.

There is no provision of this act open to this objection. The question on the other provisions stated was made before the supreme court in *Re Rahrer*, 140 U. S. 545, 11 Sup. Ct. Rep. 865. On 8th August, 1890, (26 St. p. 313,) congress had enacted—

“That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein, for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise.”

The petitioner had imported liquor into the state of Kansas in separate packages, and sold a part of it in the original package. The law of Kansas forbade the sale of liquors except for medical purposes, and forbade any one to sell for these purposes without first having procured a druggist's permit therefor from the probate judge of the county. The supreme court, after an exhaustive argument, sustained the constitutionality of this act of congress, and declared that under its operation the law of Kansas was not in conflict with section 10, art. 1, of the constitution.

Another objection to the act is that it is in violation of section 2, art. 4, of the constitution of the United States, and of the fourteenth amendment, in that this act discriminates both as to persons and products. Section 2, art. 4, declares that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states; and the fourteenth amendment declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. But we have seen that the supreme court, in *Crowley v. Christensen*, 137 U. S. 91, 11 Sup. Ct. Rep. 15, has declared that there is no inherent right in a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of a state or of a citizen of the United States. In *Mugler v. Kansas*, 123 U. S. 659, 8 Sup. Ct. Rep. 296, the court says:

“Prior to the adoption of the fourteenth amendment, state enactments regulating or prohibiting the traffic in intoxicating liquors raised no question under the constitution of the United States. Such legislation was left to the discretion of the respective states, subject to no other limitations than those imposed by their own constitutions, or by the general principles supposed to limit all legislative power. *Bartemeyer v. Iowa*, 18 Wall. 129.

Referring to the contention that the right to sell intoxicating liquors was secured by the fourteenth amendment, that case says:

“So far as such a right exists, it is not one of the rights growing out of citizenship of the United States.”

In *Beer Co. v. Massachusetts*, 97 U. S. 25, it was said that as a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the constitution of the United States. And in *Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. Rep. 97, it is declared to be no longer an open question. All these cases are quoted and reaffirmed in the case of *Mugler v. Kansas*. The rubric of that case is as follows:

"State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of the state, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the constitution of the United States, or by the amendments thereto. The prohibition by the state of Kansas, in its constitution and laws, of the manufacture or sale within the limits of the state of intoxicating liquors for general use there as a beverage, is fairly adapted to the end of protecting the community against the evils which result from excessive use of ardent spirits, and is not subject to the objection that, under the guise of police regulations, the state is aiming to deprive the citizen of his constitutional rights. Lawful state legislation, in the exercise of the police powers of the state, to prohibit the manufacture and sale within the state of spirituous, malt, vinous, fermented, or other intoxicating liquors, to be used as a beverage, may be enforced against persons who at the time happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments."

The fourteenth amendment is not designed to interfere with the power of the state, sometimes termed its "police power," to prescribe regulations to promote health, peace, morals, education, and good order of the people. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. Rep. 357. Now, every greater includes the less. If the manufacture and sale can be entirely prohibited, they can be prohibited unless certain rules are complied with.

Another objection to the act is that it is repugnant to the third clause of section 8, art. 1, of the constitution of the United States, giving congress the power to regulate commerce with foreign nations. We have seen, however, that by the act of 1890 congress has expressly recognized and affirmed the right of the states to pass an act like this; and this act of congress, therefore, is a regulation by it of commerce.

The last objection, because of repugnancy to the constitution of the United States, is that the act is in violation of the fifth amendment, which forbids the taking of property without due process of law, and the taking of private property for public use without just compensation. With regard to this last objection, it is disposed of by two cases from the supreme court. In *Transportation Co. v. Chicago*, 99 U. S. 635:

"Acts done in the proper exercise of governmental powers, and not directly encroaching on private property, although their consequences may impair its use, do not entitle the owner of such property to compensation from the state or its agents, or give him a right of action."

And in *Mugler v. Kansas*, above quoted:

"Lawful state legislation, in the exercise of the police power of the state, to prohibit the manufacture and sale within the state of spirituous, malt,

vinous, fermented, or other intoxicating liquors to be used as a beverage, may be enforced against persons who at the time happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution of its value resulting from such prohibitory enactments. A prohibition upon the use of property for purposes declared to be injurious to the health, morals, or safety of the community is not an appropriation of property for the public benefit, in the sense in which the taking of property by the exercise of eminent domain is such taking or appropriation."

Is it without due process of law? Every section of this act, in which penalties are imposed, provides for a judicial examination and conviction in a court of justice. "Law, in its regular course of administration through courts of justice, is due process, and, when secured by the law of the state, the constitutional requisition is satisfied. Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of the government, unrestrained by the established principles of private right and distributive justice." *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. Rep. 224. See, also, *Freeland v. Williams*, 131 U. S. 406, 9 Sup. Ct. Rep. 763. Even the destruction of property in the exercise of the police power of a state, when such property is used in violation of law, in maintaining a public nuisance, is not taking of property for public use, and does not deprive the owner of it without due process of law. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273.

The complainants object to the act: Because it violates the constitution of the state of South Carolina, (section 21, art. 1,) which forbids any ex post facto law, or law impairing the obligation of contracts. This has been disposed of. Because it is repugnant to sections 21 and 20 of the constitution of South Carolina. Section 20, art. 2, requires that every act or resolution shall relate to but one subject, and that shall be expressed in its title. The title of the act is, "To prohibit the manufacture and sale of intoxicating liquors as a beverage within this state, except as herein provided." I have read the act through carefully, and cannot see how this objection can prevail. See *San Antonio v. Mehaffy*, 96 U. S. 312; *Woodson v. Murdock*, 22 Wall. 351. Regulating a thing is the prohibition of it, except in accordance with certain rules. This act prohibits the sale and manufacture of intoxicating liquors except under certain regulations therein provided.

The twenty-first section and the eighteenth will be considered together. They both go to this point. The house of representatives had duly passed a bill on the subject of the sale of intoxicating liquors, and had sent it to the senate. The senate amended this bill by striking out all after the enacting words, and by substituting the contents of this act. When the bill so amended went into the house, it concurred in the amendment, but did not read it three times on three several days. It is a settled principle of parliamentary law in this state that, so long as the enacting words remain in a bill, it can be amended to any extent, even by striking out all after the enacting words, and by inserting other words as a substitute. The constitution does not require every word

in an act to have received three readings on three several days. If it did, no important bill ever became or can become a law. Very few important bills are not amended on their second reading, and such amendments, when adopted, are not read three times on three several days. Sometimes, in the house, by unanimous consent, and in the senate, upon notice, bills are amended on the third reading. Nothing is more common than to amend by striking out one section and by inserting another, or by striking out several sections and by inserting one or several; and if it be competent to amend by striking out and inserting one, two, three, four sections, clearly it is competent to strike out all the sections, and to insert others, in *pari materia*. Striking out all after the enacting words, and inserting, is nothing but an amendment, and is governed by the same rules as other amendments. I do not see any repugnancy of this act with the constitution of the state of South Carolina.

Even if, upon close examination, it should be discovered that one section, the twenty-fifth, is in conflict with the interstate commerce law, and on this point no opinion is expressed, still this would not affect the other sections of the act, and its main scope and purpose,—the suppression of sales of intoxicating liquors except by and through the agency of the state. *Hills v. Bank*, 105 U. S. 319. And it is clear that the rule asked for could not be granted.

It is urged in behalf of these complainants that they are Italian subjects, and are protected by the treaty stipulations between Italy and the United States. The language of the treaty on this point is as follows:

"Art. 2. The citizens of each of the high contracting parties shall have liberty to travel in the states and territories of the other; to carry on trade, wholesale and retail; to hire and occupy houses and warehouses; to employ agents of their choice; and generally to do anything incident to or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.

"Art. 3. The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

Under these articles the complainants have the same rights as citizens of the United States. It would be absurd to say that they had greater rights. We have seen that the right to sell intoxicating liquors is not a right inherent in a citizen, and is not one of the privileges of American citizenship; that it is not within the protection of the fourteenth amendment; that it is within the police power. The police power is a right reserved by the states, and has not been delegated to the general government. In its lawful exercise, the states are absolutely sovereign. Such exercise cannot be affected by any treaty stipulations. "*Salus populi suprema lex.*"

There are other and much more grave questions in this case, affecting the jurisdiction of this court. The conclusions reached render the discussion of them at this time unnecessary. It is best to come

at once to a final decree. Let one be entered, refusing the rule, and dismissing the bill for want of equity.

NOTE.

An Act to Prohibit the Manufacture and Sale of Intoxicating Liquors as a Beverage Within this State, Except as Herein Permitted.

Section 1. Be it enacted by the senate and house of representatives of the state of South Carolina, now met and sitting in general assembly and by the authority of the same, that on and after the first day of July, A. D. 1893, the manufacture, sale, barter, or exchange, or the keeping or offering for sale, barter, trade, or exchange, within this state, of any spirituous, malt, vinous, fermented, or other intoxicating liquors, or any compound or mixtures thereof, by whatever name called, which will produce intoxication, by any person, business firm, corporation, or association, shall be regulated and conducted as provided in this act.

Sec. 2. The governor shall, within thirty days from the approval of this act, appoint a commissioner, and all subsequent appointments, which appointments shall be submitted to the senate at its next session for its approval, believed by him to be an abstainer from intoxicants, who shall, under such rules and regulations as may be made by the state board of control, purchase all intoxicating liquors for lawful sale in this state, giving preference to manufacturers and brewers doing business in this state, and furnish the same to such persons as may be designated as dispensers thereof, to be sold as hereafter prescribed in this act. Said commissioner shall reside and have his place of business in the city of Columbia, in this state, and hold his office two years from appointment, and until another is appointed in his stead, subject to removal for cause by the state board of control. He shall qualify and be commissioned the same as other officers, and receive an annual salary of \$1,800, payable at the same time and in the same manner as is provided for the payment of salaries of state officers. He shall be allowed a bookkeeper, who shall be paid in the same manner a salary of \$1,200, and such other assistants as, in the opinion of the board of control, may be deemed necessary. He shall not sell to the county dispensers any intoxicating or fermented liquors except such as have been tested by the chemist of the South Carolina College and declared to be pure and unadulterated: provided, that said state board of control shall have authority to appoint such assistants as they may find necessary to assist the chemist of the South Carolina College in making the analysis required by this act, and the said state board of control may fix such reasonable compensation, if any, as they may deem proper for the services rendered by such chemists or such assistants. The state commissioner shall not receive from said county dispensers for such liquors sold to them more than 50 per cent. above the net cost thereof, and all amounts so received by him from said sales shall be by him paid over to the treasurer of the state monthly, under such rules as may be made by the state board of control to insure the faithful return of the same; and the state treasurer shall keep a separate account with said fund, from which the commissioner shall draw, from time to time, upon warrants duly approved by the said board, the amounts necessary to pay the expenses incurred in conducting the business of said agency. All rules and regulations governing the said commissioner in the purchase of intoxicating liquors, or in the performance of any of the duties of his office, where the same are not provided for by law, shall be prescribed by a state board of control, composed of the governor, the comptroller general, and the attorney general. He shall, before entering upon the duties of his office, execute a bond to the state treasurer, with sufficient sureties, to be approved by the attorney general, in the penal sum of \$10,000 for the faithful performance of the duties of his office. In all purchases or sales of intoxicating liquors made by said commissioner, as contemplated in this act, the commissioner shall cause a certificate to be attached to each and every package containing said liquors, when the same is shipped to him from the place of purchase, or by him to the county dispensers, certified by his official signature and seal, which certificate shall state that the liquors contained in said package

have been purchased by him for sale within the state of South Carolina, or to be shipped out of the state, under the laws of said state; and without such certificate any package containing liquors which shall be brought into the state, or shipped out of the state, or shipped from place to place within the state by any railroad, express company, or other common carrier, shall be regarded as intended for unlawful sale, and, upon conviction thereof, such common carrier shall be liable in a penalty of \$500 for each offense, to be recovered against said common carrier in any court of competent jurisdiction by complaint proceedings to be instituted by the solicitor for any circuit with whom evidence of the violation may be lodged by any citizen having knowledge or information of the violation; and any person knowingly attaching or using such certificate without the authority of the commissioner, or any counterfeit certificate, for the purpose of securing the transportation of any intoxicating liquors into, out of, or within this state, in violation of law, shall, upon conviction thereof, be punished by a fine of not less than \$500, and imprisonment in the penitentiary for not less than one year, for each offense. Said commissioner shall make a printed quarterly statement under oath, commencing August 1, 1893, of all liquors sold by him, enumerating the different kinds and quantity of each kind, the price paid and the terms of payment, and to whom sold; also the names of the parties from whom the liquor was purchased, and their place of business and date of purchase,—which statement shall be filed with the state board of control: provided, this section shall not apply to malt liquors shipped in cases or bottles thereof shipped in barrels.

Sec. 3. The state commissioners shall, before shipping any liquor to county dispensers, cause the same to be put into packages of not less than one half pint, nor more than five gallons, and securely seal the same; and it shall be unlawful for the county dispenser to break any such packages or open the same for any reason whatever. He shall sell by the package only, and the purchaser shall not open the same on the premises.

Sec. 4. It shall be the duty of the state board of control to appoint a county board of control, composed of three persons believed by said board not to be addicted to the use of intoxicating liquors, who shall hold their office for a term of two years, and until their successors are appointed. Said county board of control shall be subject to removal for cause by the state board of control. Said county board shall make such rules as will be conducive to the best management of the sale of intoxicating liquors in their respective counties: provided, all such rules shall be submitted to the state board and approved by them before adoption. Said county board of control shall qualify and be commissioned the same as other officers without fees therefor.

Sec. 5. If any county dispenser, or his clerk, shall purchase any intoxicating liquors from any other person or persons except the state commissioner, or if he or they, or any person or persons in his or their employ, or by his or their direction, shall sell or offer for sale any liquors other than such as have been purchased from the state commissioner, or shall adulterate or cause to be adulterated any intoxicating, spirituous, or malt liquors which he or they may keep for sale under this act, by mixing with the same any coloring matter or any drug or ingredient whatever, or shall mix the same with other liquors of different kind or quality, or with water, or shall sell or expose for sale such liquors so adulterated, knowing it to be such, he or they shall be guilty of a misdemeanor, and be fined in a sum of not less than two hundred dollars, or imprisoned in the county jail for not less than six months.

Sec. 6. That on and after the first day of July, 1893, no person, firm, association, or corporation shall manufacture for sale, sell, or keep for sale, exchange, barter, or dispense, any intoxicating liquors for any purpose whatever otherwise than as provided in this act. County dispensers, as herein provided, shall alone be authorized to sell and dispense intoxicating liquors, and all permits must be procured, as hereinafter provided, from the county board of control: provided, that no license for the sale of spirituous liquors now authorized to be granted by municipal authorities shall be of any force or effect after the 30th day of June, 1893, but licenses may be issued or extended to said 30th day of June, 1893, upon payment of one half of the annual license

required by the municipal and county authorities in cities or towns, where such licenses are or may be authorized to be issued: provided, further, that manufacturers of distilled, malt, or vinous liquors who are now doing business in the state shall be allowed to sell to no person in this state except to the state commissioner and to parties outside of the state. Every package, barrel, or bottle of such liquors shipped beyond the limits of this state shall have thereon the certificate of the state commissioner allowing same, and otherwise it shall be liable to confiscation, and the railroad carrying it shall be punished as in section 2: and provided, that any person shall have the right to make wine for his or her own use from grapes or other fruit.

Sec. 7. Applications for position of county dispensers shall be by petitions signed and sworn to by the applicant, and filed with the county board of control at least ten days before the meeting at which the application is to be considered, which petition shall state the applicant's name, place of residence, in what business engaged, and in what business he has been engaged two years previous to filing petition; that he is a citizen of the United States and of South Carolina; that he has never been adjudged guilty of violating the law relating to intoxicating liquors, and is not a licensed druggist, a keeper of a hotel, eating house, saloon, restaurant, or place of public amusement; and that he is not addicted to the use of intoxicating liquors as a beverage. This permit or renewal thereof shall issue only on condition that the applicant shall execute to the county treasurer a bond in the penal sum of three thousand dollars, with good and sufficient sureties, conditioned that he will well and truly obey the laws of the state of South Carolina now or hereafter in force in relation to the sale of intoxicating liquors; that he will pay all fines, penalties, damages, and costs that may be assessed or recovered against him for violation of such laws during the term for which permit or renewal is granted, and will not sell intoxicating liquors under his permit at a charge exceeding fifty per cent. above the cost thereof. Said bond shall be for the use of the county or any person or persons who may be damaged or injured by reason of any violation on the part of the obligor of the law relating to intoxicating liquors purchased or sold during the term for which said permit or the renewal thereof is granted. The said bond shall be deposited with the county treasurer, and suit thereon shall be brought at any time by the solicitor or any person for whose benefit the same is given; and in case the conditions thereof, or any of them, shall be violated, the principal and sureties thereon shall also be jointly and severally liable for all civil damages, costs, and judgments that may be obtained against the principal in any civil action brought by wife, child, parent, guardian, employer, or other person, under the provision of the law. All other moneys collected for breaches of such bond shall go into the county treasury. Said bond shall be approved by the county board of control under the rules and laws applicable to the approval of official bonds.

Sec. 8. There may be one county dispenser appointed for each county, whose place of business shall be at the county seat of said county, except the city of Charleston, for the county of Charleston, where there may be ten dispensers, and except for the city of Columbia, for the county of Richland, where there may be three dispensers appointed, whose place of business shall be located in such sections of said cities as will be most convenient for the accommodation of residents thereof. At least ten days before the first day of the meeting at which the applications for the position of county dispenser are considered, the applicant shall file with the county board of control, and a copy thereof with the clerk of court, in support of the application, such a petition as is provided for in section 7, signed by a majority of the freehold voters of the incorporated town or city in which the permit is to be used, and each person aforesaid shall sign said petition by his own true name and signature, and state that each, before signing, has read said petition, and understands the contents and meaning thereof, and is well and personally acquainted with the applicant: provided, that, in the judgment of the county board of control, other dispensaries may be established in other towns in any county.

Sec. 9. If the application for the position of county dispenser be granted, it shall not issue until the applicant shall make and subscribe on oath before the clerk of the county board of control, which shall be indorsed upon the bond, to

the effect and tenor following: "I, —, do solemnly swear (or affirm) that I will well and truly perform all and singular the conditions of the within bond, and keep and perform the trust confided in me to purchase, keep, and sell intoxicating liquors. I will not sell, give, or furnish to any person any intoxicating liquors otherwise than is provided by law; and especially I will not sell or furnish intoxicating liquors to any person who is not known to me personally or duly identified, nor to any minor, intoxicated person, or persons who are in the habit of becoming intoxicated; and I will make true, full, and accurate returns to the county board of control the first Monday of each month of all certificates and requests made to or received by me as required by law during the preceding month; and such returns shall show every sale and delivery of such liquors made by or for me during the month embraced therein, and the true signature to every request received and granted; and such returns shall show all the intoxicating liquors sold or delivered to any and every person as returned." Upon taking said oath and filing bond as hereinbefore provided, the county board of control shall issue to him a permit authorizing him to keep and sell intoxicating liquors, as in this act provided; and every permit so granted shall specify the building, giving street and number, or location, in which intoxicating liquors may be sold by virtue of the same, and the length of time in which the same shall be in force, which in no case shall exceed twelve months. Permits granted under this act shall be deemed trusts reposed in the recipients thereof, not as a matter of right, but of confidence, and may be revoked upon sufficient showing by order of the county board of control; and upon the removal of any county dispenser, or upon demand of the county board of control, he shall immediately turn over to the said county board of control all liquors and other property in his possession belonging to the state or county. Said county board of control shall be charged with the duty of prosecuting the county dispenser or any of his employees who may violate any of the provisions of this act.

Sec. 10. The county board of control shall use as their office the office of the county commissioners of their respective counties, and the clerk of the board of county commissioners shall serve as their clerk. They shall preserve, as part of the records and files of their office, all petitions, bonds, and other papers pertaining to the granting or revocation of permits, and keep suitable books in which bonds and permits shall be recorded. The books shall be furnished by the county like other public records. The county board of control shall designate or provide a suitable place in which to sell the liquors, and shall furnish or grant permits to purchase from the state commissioners such liquors as shall be necessary. The members of the county board of control shall meet once a month, or oftener on the call of the chairman, and for their service they shall each receive a per diem of \$2, and 5 cents mileage each way, and their clerk shall receive \$2 per day for the days actually employed as such, but they shall not receive compensation for more than thirty days in any one year. They shall, upon the approval of the state board of control, employ such assistants for the county dispenser as may be necessary. The county dispenser and his associates shall receive such compensation as the state board of control may determine. All profits, after paying all expenses of the county dispensary, shall be paid one half to the county treasury, and one half to the municipal corporation in which it may be located; such settlements to be made monthly.

Sec. 11. Before selling or delivering any intoxicating liquors to any person, a request must be presented to the county dispenser, printed or written in ink, dated of the true date, stating the age and residence of the signer, for whom and whose use the liquor is required, the quantity and kind requested, and his or her true name and residence, and, where numbered, by street and number, if in a city, and the request shall be signed by the applicant in his own true name and signature, attested by the county dispenser or his clerk who receives and files the request, in his own true name and signature, and in his own handwriting. But the request shall be refused if the county dispenser filling it personally knows the person applying is a minor, that he is intoxicated, or that he is in the habit of using intoxicating liquors to an excess; or, if the applicant is not so personally known to said

county dispenser before filling said order or delivering said liquor, he shall require identification, and the statement of a reliable and trustworthy person of good character and habits, known personally to him, that the applicant is not a minor, and is not in the habit of using intoxicating liquors to an excess.

Sec. 12. Requests for the purchase of liquor shall be made upon blanks furnished by the county auditor, in packages of one hundred each, to the county dispensers, from time to time, as the same shall be needed, and shall be numbered consecutively by the auditor. The blanks aforesaid shall be furnished to the county auditor by the state board of control in uniform books like bank checks, and the date of delivery shall be indorsed by the county auditor on each book, and receipt taken therefor and preserved in his office. The county dispenser shall preserve the application in the original form and book, except the filling of the blanks therein, until returned to the county auditor. When return thereof is made, the county auditor shall indorse thereon the date of return, and file and preserve the same, to be used in the quarterly settlements between the county dispenser and the county treasurer. All unused or mutilated blanks shall be returned or accounted for before other blanks are issued to such county dispensers.

Sec. 13. On or before the tenth day of each month, each county dispenser shall make full returns to the county auditor of all requests filled by him and his clerks during the preceding month upon blanks to be furnished by the state board of control for the purpose, and accompany the same with an oath, duly taken and subscribed before the county auditor or a notary public, which shall be in the following form, to wit: I, ———, being duly sworn, state on oath that the requests for liquors herewith returned are all that were received and filled at my place of business under my permit during the month ———, 18—; that I have carefully preserved the same, and that they were filled up, signed, and attested at the date shown thereon, as provided by law; that said requests were filled by delivering the quantity and kind of liquors required; and that no liquors have been sold or dispensed under my permit during said month except as shown by the requests herewith returned; and that I have faithfully observed and complied with the provisions of my bond and oath taken by me, thereon indorsed, and with all the laws relating to my duties in the premises.

Sec. 14. Upon failure of any county dispenser to make the returns to the auditor as herein required, it shall be the duty of said auditor to report such failure to the county board of control, and the said county board of control shall immediately summon said delinquent county dispenser to appear before them and show cause why his permit should not be revoked; and, if the cause shall not be shown to the satisfaction of the county board of control, they shall immediately annul said permit and give public notice thereof; and the solicitor shall proceed to enforce the penalties prescribed in this act for such violation against said county dispenser at the next succeeding term of court of the county in which such permit is held, and any county dispenser who shall sell or dispense any intoxicating liquors after his permit shall have been revoked shall, upon conviction thereof, be fined not less than \$500, and be imprisoned in the county jail for six months.

Sec. 15. Every county dispenser shall keep a strict account of all liquors received by him from the state commissioner, in a book kept for that purpose, which shall be subject at all times to the inspection of the circuit solicitor, any peace officer, or grand juror of the county, or of any citizen, and such book shall show the amount and kind of liquors procured, the date of receipt and amount sold, the amount on hand of each kind for each month. Such book shall be produced by the party keeping the same, to be used as evidence on trial of any prosecution against him, on notice duly served that the same will be required as evidence.

Sec. 16. The payment of the United States special tax as a liquor seller, or notice of any kind in any place of resort or in any store or shop, indicating that intoxicating liquors are there sold, kept, or given away, shall be held to be prima facie evidence that the person or persons paying said tax, and the parties displaying such notices, are sellers of intoxicating liquors;

and unless said person or parties are selling under permit, as prescribed by this act, they shall be punished as provided for by this act.

Sec. 17. Licensed druggists conducting drug stores, and not holding permits, and manufacturers of proprietary medicines, are hereby authorized to purchase of county dispensers of the counties of their residence intoxicating liquors (not including malt) for the purpose of compounding medicines, tinctures, and extracts that cannot be used as a beverage. Such permit holders shall not charge such licensed druggists over 10 per cent. net profits for liquors so sold. Such purchaser shall keep a record of the uses to which the same are devoted, giving the kind and quantity so used; and on or before the tenth of each calendar month they shall make and file with the county auditor, and with the county board of control, sworn reports of the preceding calendar month, giving a full and true statement of the quantity and kinds of such liquors purchased and used, the uses to which the same have been devoted, and giving the names of county dispenser from whom the same was purchased, and the dates and quantities so purchased, together with an invoice of each kind still in stock and kept for such compoundings. If said licensed druggist sell, barter, give away, or exchange, or in any manner dispose of, said liquors, or use the same for any purpose other than authorized in this section, he shall, upon conviction before any court of general sessions, forfeit his license, and be liable to all penalties, prosecutions, and proceedings at law and in equity, provided against persons selling without permit, and, upon such conviction, the clerk of court shall, within ten days after such judgment or order, transmit to the board of pharmaceutical examiners the certified record thereof, upon receipt of which the said board shall strike the name of the said druggist from the list of pharmacists, and cancel his certificate: provided, that nothing herein contained shall be construed to authorize the manufacture or sale of any preparation or compound, under any name, form, or device, which may be used as a beverage which is intoxicating in its character.

Sec. 18. That the sum of fifty thousand dollars, if so much be necessary, is hereby appropriated for the purpose of purchasing and of supplying liquors to be distributed to county dispensers under the provisions of this act, to be expended by the state treasurer, upon the requisition of the state commissioner, with the approval of the state board of control: provided, that the amounts advanced to each county dispenser shall be considered loans, to be refunded out of the profits derived from the sales of liquors by the county dispenser therein.

Sec. 19. If any person shall make any false or fictitious signature, or sign any name other than his or her own, to any paper required to be signed by this act, without being authorized so to do, or make any false statement in any paper, request, or application signed to procure liquors under this act, the person so offending shall be guilty of a misdemeanor, and, upon conviction therefor, shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, and costs of prosecution, or be imprisoned not less than thirty days, nor more than six months.

Sec. 20. If any county dispenser or his clerk shall make false oath touching any matter required to be sworn to under the provisions of this act, the person so offending shall, upon conviction therefor, be punished as provided by law for perjury. If any county dispenser, under the law, shall purchase or procure any intoxicating liquors from other person than the state commissioner, or make any false return to the county auditor, or use any request for liquors for more than one sale, in any such case he shall be deemed guilty of a misdemeanor, and, upon conviction, punished by a fine of not less than \$100, nor more than \$500, and imprisonment in the county jail for not less than ninety days, nor more than one year, for each offense.

Sec. 21. Every person who shall, directly or indirectly, keep or maintain, by himself or by associating or combining with others, or who shall in any manner aid, assist, or abet in keeping or maintaining, any club room or other place in which any intoxicating liquors are received or kept for the purpose of barter or sale as a beverage, or for distribution or division among the members of any club or association by any means whatever, and every per-

son who shall barter, sell, or assist or abet another in bartering or selling, any intoxicating liquors so received or kept, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, and by imprisonment in the county jail not less than ninety days, nor more than one year.

Sec. 22. All places where intoxicating liquors are sold, bartered, or given away in violation of this act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this act, are hereby declared to be common nuisances; and if the existence of such nuisance be established, either in a criminal or equitable action, upon the judgment of a court, or judge having jurisdiction, finding such place to be a nuisance, the sheriff, his deputy, or any constable of the proper county or city where the same is located, shall be directed to shut up and abate such place by taking possession thereof, if he has not already done so, under the provision of this act, and by taking possession of all such intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining such nuisance; and such personal property so taken possession of shall, after judgment against said defendant, be forthwith confiscated to the state, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall, for the first offense, be punished by a fine of not less than \$100, nor more than \$1,000, or by imprisonment in the county jail of not less than ninety days, nor more than one year, and for each successive offense be punished by imprisonment in the penitentiary for a period not exceeding two years nor less than one year.

Sec. 23. The attorney general, or his assistant, the circuit solicitor, or any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action in the usual manner of granting injunctions, except that the affidavit or complaint, or both, may be made by the attorney general, his assistant, or the solicitor of the circuit, upon information or belief, and no bond shall be required; and if an affidavit shall be presented to the court or judge, stating or showing that intoxicating liquors, particularly describing the same, are kept for sale, or are sold, bartered, or given away, on the premises, particularly describing the same, where such nuisance is located contrary to law, the court or judge shall, at the time of granting the injunction, issue his orders commanding the officer serving the writ of injunction, at the time of such service, diligently to search the premises, and carefully to invoice all articles found therein, used in or about the carrying on of the unlawful business, for which search and invoicing said officer shall receive the fees now allowed by law for serving an injunction. If such officer, upon such search, shall find upon such premises any intoxicating liquor, or liquors of any kind, in quantity going to show it was for purpose of sale or barter, he shall take the same into his custody, and turn over the same to the sheriff of the county, who shall securely hold the same to abide the final judgment of the court in the action, (the expenses for holding to be taxed as part of the costs of the action;) and such officer shall also take possession of all personal property found on such premises, and turn over the same to the sheriff of the county, who shall hold the same until the final judgment in the case. The finding of such intoxicating liquors on such premises, with satisfactory evidence that the same were being disposed of contrary to this act, shall be prima facie evidence of the nuisance complained of. Liquors seized as hereinbefore provided, and the vessels containing them, shall not be taken from the custody of the officer in possession of the same by any writ of replevin or other process while the proceedings herein provided are pending; and final judgment in such proceedings in favor of the plaintiff shall in all cases be a bar to all suits against such officer or officers for the recovery of any liquors seized, or the value of the same, or for damages alleged to arise by reason of the seizure and detention thereof. Any person violating the terms of any injunction granted in

such proceedings shall be punished for contempt, for the first offense, by a fine of not less than two hundred dollars, nor more than one thousand dollars, and by imprisonment in the county jail not less than ninety days, nor more than one year. In case judgment is rendered in favor of plaintiff in any action brought under the provisions of this section, the court or judge rendering the same shall also render judgment for a reasonable attorney's fee in such action in favor of the plaintiff, and against the defendants therein, which attorney's fee shall be taxed and collected as the other costs therein, and, when collected, paid to the attorney or attorneys of the plaintiff therein: provided, if such attorney be the state's attorney or solicitor, such attorney's fee shall be paid into the county treasury. In contempt proceedings arising out of the violations of any injunction granted under the provisions of this act, the court, or, in vacation, the judge thereof, shall have the power to try summarily, and punish, the party or parties guilty, as required by law. The affidavits upon which the attachment for contempt issues shall make a prima facie case for the state. The accused may plead in the same manner as to an indictment, in so far as the same is applicable. Evidence may be oral, or in the form of affidavits, or both. The defendant may be required to make answers to interrogatives, either written or oral, as, in the discretion of the court or judge, may seem proper. The defendant shall not necessarily be discharged upon his denial of the facts stated in the moving papers. The clerk of the court shall, upon the application of either party, issue subpoenas for witnesses, and, except as above set forth, the practice in such contempt proceeding shall conform as nearly as may to the practice in the court of common pleas.

Sec. 24. It shall be the duty of sheriffs, deputy sheriffs, and constables having notice of the violation of any of the provisions of this act to notify the circuit solicitor of the fact of such violation, and to furnish him the names of any witnesses within their knowledge, by whom such violation can be proven. If any such officer shall willfully fail to comply with the provisions of this section, he shall, upon conviction, be fined in a sum not less than one hundred dollars, nor more than five hundred dollars, and such conviction shall be a forfeiture of the office held by such person; and the court before whom such conviction is had shall, in addition to the imposition of the fine aforesaid, order and adjudge the forfeiture of his said office.

Sec. 25. No person shall knowingly bring into this state, or knowingly transport from place to place within this state, by wagon, cart, or other vehicle, or by any other means or mode of carriage, any intoxicating liquors, with the intent to sell the same in this state in violation of law, or with intent that the same shall be sold by any other person, or to aid any other person in such sale, under a penalty of \$500 and costs for each offense, and in addition thereto shall be imprisoned in the county jail for one year. In default of payment of said fine and costs, the party shall suffer an additional imprisonment of one year. Any servant, agent, or employe of any railroad corporation, or of any express company, or of any persons, corporations, or associations doing business in this state as common carriers, who shall remove any intoxicating liquors from any railroad car, vessel, or other vehicle of transportation, at any place other than the usual and established stations, wharves, depots, or places of business of such common carriers within some incorporated city or town, where there is a dispensary, or who shall aid in or consent to such removal, shall be subject to a penalty of \$50 and imprisonment for thirty days for every such offense: provided, that said penalty shall not apply to any liquor in transit, when changed from car to car to facilitate transportation. All such liquor intended for unlawful sale in this state may be seized in transit, and proceeded against as if it were unlawfully kept and deposited in any place. And any steamboat, sailing vessel, railroad, express company, or other corporation, knowingly transporting or bringing such liquor into the state, shall be punished upon conviction by a fine of five hundred dollars and costs for each offense. Knowledge on the part of any authorized agent of such company shall be deemed knowledge of the company.

Sec. 26. The governor shall have authority to appoint one or more state constables, at a salary of \$2 per day and expenses when on duty, to see that

this act is enforced, the same to be charged to the expense account of the state commissioner.

Sec. 27. No law now in effect, prohibiting the sale of intoxicating liquors in any of the counties or towns of this state, is repealed by this act.

Sec. 28. All acts or parts of acts inconsistent with this act are hereby repealed.

Approved December 24, 1892.

WHITNEY v. FAIRBANKS et al.

(Circuit Court, D. Vermont. February 25, 1893.)

1. CORPORATIONS — STOCKHOLDERS — SUITS AGAINST OFFICERS FOR BREACH OF TRUST.

Stockholders cannot maintain a bill on behalf of a company charging its officers with misapplication and misappropriation of the funds of the company, and with violation of trust, unless the company has refused to bring such suit upon the express request of the stockholders.

2. SAME—NECESSARY ALLEGATIONS.

In such a suit by a stockholder a right of action in the company must be alleged, just as if the suit had been brought by the company.

3. SAME—JOINDER OF CAUSES OF ACTION.

The plaintiff in such a suit cannot join causes of action accruing to himself personally with causes of action belonging to the company.

4. EQUITY JURISDICTION—FRAUD—FEDERAL COURTS.

In the federal courts, where the distinction between suits at law and in equity is strictly maintained, a bill whereby a purchaser of stock in a corporation seeks relief against his vendor because of fraud in the transactions between them is demurrable when it fails to show more than a right to pecuniary damages for alleged misrepresentations in respect to the stock.

In Equity. Suit by Edwin R. Whitney against Franklin Fairbanks and others. Heard on demurrer to the bill. Demurrer sustained.

Geo. E. Lawrence, for orator.

Henry C. Ide, for demurrants.

WHEELER, District Judge. According to the bill the orator has 300 out of 4,000 shares of the stock of the Standard Electric Company, acquired on representation that it was fully paid up from the individual defendants, who have a majority of the whole, none of which is in fact paid up, and have managed the company for the benefit of the E. & T. Fairbanks Company, in which they are largely interested. The prayer is for payment of the stock; an accounting between the two companies, and determination of the orator's claim for misrepresentation, misapplication of funds, and violation of trust; and the general prayer. All the defendants but the electric company have demurred. The bill shows no cause of action in the orator's own right against the Fairbanks Company or against the individual defendants for the stock or breach of trust. Such claims belong wholly to the electric company, and the orator has no right to prosecute them unless that company has refused, on his express request, and by the refusal given him a cause of complaint against both. *Hawes v. Oakland*, 104 U. S. 450. In

such a case the ninety-fourth equity rule requires allegation of ownership of stock at the proper time, of efforts to procure action by the company, with particularity, and that the suit is not collusive to confer jurisdiction on a federal court. 104 U. S. ix. These requirements are not met in this bill. Besides this, the bill fails to set forth with any certainty any cause of action or ground for relief in favor of the electric company in any of the respects suggested as grounds of claim, or that for any cause the orator is unable to set forth the claims with sufficient particularity; and no discovery, as such, for obtaining relief, is asked. The right of action in favor of the company needs to be as well alleged in a suit by the stockholder as in a suit by the company, and the defendants are not bound to answer allegations concerning them unless they are properly set forth, or proper excuse for not setting them forth is given. Causes of complaint in favor of the orator individually are different in right from those in favor of the company, prosecuted by him as a stockholder, and cannot properly be joined with them. *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. Rep. 924. The allegations in respect to individual relief do not suggest enough to give a right to a decree for setting aside the transaction by which the stock was acquired, and for a return of the consideration, or to anything beyond pecuniary damages for the alleged misrepresentation in respect to the stock. *Taylor v. Ashton*, 11 Mees. & W. 401. A suit for such purely pecuniary remedy cannot be maintained in such a case in equity in the federal courts, where the distinctions between suits at law and in equity are kept up very carefully. *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. Rep. 249. In no aspect do the allegations of this bill appear to be sufficient. Demurrer sustained.

HOFMAN et al. v. KEANE.

(Circuit Court, W. D. Washington. March 3, 1893.)

VENDOR AND VENDEE — CANCELLATION OF SALE AND CONVEYANCE — FRAUDULENT REPRESENTATIONS.

In an action by a vendee against his vendor to cancel a sale and conveyance of 52½ acres of land, it appeared that the tract was represented on a plat of a government survey as containing this quantity; that plaintiff and defendant inspected the land together, but were unable to locate the boundaries, and neither of them knew the quantity or extent of it; that a portion of the tract had been injured by avulsion; that they then estimated that the tract contained 52 acres, and that 6 acres were practically destroyed, and made a corresponding deduction from the price of the whole tract. It appeared, however, that the land had been so washed away as to leave but 19½ acres of tillable land. *Held*, that as the parties had assumed that there was a deficit of an unknown quantity of tillable land, and agreed upon an abatement of price on that account, the allegations of fraud were not sustained.

In Equity. Bill by Frank C. Hofman and Bertha C. Hofman against Thomas C. Keane to cancel a sale and conveyance of real estate on the ground of fraud on the part of the vendor in misrepresenting the facts as to the quantity of land. Findings and decree for the defendant. Bill dismissed.

Daniel C. Millett and Reynolds & Stewart, for complainants.
Garvey & Smith and Thomas Carroll, for defendant.

HANFORD, District Judge. The complainants charge the defendant with having committed a fraud upon them by falsely representing the tract of land described in their bill of complaint as containing 52.25 acres, when in fact the quantity of land in said tract is but 19.5 acres, and thereby inducing them to purchase said tract for the price of \$3,220, and on this ground pray for a rescission of the contract. The answer denies the charge of fraud, and makes an issue as to the quantity of land in the tract. From the evidence I find that upon the plat of the government survey the tract is shown as a lot containing 52.25 acres, situated between the main channel of the Cowlitz river and a branch of said river; the branch being one of the boundaries. Since the government survey was made, the river and said branch have, by avulsion, united in a new channel cut through this tract, dividing it into two parts, and washing away a portion of the soil. The change made by the river has not reduced the area to which the owner has title, but by the washing away of the soil the quantity of tillable land has been diminished so that there remains but 19½ acres of tillable land. Before concluding negotiations for the sale the defendant conducted the plaintiff Frank C. Hofman to the land for the purpose of viewing it. The loss of soil by the action of the river was then noticed by said plaintiff, as well as by the defendant, but neither of them knew the extent of it, or the quantity of land in the tract, and they were not able to locate all of the boundaries. In their calculations the parties estimated the tract as 52 acres, and fixed \$70 per acre as the price; and, instead of measuring the ground, they agreed to consider the loss by action of the river as being equal to the price of 6 acres, at said rate. Thus \$3,220 became the agreed price for the whole tract. By his deed the defendant conveyed the entire tract to the plaintiffs. The parties having, in making their contract, assumed that there was a deficit of an unknown quantity of tillable land, and agreed upon an abatement of a specified sum from the contract price to make good the loss, I hold that the allegations of fraud are not sustained. The complainants have received all that they can justly claim, although it now appears that the bargain is not so advantageous to them as they supposed it to be at the time of making it. Decree dismissing the bill, with costs.

PUGET MILL CO. v. BROWN et al.

(Circuit Court, N. D. Washington. January 5, 1893.)

1. PUBLIC LANDS—DECISIONS OF THE LAND OFFICE—WHEN CONCLUSIVE.

Decisions by the secretary of the interior and his subordinates on questions of fact arising in the administration of the land office are conclusive upon the courts when made in the performance of their official duties, no fraud being shown; but such decisions, to be valid, must be made according to the usual and regular rules of practice in the department, and

must be based on legal evidence, or upon some formal inquiry or trial at which the parties have a fair opportunity of presenting evidence to support the claims or rights which they assert.

2. SAME—EVIDENCE—SOLDIERS' ADDITIONAL HOMESTEAD ENTRIES.

The record of the general land office, showing that an additional homestead entry under sections 2304, 2306, in the name of a soldier's widow, was allowed at a district land office, upon the filing of the necessary formal papers and presentation of a paper purporting to be a power of attorney, executed by such widow, authorizing the entry, and that more than 10 years afterwards the commissioner of the general land office canceled said entry for fraud, without giving the party interested a formal hearing, and without proof of fraud other than an unauthenticated letter from a person assuming to be the one who made the original homestead entry, contradicting the statements in the additional homestead entry papers, is not conclusive, nor sufficient evidence of the illegality of such additional entry.

3. SAME—INVALID TRANSFER.

Where such a power of attorney shows on its face that the alleged applicant had already parted with all her beneficial interest, a claimant of the land who admits that he purchased "scrip" therefor, and who does not offer to prove that it was different from the ordinary "Soldier's Additional Homestead Scrip," will be presumed to have known either that the power of attorney divested its maker of all beneficial interest before the entry was made, or that, at the time it left the possession and control of its maker, it was a mere blank, and that by subsequently filling the blanks, so as to make it appear valid, a forgery was committed; hence a deed from the attorney pursuant to the sale was not such an attempted transfer by a bona fide instrument in writing as would entitle the grantee to make a cash entry under 21 St. at Large, p. 238, § 2, though such entry was sanctioned in advance by the commissioner of the general land office.

In Equity. Suit by the Puget Mill Company, a corporation, against Thomas H. Brown, to determine conflicting claims, under the laws relating to the public lands, to a tract of land to which said Brown holds the legal title by a patent issued by the United States, and for a decree declaring that he holds said title in trust for the plaintiff, and against J. H. Irvine and O. B. McFadden, for an injunction to restrain the cutting of timber on said land. Decree that the bill be dismissed.

Hughes, Hastings & Stedman, for complainant.
Stratton, Lewis & Gilman, for defendants.

HANFORD, District Judge. The original bill of complaint in this case shows that the plaintiff and the defendant Brown each claim a certain tract of land in Snohomish county, in this state, by virtue of entries and purchases thereof made by each, respectively, under the laws of the United States providing for the sale and disposition of public lands, and prays for an injunction to prevent the defendants Irvine and McFadden from removing timber from said tract, which they were about to do under a contract with the defendant Brown. By a supplemental bill, it is shown that, since the commencement of this suit, the government has, by a patent, conveyed the legal title to said tract to the defendant Brown, and the complainant now asks the court to decree that it has a superior right to said land, by virtue of its purchase of an earlier date than the entry and purchase made by said Brown, and that by said patent the title became vested in him, as a trustee,

for the use and benefit of the complainant. The parties have made up and filed an agreed statement of facts, upon which the case has been submitted. The plaintiff's claim of title is based upon a cash entry made at Olympia land office February 10, 1885, pursuant to the second section of the act of congress entitled "An act relating to the public lands of the United States," approved June 15, 1880, (21 St. U. S. p. 238, § 2,) which reads as follows:

"That persons who have heretofore, under any of the homestead laws, entered land properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by bona fide instruments in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre; and the amount heretofore paid the government upon said lands shall be taken as part payment of said price: provided, this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws."

As this law by its terms only authorizes entries to be made for the purpose of perfecting titles of persons who had previously claimed the same land under the homestead laws, or the assignees of such claimants to whom the rights of homestead claimants had been previously conveyed bona fide, by instruments in writing, it becomes necessary to consider the prior proceedings in the land office, and what, if any, rights the complainant had sought to acquire to the land in question by an entry under the homestead laws. By the statement of facts it appears that an entry of the tract was made at the Olympia land office in the name of Susan King, in the month of January, 1876, as a soldier's additional homestead, under sections 2304, 2306, Rev. St. The latter section provides that "every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

The practice in the land offices of the United States during and prior to the year 1876 permitted parties to select additional lands in any part of the country, and without appearing in person at the land office to make their entries; that is to say, parties were permitted to appear by authorized attorneys, and file their applications and the affidavits and proofs required. Taking advantage of this liberal mode of making additional entries under this law, attempted transfers of soldiers' additional homestead rights became common, although such rights are not by the laws made assignable. The traffic was facilitated and carried on by means of sets of papers known to the trade as "Soldiers' Additional Homestead Scrip," consisting of (1) an affidavit stating briefly the facts essential to entitle the affiant to make an additional entry, and, further, that the entry is made for the affiant's "own exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever;" (2) an application to make an additional entry, signed by the applicant, but having blank spaces to be

filed by inserting the date, name of the land office, and description of the land to be entered; (3) a land-office certificate, showing the original homestead entry of the applicant; (4) in case of the supposed applicant being a widow, other affidavits showing her marriage to a soldier, and the fact and date of his death; (5) an irrevocable power of attorney to make the additional entry, sell and convey the land, and appropriate the purchase money, completely executed, witnessed, acknowledged, and certified, but having blanks wherein to insert the name of the attorney in fact and description of the land.

To effect the entry made in the case of Susan King, aforesaid, papers of the above description were filed in the land office, except the power of attorney, which was exhibited there, but not filed. The plaintiff bargained with some person, (not named,) who held said papers, and claimed to be acting for said Susan King, "to purchase the same, and the right of the said Susan King thereunder, and pay therefor, upon the entry of said land and the execution of the deed to plaintiff therefor, the sum of five hundred dollars." The parties have not seen fit in their statement of facts to mention the date of this agreement, nor to give the court any information as to when this land was selected for entry by means of said papers, nor by whom, nor when or by whom the description thereof was written in the papers which were bargained for. The papers appear to be regular and sufficient for the purpose intended, except for one defect, viz. the irrevocable power of attorney showed upon its face that, in consideration of \$500 paid to her, the ostensible applicant had previously parted with all her beneficial interest in the land. In June, 1876, a paper, purporting to be a deed conveying said tract from Susan King to the plaintiff, was executed and delivered by W. D. Scott, the attorney in fact named in said power of attorney. It is now claimed by the plaintiff that an attempt was made bona fide, by said instrument in writing, to transfer the rights of the Susan King, who made an original entry for a homestead of a tract less than 160 acres, in and to the land in controversy, under the entry made at Olympia in January, 1876, as an additional homestead, which she claimed the right to make as the widow of a deceased soldier.

On the 16th of January, 1885, N. C. McFarland, the then commissioner of the general land office, acting upon information contained in a letter from the assistant adjutant general of the United States army as to the military record of Joseph S. or Joshua S. King, whose widow was supposed to be the Susan King, in whose name the said additional homestead entry was made, and other information contained in a letter purporting to have been written by a Mrs. Susan King, alleging herself to be the person who made the original homestead entry referred to in the set of papers filed in the Olympia land office, and that her husband's name was John Wesley King, and that he did not serve in the United States army during the Civil War, made an order holding said additional homestead entry for cancellation, and allowing the parties interested 60 days from the receipt of notice of said order within which to

show cause why the said entry should not be canceled, or make an application to purchase the land under the said act of June 15, 1880.

The plaintiff elected to take advantage of the option offered by the commissioner's said order, and accordingly did, on the 10th day of February, 1885, make application at said land office, under said act, and paid the government price for the land. More than two years afterwards, the successor in office of said commissioner of the general land office, without affording an opportunity to the complainant to defend its claim concerning the validity of said entry, and without any inquiry as to the facts or evidence of fraud, other than what appeared by the papers on file hereinbefore specified, including the official letter of the assistant adjutant general of the army and the letter supposed to have been written by a person bearing the name of Mrs. Susan King, made an order canceling said entry, alleging as the reason for making said order that said entry was "fraudulent or illegal." From said order an appeal was taken to the secretary of the interior, and, upon consideration thereof, W. L. Muldrow, acting secretary of the interior, on September 8, 1888, made an order and decision affirming the order of the commissioner cancelling said entry. This order and decision of the acting secretary assumed that the cash entry made by the complainant was fraudulent and invalid, because the prior additional entry of the same land was based upon fraud and perjury.

The defendant Brown filed a declaratory statement as a settler upon said land under the pre-emption law, June 24, 1890, and made final proof and payment on the 24th day of March, 1891, and a patent conveying the said land to him was issued February 18, 1892, pursuant to his said declaratory statement and final proof.

The secretary of the interior and his subordinate officers in the general land office are clothed with certain powers and functions constituting them a special tribunal for the hearing of evidence and determination of questions arising in the administration of the laws providing for the sale and disposition of public lands; and, without a showing of fraud, the decisions of said tribunal as to questions of fact made in the performance of their official duties are treated by the courts as conclusive. But the decisions of said tribunal, to have any force, must be made in the due performance of official duties, and in accordance with the usual and regular rules of practice or usage in the department, and must be based upon legal evidence, or upon some formal inquiry or trial at which the parties to be affected have a fair opportunity of presenting evidence to support the claims or rights which they assert. The grounds of the decision of the acting secretary of the interior upon the appeal taken by the complainant from the order of the acting commissioner of the general land office, so far as shown by the record, are fully stated in the following extract from the decision itself:

"Cash entry No. 9,194 covered soldier's additional homestead entry No. 2,410, made in the name of Susan King, widow of Joseph S. King, January 26, 1876. Your office decided January 16, 1885, that entry No. 2,410 was held for cancellation as illegal and fraudulent, for the reason that 'Susan King, who made

the original homestead entry upon which said additional homestead entry is based, informed your office in a letter dated December 27, 1884, that her deceased husband was not named Joshua S. King, but was named John Wesley King, and that he never served in the United States army during the recent Rebellion.

"By your said office decision, the parties were allowed to show cause within sixty days from notice why the entry should not be canceled, or to file in the local land office an application to purchase the land under the act of June 15, 1880, the same as in the other additional entries hereinbefore mentioned and described. A deed is attached to the papers of the said cash entry, by which it appears that a person naming herself Susan King conveyed the land covered by the said entry to the appellant June 15, 1876; and the latter made cash entry for the said land February 10, 1885.

"The record shows that the person of the name of Susan King, or assuming such name, made the said additional homestead entry by virtue of the services of one Joseph S. King, of whom she is claimed to be the widow, in the army of the United States, in Company E, third regiment of Arkansas cavalry volunteers.

"The party made affidavit, bearing date September 13, 1875, in which it is set out that she is the widow of Joseph S. King; that the latter served as a soldier in the said company, and was honorably discharged on or about June 30, 1865, after serving more than 90 days. Affiant further alleged that she was married to said Joseph S. King on July 15, 1855, who died August 30, 1866. Attached to the entry certificate is a certificate from the assistant adjutant general that one Josiah King was enrolled on October 15, 1863, in Company E, third regiment of Arkansas cavalry volunteers, mustered into service November 19, 1863, to serve three years; that on the muster roll of said company for the months of November and December, 1863, he was reported as Joseph S. King, and was so borne on all subsequent rolls; that he was mustered out with said company at Lewisburg, Ark., June 30, 1865. Attached to the papers is also a letter, signed by Susan King, dated December 27, 1884, addressed to the general land office, reading as follows: 'In reply to yours of the 2nd instant, would say that I homesteaded N. W. of S. E. Sec. 7, T. 9 N., R. 22 W., Johnson county, Arkansas, containing forty acres, as the deed from the land office at Washington City, as well as the county records, will show. My husband, John Wesley King, did not serve in the United States army during the late war.' The land described in the letter is the land covered by the original homestead entry, upon which the additional entry was based. * * *

"In the case of entry No. 9,194, based on additional entry made in the name of King, it is shown by the records of the department of war and the letter of the genuine Susan King that the application for the additional homestead was founded on fraud and perjury. The signature 'Susan King,' appearing in the affidavit for the additional entry, and the signature of Susan King in the letter, appear not to be in the same handwriting.

"The question of the validity of these five cash entries is controlled by decision in the Case of J. S. Cone, 7 Dec. Dep. Int. 94. It was there decided that the second section of the act of June 15, 1880, (21 St. p. 238,) should not be construed to permit an entryman, or his attempted transferee, to purchase land covered by an entry which depends for its inceptive right upon false and fraudulent statements and forged documents. This opinion is still adhered to."

From the record it appears that there was no pretense of anything resembling a formal inquiry into the actual facts of the transaction, no taking of proofs, no distinct findings of any facts upon which the conclusion that the additional homestead entry was fraudulent could be founded, and there was no legal evidence before the acting secretary to support such findings. If it be claimed that the charge of fraud was in effect confessed on the part of the complainant by having declined to maintain the validity of the additional homestead entry in a contest with the government, a good answer to

such claim is to be found in the fact that, instead of making default after a fair notice or summons to show cause, or in any manner declining to take issue upon an allegation of fraud, the complainant responded to the notice contained in the order of Commissioner McFarland, by electing to pay the government price for the land and make a second entry. The commissioner, by the only notice ever given affording an opportunity to support by evidence the validity of the additional homestead entry, also gave an option to terminate the controversy in a less expensive and more expeditious way. Therefore no admission can be fairly inferred from the mere fact that the better way suggested by the commissioner was chosen. The acting secretary, by his decision, treats the unsworn statements contained in the unauthenticated letter purporting to have been written by a Mrs. Susan King, in an apparently different handwriting from that of the signatures upon the papers filed in making the additional homestead entry, years subsequent to the execution of a deed purporting to be a conveyance of the land by the individual in whose name the entry was made, as being sufficient, without evidence to identify the writer as the real Susan King who made the original homestead entry, to establish the falsity of the statements in the application and affidavits upon which the additional homestead entry was made.

If, in the determination of the issues between the parties now contending for the land, the scope of the inquiry is so limited that the court can only review the decision of the acting secretary in the light of the facts appearing by the record of the case in the general land office, then the plaintiff ought to prevail. But there is evidence before the court, not found in the general land office, to be considered, and the conscience of the chancellor must be satisfied that the complainant has a superior right, according to the principles of equity, before the court can, in the exercise of the extraordinary powers of a court of equity, decree a transfer of the title from the defendant, in whom it is now vested. Now, by the agreed statement of facts before me it appears that the complainant did not deal directly with Susan King; and, giving to its officers and agents credit for the sagacity and prudence of business men of ordinary intelligence, there appears to be no theory consistent with the facts which can lead to a conclusion that there was any bona fide attempt to transfer any right to the land which the parties could reasonably have supposed to have been acquired by the additional homestead entry. An attempt to convey a title cannot be bona fide on the part of the vendee unless in making the purchase he acts with reasonable prudence, and under an honest belief that the vendor has the right to convey the title to him. Now, I find annexed to the statement of facts the original instrument, purporting to be a power of attorney from Susan King to W. D. Scott, under which the deed to plaintiff was executed by Scott. By the date of its execution and acknowledgment, in connection with the admitted fact that the complainant's bargain was for "scrip," (so called,) and that it paid the purchase money to a stranger, and the further fact that upon the present trial the complainant has not

offered to prove that the so-called "scrip" which it bargained for was different in character from the sets of blanks which were commonly sold and traded in by dealers, and by them called "Soldier's Additional Homestead Scrip," the inference is justified that the complainant, at the time of its purchase, either knew, or ought to have known, that said power of attorney either divested the maker of it of all her beneficial interest in the land some four months prior to the additional entry in the land office at Olympia, and therefore falsified the statements of the application and affidavits whereby the entry was made, or that, at the time when it left the possession and control of its maker, said power of attorney was a mere blank, utterly void, and that by subsequently filling the blanks, so as to make it appear to be complete and valid, a forgery was committed.

My conclusions are that the attempted transfer of rights acquired under the homestead laws to the complainant was not bona fide; that the cash entry was therefore not authorized by the act of June 15, 1880; and that no rights adverse to the government can be acquired by an entry not authorized by law, even though sanctioned in advance by a commissioner of the general land office. The defendants are entitled to have the suit dismissed.

Decree accordingly.

UNITED STATES v. WORKINGMEN'S AMALGAMATED COUNCIL OF
NEW ORLEANS et al.

(Circuit Court, E. D. Louisiana. March 25, 1893.)

1. INJUNCTION—WHEN GRANTED—UNLAWFUL COMBINATIONS.

Where an injunction is asked against the interference with interstate commerce by combinations of striking workmen, the fact that the strike is ended and labor resumed since the filing of the bill is no ground for refusing the injunction. The invasion of rights, especially where the lawfulness of the invasion is not disclaimed, authorizes the injunction.

2. SAME—BILL AND ANSWER—WAIVER OF OATH.

Where the bill for injunction waives the oath of the respondents, an answer, under oath, denying all the equities of the bill, can, under the amendment to equity rule 41, be used at the hearing with probative force of an affidavit alone. Whether the injunction should issue must be determined by the whole evidence submitted.

3. UNLAWFUL COMBINATIONS—RESTRAINT OF TRADE.

The act declaring illegal "every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations," (26 St. at Large, p. 209,) applies to combinations of laborers as well as of capitalists.

4. SAME—EVIDENCE—ADMISSIBILITY.

In order to sustain the allegations of a bill praying an injunction against a combination in restraint of interstate commerce, the complainant may offer in evidence, as matter of history, the official proclamation of the various government officers, and also newspaper reports supported by affidavits containing manifestoes and declarations of the respondents.

5. SAME—LAWFUL COMBINATIONS TURNED TO UNLAWFUL PURPOSES.

The fact that a combination of men is in its origin and general purposes innocent and lawful is no ground of defense when the combination is

turned to the unlawful purpose of restraining interstate and foreign commerce.

6. SAME--LABOR STRIKES.

A combination of men to secure or compel the employment of none but union men becomes a combination in restraint of interstate commerce, within the meaning of the statute, when, in order to gain its ends, it seeks to enforce, and does enforce, by violence and intimidation, a discontinuance of labor in all departments of business, including the transportation of goods from state to state, and to and from foreign nations.

In Equity. Suit by the United States against the Workingmen Amalgamated Council of New Orleans, La., and others, to restrain the defendants from interfering with interstate and foreign commerce. Injunction granted.

F. B. Earhart, U. S. Atty.

A. H. Leonard, M. Marks, and Evans & Dunn, for defendants.

BILLINGS, District Judge. This cause is submitted upon an application for an injunction on the bill of complaint, answer, and numerous affidavits and exhibits. The bill of complaint in this case is filed by the United States under the act of congress entitled "An act to protect trade and commerce against unlawful restraint and monopolies," (26 St. at Large, p. 209.) The substance of the bill is that there is a gigantic and widespread combination of the members of a multitude of separate organizations for the purpose of restraining the commerce among the several states and with foreign countries. It avers that a disagreement between the warehousemen and their employes and the principal draymen and their subordinates had been adopted by all the organizations named in the bill, until, by this vast combination of men and of organizations, it was threatened that, unless there was an acquiescence in the demands of the subordinate workmen and draymen, all the men in all of the defendant organizations would leave work, and would allow no work in any department of business; that violence was threatened and used in support of this demand; and that this demand included the interstate and foreign commerce which flows through the city of New Orleans. The bill further states that the proceedings on the part of the defendants had taken such a vast and ramified proportion that, in consequence of the threats of the defendants, the whole business of the city of New Orleans was paralyzed, and the transit of goods and merchandise which was being conveyed through it from state to state, and to and from foreign countries, was totally interrupted. The elaborate argument and brief of the solicitors for the defendants presents six objections.

The defendants urge (1) that, the strike or cessation of labor being ended, and labor resumed throughout all branches of business, there is no need for an injunction. I know of no rule which is better settled than that the question as to the maintenance of a bill, and the granting of relief to a complainant, is to be determined by the status existing at the time of filing the bill. Rights do not ebb and flow. If they are invaded, and recourse to courts of justice is rendered necessary, it is no defense to the invasion of a right, either

admitted or proved, that since the institution of the suit the invasion has ceased. With emphasis would this be true where, as here, the right to invade is not disclaimed. The question, then, is, what was the state of facts at the time of and prior to the filing of the bill? or whether, if the facts alleged in the bill were true at that time, there was need of an injunction.

The defendants urge (2) that the right of the complainants depends upon an unsettled question of law. The theory of the defense is that this case does not fall within the purview of the statute; that the statute prohibited monopolies and combinations which, using words in a general sense, were of capitalists, and not of laborers. I think the congressional debates show that the statute had its origin in the evils of massed capital; but, when the congress came to formulating the prohibition which is the yardstick for measuring the complainant's right to the injunction, it expressed it in these words: "Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.

The defendants urge (3) that, the answer being under oath, and denying all the allegations of the bill, the injunction cannot issue. Before the adoption of the amendment to the forty-first rule in equity, it was a rule in chancery practice that, where the answer was under oath, and denied all the equities of the bill, the injunction should be refused; but, since in this case the oath of the respondents is waived in the bill, their answer, under rule 41, can be used at this hearing with the probative force of an affidavit alone, and no longer has necessarily the effect claimed for it by the defendants' solicitors.

The defendants urge (4) that the proofs in the case are vague, and insufficient to establish the allegations of the bill. When I consider the affidavits of individuals, and the proclamations of the governor of the state of Louisiana and the mayor of the city of New Orleans, and the statements in the public journals, supported by testimony, and the affidavits filed in this cause, I find the material allegations of the bill fully sustained. Not only was the flow of commerce through the city of New Orleans purposely arrested, but even the transportation of the goods and merchandise from the government warehouses to the landings was forcibly stopped. The following exhibits in the case, consisting of proclamations of the governor of Louisiana and the mayor of New Orleans, taken from the official journals, manifestoes, and the recitals of the sayings of

the defendants, taken from the public newspapers, which have not been disproved by the respondents, show, as matter of history, the vast proportions of the interruption caused by the defendants to the prosecution of all the branches of business within the city of New Orleans, and the purpose with which it was done, to wit, that no business was to be transacted till the demands made by the employes of the warehousemen and the subordinate draymen were complied with:

"A General Strike Ordered by the Amalgamated Council for To-Morrow, Unless the Merchants Recognize the Union this Evening.

"President Leonard's Statement.

"When the people of New Orleans awake to-morrow morning, they will probably find that one of the largest strikes that has ever taken place in this city has been inaugurated. To-day, at 12:30 o'clock, President Leonard, of the Amalgamated Council, made his promised statement to the members of the press relative to last night's meeting of the council. Mr. Leonard said that it had been decided at the meeting to order a general strike for to-morrow morning, unless the merchants ask for a conference this afternoon. The unions were determined to compel the employers to recognize them, and they took this step to force this recognition, if possible. Mr. Leonard further said that every trade and line over which the council has jurisdiction will go out, barring none. If at any time during the strike the merchants manifest a desire to recognize the unions, the men will be ordered to return to work, and a conference committee appointed to meet a similar committee from the merchants. The committee of fifteen of the Amalgamated Council will remain in session for some hours this evening, and the employers will thus be given their last chance to accede to the demands of the strikers."

"The Strike Ordered.

"Hail Amalgamated Council, New Orleans, November 4, 1892.

"At a meeting of presidents of the labor unions and organizations, held on Friday, November 4, 1892, at the Screwmen's Hall, the following manifesto was adopted and ordered submitted to all the members of labor unions and organizations in the city of New Orleans:

"To All Union Men Wherever Found, Greeting: In view of the fact that in the difficulty existing between the board of trade, merchants, boss draymen, and weighers, and in view of the fact that they claim to represent the entire employing power in the city, and claim broadly and emphatically that they will not recognize unions or labor organizations in connection with their business, and endeavor by their acts to prevent other employers from either employing or recognizing union men, and believing it for the best interests of organized labor that we refrain from working for any employer until the board of trade and others recognize the rights of men to organize into labor unions throughout the city, calling them, as union men, to abstain from any work or assisting in any way in prolonging the existing difficulty. The gauntlet has been thrown down by the employers that the laboring men have no rights that they are bound to respect, and, in our opinion, the loss of this battle will affect each and every union man in the city; and, after trying every honorable means to attain an equitable and just settlement, we find no means left open but to issue this call to all union men to stop work, and assist with their presence and open support from and after Saturday noon, November 5, 1892, and show to the merchants and all others interested that the labor unions are united.

"James Leonard, Chairman.
 "John Breen,
 "A. M. Keir,
 "James E. Porter,
 "John M. Callaghan,
 "'Committee.'"

"Will the Strike be General?

"Meeting of the Amalgamated Council this Evening.

"To the representative of a morning paper, Assistant State Organizer Porter said the outlook for successful strike was a most excellent, and promised that every union in the city would stand by the locked-out workmen. He said it was possible a general strike would be ordered, and that labor is determined to win this struggle. A union man who was with Mr. Porter is represented to have said that the strike will be made a victory of the laboring classes of the city, and, unless the unions are recognized, there will be more bloodshed than imagined. Mr. Porter is reported to have added: 'We propose to win by peace, if we can; but, if we are pushed to the wall, force will be employed.' There are ninety-seven unions in the city. The Amalgamated Council meets to-night to discuss the strike. The joint conference of the executive committees of the striking organizations met last night, and decided to pay no attention to the invitation of the merchants with respect to the proposed tribunal. Inasmuch as the merchants decline to recognize the unions, the unions refuse to appoint any members of the tribunal, and will only do so when they are given to understand that the men they may appoint are to be regarded as official representatives of their unions."

"Answer to Proposition of the Governor.

"Nov. 8th, 1892.

"To His Excellency, Gov. M. J. Foster—Dear Sir: According to agreement, we were to give you an answer this morning in regard to certain propositions that you have submitted; but, after consideration by the committees, we found that the propositions would have to be first submitted to the executive committee of the merchants' body, and we have not, up to the present time, heard what action was taken in regard to the matter. In consideration of these facts, we now have these propositions to submit, and will have to stand on them: First. We are willing to arbitrate on wages. Second. We are willing to arbitrate on hours. Third. We want the question of 'none but union men to be hired when available, from and after the final adoption of tariff and hours,' to be accepted without arbitration.

"James Leonard, Chairman.

"John Breen.

"A. M. Keir.

"John Callaghan.

"James Porter."

"Proclamation.

"Mayoralty of New Orleans, City Hall, Nov. 9, 1892.

"Citizens of New Orleans: The time has come when I, as your mayor, feel that the forces placed at my command are inadequate to further protect peaceable citizens and their property, owing to the many demands made on them. I am then compelled to call upon all good citizens desirous of the welfare and safety of the city. I, therefore, as your chief magistrate, do hereby issue this, my proclamation, commanding all law-abiding and law-loving citizens to attend at the city hall to-morrow, (Thursday,) Nov. 10, 1892, and then and there to be sworn in as special officers to aid and assist the organized police force of this city in their duties incumbent upon them.

"Given under my hand and seal of office, this ninth day of November, in the year of our Lord 1892.

"By the Mayor,

"Clark Steen, Secretary."

John Fitzpatrick.

"Proclamation of the Governor.

"New Orleans, La., Nov. 10/92.

"To the People of New Orleans: The condition of affairs prevailing in your city during the past ten days; the danger to the peace and good order of this community arising from the paralysis of industry, trade, and commerce, and from the suspension of the usual means of transportation; the inse-

curity of life and property caused by the perturbed state of the public mind, aggravated by the closing of the gas and electric light works, thus holding out an incentive to criminals to ply their vocation in darkness,—have not escaped my attention, and have caused me the deepest solicitude. I therefore request all peaceable citizens not to congregate in crowds upon the streets and thoroughfares, and I urge upon them to discountenance all undue excitement and acts of violence, and to make known to the officers intrusted with the administration of the law any breaches of the peace. I hereby declare that the people of this city must and shall be protected in the full enjoyment of all their constitutional rights and privileges. All the power vested in me by the constitution and laws of this state shall be devoted to the preservation of the peace, the maintenance of good order, and the protection of the lives and property of the citizens. Murphy J. Foster, Governor of Louisiana.”

“The governor said there were no further orders to communicate at the moment. It is understood, however, that orders are being issued to the militia, and that, after the railroad presidents’ meeting is over, an effort will be made to start the street cars. The companies are expected to furnish the drivers, and the entire military force of the state, with the bodies that are being organized as recruits, will be used to furnish them with the necessary protection. That will settle the question very soon whether the rioters or the legally constituted authorities of the state are to be masters of the situation.”

The defendants urge (5) that the corporations of the various labor associations made defendants are in their origin and purposes innocent and lawful. I believe this to be true. But associations of men, like individuals, no matter how worthy their general character may be, when charged with unlawful combinations, and when the charge is fully established, cannot escape liability on the ground of their commendable general character. In determining the question of sufficiency of proof of an accusation of unlawful intent, worth in the accused is to be weighed; but when the proof of the charge is sufficient,—overwhelmingly sufficient,—the original purpose of an association has ceased to be available as a ground of defense.

The defendants urge (6) that the combination to secure or compel the employment of none but union men is not in the restraint of commerce. To determine whether the proposition urged as a defense can apply to this case, the case must first be stated as it is made out by the established facts. The case is this: The combination setting out to secure and compel the employment of none but union men in a given business, as a means to effect this compulsion, finally enforced a discontinuance of labor in all kinds of business, including the business of transportation of goods and merchandise which were in transit through the city of New Orleans, from state to state, and to and from foreign countries. When the case is thus stated,—and it must be so stated to embody the facts here proven,—I do not think there can be any question but that the combination of the defendants was in restraint of commerce.

I have thus endeavored to state and deal with the various grounds of defense urged before me. I shall now, as briefly as possible, state the case as it is established in the voluminous record.

A difference had sprung up between the warehousemen and their employes and the principal draymen and their subordinates. With the view and purpose to compel an acquiescence on the part of the

employers in the demands of the employed, it was finally brought about by the employed that all the union men—that is, all the members of the various labor associations—were made by their officers, clothed with authority under the various charters, to discontinue business, and one of these kinds of business was transporting goods which were being conveyed from state to state, and to and from foreign countries. In some branches of business the effort was made to replace the union men by other workmen. This was resisted by the intimidation springing from vast throngs of the union men assembling in the streets, and in some instances by violence; so that the result was that, by the intended effects of the doings of these defendants, not a bale of goods constituting the commerce of the country could be moved. The question simply is, do these facts establish a case within the statute? It seems to me this question is tantamount to the question, could there be a case under the statute? It is conceded that the labor organizations were at the outset lawful. But, when lawful forces are put into unlawful channels,—i. e. when lawful associations adopt and further unlawful purposes and do unlawful acts,—the associations themselves become unlawful. The evil, as well as the unlawfulness, of the act of the defendants, consists in this: that, until certain demands of theirs were complied with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country. What is meant by "restraint of trade" is well defined by Chief Justice Savage in *People v. Fisher*, 14 Wend. 18. He says:

"The mechanic is not obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair; but he has no right to say that no other mechanic shall make them for less. Should the journeymen bakers refuse to work unless for enormous wages, which the master bakers could not afford to pay, and should they compel all journeymen in the city to stop work, the whole population must be without bread; so of journeymen tailors or mechanics of any description. Such combinations would be productive of derangement and confusion, which certainly must be injurious to trade."

It is the successful effort of the combination of the defendants to intimidate and overawe others who were at work in conducting or carrying on the commerce of the country, in which the court finds their error and their violation of the statute. One of the intended results of their combined action was the forced stagnation of all the commerce which flowed through New Orleans. This intent and combined action are none the less unlawful because they included in their scope the paralysis of all other business within the city as well.

For these reasons I think the injunction should issue.

THOMSON-HOUSTON ELECTRIC CO. v. DALLAS CONSOLIDATED
TRACTION RY. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 6, 1893.)

No. 103.

CORPORATIONS—STOCKHOLDERS—UNPAID STOCK—EXECUTION—FEDERAL COURTS
—JURISDICTION.

The stockholders of a corporation formed a new corporation, cancelled their stock in the old corporation, and caused the property thereof to be conveyed to the new one; and in payment therefor one of such stockholders took stock in such new corporation, also bonds and cash, the stock taken not having any market value, and the bonds and cash equaling the value of his stock in the old. A creditor of the new corporation having obtained judgment against it in the United States circuit court in Texas, moved for an execution against such stockholder, in conformity with the provisions of Rev. St. Tex. art. 595, allowing an execution against a stockholder to the amount of his stock unpaid. *Held*, that the federal court had no power, on its law side, to proceed under the statute to reach alleged unpaid subscriptions for stock obtained under such circumstances.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Action by the Thomson-Houston Electric Company against the Dallas Consolidated Traction Railway Company and J. T. Trezevant. The plaintiff recovered a judgment against the railway company, and then made a motion to issue execution against Trezevant, a stockholder. The circuit court overruled the motion. Plaintiff brings error. Affirmed.

John D. Templeton and A. M. Carter, for plaintiff in error.

W. W. Leake, (Seth Shepard and T. S. Miller, on the brief,) for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

McCORMICK, Circuit Judge. We adopt from the brief of one of the counsel for plaintiff in error the following statement of the case:

"The Thomson-Houston Electric Company, the plaintiff in error, is a Connecticut corporation; the Dallas Consolidated Traction Railway Company is a Texas corporation, created and organized, under the laws of the state of Texas relating to private corporations, for 'the construction and maintenance of a street railway.' On the 23d day of February, 1892, the plaintiff in error recovered a judgment against the said traction railway company, for the sum of \$33,590.96. On March 30, 1892, an execution was issued on said judgment and placed in the hands of the United States marshal for the northern district of Texas, who returned the same into the court, stating that he was unable to find any property of the defendant whereon to levy the writ. Thereafter on April 15, 1892, the plaintiff in error filed its motion in the said court in the said cause, against the said traction railway company, alleging, in effect, the recovery of said judgment on the 23d day of February, 1892, for the said sum of money. That an execution had been issued thereon on the 30th day of March, 1892, which was returned on the 5th day of April, 1892, with the above indorsement; that is to say, that the marshal could find no property of the defendant whereon to levy the execution. It was further alleged that J. T. Trezevant was a stockholder in the defendant corporation, he being a sub-

scriber for and owner of 840 of its shares, being of the par value of \$25 each. That Trezevant had not paid to the said corporation the full value of his said shares of stock, but, instead thereof, there was still due and owing to the corporation 60 per cent. of the par value of the said shares of stock, amounting to the sum of \$12,600. That the defendant corporation was not a railway, or religious, or charitable, corporation. Plaintiff in error moved the court that after notice to Trezevant it make such order as might be proper to cause an execution to issue against the property of the said Trezevant in favor of the plaintiff in error for all the balance remaining due and unpaid from him on his stock to said traction railway company. The defendant in error Trezevant filed exceptions and demurrer to the said motion for an execution against him. He denied generally the allegations contained in the motion, and denied that he owned or held any unpaid stock in defendant corporation, and averred that all the stock he then held was paid up. The motion came on for the consideration of the court, July 8, 1892, and on hearing the same the court overruled all the demurrers and exceptions of Trezevant to the said motion; and thereupon proceeded to hear the evidence and argument, and to consider the same, and it thereupon adjudged that it was 'without power to determine whether or not the said J. T. Trezevant had paid in full for the 840 shares of stock owned by him in the Dallas Consolidated Traction Railway Company, and it is therefore ordered that the said motion be, and the same is hereby, dismissed, without prejudice to the right of the plaintiff whatever.' From this judgment or order of the court, the plaintiff in error prosecutes this writ of error. At the request of the plaintiff in error, conclusions of law and fact were filed by the court. The plaintiff in error properly took its bill of exceptions to the said ruling of the court. It assigns for error that the court erred in not entering judgment for the plaintiff against the defendant J. T. Trezevant, upon the facts found by the court, for 60 per cent. of the amount of his subscription of \$22,500, namely, \$13,500."

At the request of the plaintiff's attorneys the judge of the circuit court filed a written statement of his conclusions of law and fact, finding as follows:

"First. In A. D. 1890, there was existing in Dallas county, in the state of Texas, a private corporation known as the Dallas Consolidated Street Railroad Company; this corporation was incorporated under the general laws of Texas for the purpose of owning and operating street railroad in the city and county of Dallas, in the state of Texas; and this company owned then about 28 miles of street railroad in the city of Dallas, besides various lots and blocks of land in the city of Dallas, all of the value of \$550,000, over and above its indebtedness; this company had executed and had outstanding its first mortgage bonds on all of its property to the amount of \$250,000, and owed a floating debt of \$70,000; its capital stock was \$500,000. J. E. Schneider, R. A. Ferris, John N. Simpson, Alfred Davis, Julius E. Schneider, N. A. McMillan, and defendant J. T. Trezevant owned all of the stock of this corporation. Second. The stockholders in this corporation desired to sell their stock, and, through John N. Simpson, tried to effect a sale of their entire shares of stock at par, or for par and as much over as they could. For this purpose Simpson went to St. Louis, Mo., in 1890, but was not able to make a satisfactory sale. Third. Defendant J. T. Trezevant then began negotiations with one W. W. Kurtz and his associates, of Philadelphia, to sell their said stock, which he did not do. This finally culminated in an agreement between those then owning the stock of the Dallas Consolidated Street Railway Company and the said W. W. Kurtz, H. K. Fox, and Nelson F. Evans to form a new corporation, which was done July 25, 1890, under the name of the Dallas Consolidated Traction Railway Company. The purposes for which this corporation was formed, as expressed in its charter, was for the construction, owning, maintaining, and operating street railways in the city and county of Dallas, state of Texas, and for these purposes, the charter provided, might purchase or otherwise become the owner or operator of any street railway then built or that might thereafter be built in said city and county. Fourth. The capital

stock of this company was fixed by its articles of incorporation at \$1,250,000. Fifth. All of the stockholders in the Dallas Consolidated Street Railway Company, except Julius E. Schneider and N. A. McMillan, signed the articles of incorporation, and each of them was made and acted as directors of the new corporation, and all of them or most of them were directors of the old company. Sixth. It was agreed between those owning the old shares of stock of the Dallas Consolidated Street Railway Company and said W. W. Kurtz and his associates that the new street railway company should acquire the property of the old Dallas Consolidated Street Railway Company on the following terms: The old stockholders in the old company were to surrender their certificates of stock in the old company and have them cancelled, and the old company should transfer to the new company all of the former's property; that the latter company should issue its first mortgage bonds for \$1,250,000, and should issue its stock to the extent of \$1,000,000. This was done, and the stock and bonds were issued. It was agreed that the stockholders in the Dallas Consolidated Street Railway Company should have of these bonds \$225,000, and a like amount of stock of the new company; and these stocks and bonds were so issued and delivered. It was also agreed among the said stockholders and officers of the said two companies that said W. W. Kurtz and his associates, residing in Philadelphia, were to receive \$525,000 of the bonds of said new company and \$775,000 in the stock of same, and they were to, and did, pay to defendant J. T. Trezevant and his Dallas associates, in cash, the sum of \$325,000. Seventh. J. T. Trezevant owned one tenth of the shares of the old company, received one tenth of the said \$325,000 cash, or \$32,500; also one tenth of the bonds received by the stockholders of the old company, or \$22,500, and one tenth of the stock delivered to the Dallas parties; so that he received:

Cash.....	\$32,500
Bonds.....	22,500
Stock.....	22,500
Total	<u>\$77,500</u>

—Eighth. I find that the cash and bonds received by defendant Trezevant equaled the value of his interest in the old company, and his stock of \$22,500 cost him nothing. Ninth. W. W. Kurtz and his associates were also to pay into the treasury of the company for development purposes, and to enable the old company to pay its floating debt, \$200,000; he only paid into the treasury \$126,000, and got only \$451,000 in bonds of the company. The \$74,000 in bonds W. W. Kurtz was to get, the company used to secure the floating debt owing by the old company, which the new company assumed, and which has not been paid. The other bonds, amounting to \$500,000, were, by an agreement of all parties, placed in the hands of the Fidelity Trust Company, trustee in the mortgage to secure the bonds, one half of which when sold was to raise money to retire the \$250,000 bonds of the old company, and the other or remaining bonds, when sold and money realized, was to be used by the company in developing its property and making extensions. These bonds never could be sold, and are now with the said trust company. The old bonds are still outstanding and unpaid. I find that there are now outstanding against said property the following debts, to wit:

1st bonds:	
To Dallas parties.....	\$ 225,000
To W. W. Kurtz and associates.....	451,000
To collaterals.....	74,000
Bonds of old company.....	250,000
Total	<u>\$1,000,000</u>
2nd:	
Floating debt secured by bonds.....	70,000
Total debt.....	<u>\$1,070,000</u>

Tenth. At the time of the transaction between the stockholders of the old company and the said W. W. Kurtz and associates was going on, plaintiff, a Connecticut corporation, and a citizen of that state, was erecting, under a written contract for the Dallas Consolidated Street Railway Company, its electrical appliances to operate parts of its line by electricity, which it did at and for the sum of about \$42,000, completing its work in December, 1890. At this time the Dallas Consolidated Traction Railway Company was in possession of and operating the said street railroads, and this company paid plaintiff the sum of about \$10,000, and gave its notes to plaintiff for the balance due for its said work. These notes were not paid when due, and plaintiff instituted a suit, No. 1,433, in this court, against said Dallas Consolidated Traction Railway Company for its said debt, and on the 23d day of February, 1892, recovered a judgment against said defendant for the sum of \$33,590.96, and costs, amounting to about \$25; the judgment bears 6 per cent. On this judgment an execution issued March 30, 1892, and was thereafter placed in the United States marshal's hands, who thereafter returned the same into this court, stating in his return that he was unable to find any property of the defendant in the writ whereon to levy the same. Plaintiff then filed its motion in this cause against defendant J. T. Trezevant for an execution for 60 per cent. of \$22,500, the amount of stock received by him from the Dallas Consolidated Traction Railway Company. Eleventh. That the stock of the defendant company had no value at the date of its issuance, and has had none since. Twelfth. That the plaintiff, at the time it accepted the defendant company's notes, knew of the transfer from the old to the new company."

"Conclusions of law: I do not think that the plaintiff can proceed under article 595, Rev. St. Tex., in a case like this in this court, on the law side of the docket, and get an execution against one who has obtained his stock as defendant has in this case. I, therefore, refuse the motion, without prejudice to the plaintiff to bring such appropriate proceedings as it may see proper."

The language of the statute referred to is as follows:

"If any execution shall have been issued against property or effects of a corporation, except a railway, or a religious, or a charitable, corporation, and there cannot be found any property whereon to levy such execution, then the execution may be issued against any of the stockholders to an extent equal to the amount of stock unpaid; but no execution shall issue against any stockholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion such court may order execution to issue accordingly, or the plaintiff in execution may proceed by action to charge the stockholders with the amount of his judgment, in accordance with the liability of the stockholders." Rev. St. Tex. art. 595.

We concur in the opinion of the judge of the circuit court that the plaintiff cannot proceed at law in the circuit court, under article 595 of the Texas Revised Statutes, to get an execution against one who has obtained his stock under the circumstances and in the manner that the defendant did in this case. We have had occasion, in a case just decided, *Grant v. Railroad Co.*, 54 Fed. Rep. 569, to examine carefully all the leading decisions of the United States supreme court bearing on this subject and cited and discussed by counsel in this case. It is often difficult to extract and cast into a formula the doctrines of numerous cases presenting so many various phases as arise in the subscription, issuance, and disposition of the stock of incorporated companies. It is perhaps not more difficult than it might prove hurtful. The same reasons which have for so many years justified the courts in declining to attempt an exact and general definition of fraud apply with hardly

less force to warn against any unnecessary announcement of a general doctrine deduced from adjudged cases in which alleged fraud enters as the vital issue. In this case there was no subscription of stock. The defendant did not contract to pay anything more for his stock than he did pay. He had property which the corporation wanted and needed, suitable for its use and ready for its use. In this case it is immaterial that he was a member, even a director, of the corporation to which he sold. His property, over and above all the charges on it, legal or equitable, was worth, net, \$55,000. He sold it for \$32,500, in cash, and \$45,000, in the bonds and stock of the corporation. Where is the proof that the stock and bonds were or are worth more than the property he gave for them, namely, \$22,500? The judge of the circuit court finds that the stock of the company had no value at the date of its issuance, and has had none since. He also finds that, of the issue of \$1,250,000 par value of bonds, \$500,000, that were to have been sold for specified purposes, "never could be sold," and are now with the depository. What has the defendant done to harm the plaintiff, or to render himself liable to it in the sum of \$13,500, or any other sum? Is this liability claimed because the issuance of the stocks or of the bonds or of both were wholly or in part fictitious issues? If so it certainly presents matters which the circuit court could not try on the motion made by the plaintiff in this cause. It is manifestly immaterial to inquire or determine whether in any case execution may, under section 595, be ordered against a stockholder in a street-railway corporation. The judgment of the circuit court is affirmed.

WOOD v. BRAXTON et al.

(Circuit Court, D. West Virginia. July 29, 1892.)

1. **EQUITY—JURISDICTION—ENJOINING THE CUTTING OF TIMBER.**

The jurisdiction of a court of equity to enjoin the cutting of timber from lands of which the title is in dispute is now fully established, irrespective of any question as to defendant's solvency or ability to respond in damages to an action at law.

2. **SAME—INJUNCTION—WHEN ISSUED.**

Where the timber growing upon a tract of land constitutes the chief element of value, an injunction will issue to restrain the cutting of such timber pending an appeal to the supreme court of the United States in another action involving the title, wherein the present defendant obtained judgment against the present plaintiff in the trial court.

3. **SAME.**

In such case, the fact that the time has elapsed in which an order could be made that the appeal should operate as a supersedeas will not prevent the awarding of the injunction, when it appears that at the time the decree appealed from was entered, and for long after, defendant manifested no purpose to cut timber from the lands.

4. **SAME.**

It appearing, however, that defendant has expended large sums of money in preparing mills, booms, and roads for getting at the timber, and has a large number of laborers in its employ, the injunction will be dissolved upon the giving of a bond in an amount to be determined by the court.

to indemnify the plaintiffs, and defendants will then be permitted to proceed with their business, upon rendering periodical accounts as the court may direct.

In Equity. Bill by Walter Wood against Tamlin Braxton and others to enjoin the cutting of timber upon certain lands pending an appeal from an action to determine the title as between the parties to the injunction. Injunction granted.

John J. Davis and H. M. Russell, for plaintiff.

John Brannon and W. Mollohan, for defendants.

GOFF, Circuit Judge. This is a motion for an injunction against the defendants restraining them from cutting and removing timber from the lands in the bill mentioned. The plaintiff alleges that he is the owner of a tract of land containing 100,000 acres, situated principally in Webster county, W. Va., known as the "McCleary Tract." He claims to be the sole and exclusive owner of the land, that he is in actual possession of part thereof, and that he is entitled to the possession of all. Copies of the deeds and title papers under which he claims, duly certified as such, are filed as exhibits, and made part of the record of this case. It is charged in the bill that the defendant "the West Virginia and Pittsburgh Railroad Company, its agents and employes, are committing great waste and doing irreparable injury to said land by cutting and removing valuable timber therefrom, without authority or right so to do." The plaintiff represents that certain other of the defendants "the Caperton heirs," who then claimed to be the owners of part of said land, instituted a proceeding in equity against the plaintiff and others, which involved the title to the land, and that such suit is now pending on appeal in the supreme court of the United States, and that defendants have unlawfully combined together and entered upon said land, and are removing the timber, which is alleged to be the substance and value of the land, while the appeal is pending and undecided. Plaintiff charges that if the timber is removed the land will be practically valueless, and that he will suffer irreparable injury, for which he has no adequate remedy at law.

The defendant "the West Virginia and Pittsburgh Railroad Company" answers the bill, and claims to be the owner of the "Caperton lands," to have a "good and valid title to the whole thereof, superior to all others." A copy of the record of said case now pending in the supreme court of the United States, entitled "Benjamin Rich, Walter Wood, Richard Wood, et al., Appellants, vs. Tamlin Braxton et al., Appellees. Appeal from the circuit court of the United States for the district of West Virginia," is filed with the answer, and made a part of this case as an exhibit. It appears that on the 8th day of August, 1881, Tamlin Braxton and others, the heirs at law of Allen T. Caperton, deceased, commenced a suit in the circuit court of Webster county, W. Va., against the plaintiff and others, claiming title in their bill to five parcels of land, as follows: A tract, 41,171½ acres, part of a tract of 153,-

900 acres granted to Robert Morris by patent dated March 12, 1797, 5,000 acres granted to Abner Cloud by patent dated March 10, 1795, 2,738 acres granted to A. C. & D. B. Layne by patent dated September 1, 1851, 9,330 acres granted to Austin Hollister by patent dated November 1, 1855, and 5,938 acres granted to said Hollister by patent dated February 1, 1858. The bill alleges that by conveyances regularly made from the grantees, and duly recorded, the title to about 50,000 acres of the Robert Morris grant, and to all of the other mentioned grants, was legally vested in fee in Allen T. Caperton prior to the year 1860, and that he was the owner thereof at the time of his death, and that the lands are located in the counties of Greenbriar, Nicholas, and Webster, in the state of West Virginia. That prior to the year 1868 the title of Caperton to the land had never been questioned, and that during that year Benjamin Rich, G. P. Shreeve, and Albert Owen, with intent to defraud Caperton of his lands, entered or caused to be entered on the land books of Webster county a number of large tracts of land, among others a tract of 100,000 acres, in the name of William McCleary, and also a tract of 58,500 acres in the name of Henry Banks. That they allowed said two tracts of land to be returned delinquent for the nonpayment of the taxes assessed thereon for the year 1868, and at a sale made by the sheriff of Webster county of the lands mentioned for the delinquent taxes due thereon (on the 24th day of September, 1869) they, Rich, Shreeve, and Owen, became the joint purchasers thereof for said taxes, and that deeds for the same were made to them. That by various deeds certain portions of the lands, and certain interests therein, were conveyed to different persons, and that the defendants in that suit (the present plaintiff, Walter Wood, being one of them) claimed to have the legal title to the same, but that in fact and in law all of their deeds were inoperative, null and void, because obtained by fraud and collusion, and because of certain defects in the execution thereof, and in connection with the tax sale, which were set forth in said bill. It is not necessary, for the purposes of this motion, to examine all of the deeds, nor refer to the different persons who have claimed an interest in the lands by virtue thereof, nor mention either the reasons assigned why the deeds are void or the defense made relative thereto. This court, at this time, is not to determine the issues joined in that controversy. But it should be noted here that it is charged in the bill filed therein that the 100,000-acre tract and the 58,500-acre tract mentioned cover and include, as parts thereof, the whole of the lands as claimed by Allen T. Caperton in his lifetime, and that a portion thereof was in the possession of two of the defendants to that suit, who claimed it under contracts made with Rich and those claiming under him, and that the prayer of said bill was that the deeds to Rich and others under the tax sale, and the subsequent deeds based thereon, should be held and decreed inoperative, null and void, and that the title of the heirs of Caperton in and to the lands be quieted. On the 3d day of April, 1882, the suit was, on petition of Edward R. Wood and Walter Wood, under the provisions of the act of congress in such proceedings provided, re-

moved from the circuit court of Webster county, W. Va., to the circuit court of the United States for the district of West Virginia at Parkersburg, where it was docketed on the 12th day June, 1882. Several amended and supplemental bills were, with leave of the court, filed. Much testimony was taken. The case was finally matured, and on the 27th day of September, 1889, having then been pending over eight years, a decree was passed by this court, Hon. John J. Jackson, district judge, presiding, in and by which the deeds complained of (the same being the conveyances under which the plaintiff in this proceeding claims title) were each and all of them set aside as inoperative, fraudulent, null and void, and as clouds upon the title of the heirs of Allen T. Caperton to said land. 47 Fed. Rep. 178. From this decree, upon motion of Rich, Wood, and others, defendants in the suit, an appeal was awarded, and is now pending in the supreme court of the United States.

The jurisdiction of courts of equity by way of injunction to restrain waste, to prevent the cutting of timber, and the mining of minerals, is one of comparatively recent origin, but it is now fully recognized and well established in this country as well as in England. A leading case, in which the question of equity jurisdiction in such controversies was fully considered and previous authorities discussed, is that of *Jerome v. Ross*, 7 Johns. Ch. 315. This is the last decree rendered by that illustrious chancellor, whose able, clear, and erudite opinions, not only charm, but instruct and convince us,—Kent,—and it is replete with the wisdom of the English and American decisions on that question. See, also, *Anderson v. Harney*, 10 Grat. 386; *McMillan v. Ferrell*, 7 W. Va. 223; *Moore v. Ferrell*, 1 Ga. 7; *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. Rep. 565.

If the nature of the injury complained of goes to the substance of the estate, thereby producing irreparable mischief, equity will interfere in limine, and not require the party to resort to an action at law, and this independent of the question of the insolvency of the defendant. The chief value of the land in the bill mentioned is charged to be in its timber, and this the defendants, it is conceded, have made extensive arrangements to remove, having expended many thousands of dollars for that purpose. This removal goes to the very substance of the inheritance, to the destruction of that which is the main element of value to it. The fact that the value of timber can be estimated, that it can be determined by the thousand feet, or by the car load, does not deprive a court of equity of the right to interfere by way of injunction, in cases where it is being cut and removed or destroyed, and where the ownership is in controversy. The products of mines and forests have a value that can generally be fixed, yet it was in prevention of trespasses to property of that character that the jurisdiction in question had its origin, and is now most frequently exercised. While it is true that, when this jurisdiction for equity was first claimed, "Lord Thurlow hesitated" and "Lord Eldon doubted," it is now well determined—the decisions coming from courts of such character as to command our respect and of such grade as to compel our approval—that the jurisdiction not only exists, but that it is absolutely essential for the preservation of right and the suppression of wrong.

What force, if any, shall the decree appealed from have, relative to this motion for an injunction? This court is not now to express an opinion as to the validity of the plaintiff's claim to the land in question, nor as to the strength of the defendant's title thereto, nor will the fact that the court in the case now pending on appeal has decreed against the present plaintiff, holding his title papers void, prevent this court from taking such action as will protect the rights of said plaintiff in and to the property in controversy in the event it shall be held that the decree so appealed from is erroneous. Had this motion been made before the decree was passed, would it, on the facts as now presented, pending said suit, have been granted? I think so. If the writ of injunction had issued before said decree was entered, and had been in force at the time thereof, it would likely have been there dissolved in express terms, and greater reason would have existed for providing that the appeal then taken should have had the force and effect of a supersedeas, the absence of which is relied on in the answer filed in this case, and was commented on in the argument of counsel in connection with this motion. It must be kept in mind that the situation as to the property in question is very different now from what it was when the decree was entered by Judge Jackson. At that time no one was attempting to remove the timber on said land, or making arrangements to do so, by constructing roads and mills, and the point made by the defendant, the "West Virginia and Pittsburgh Railroad Company," that this court should not grant the injunction prayed for, because the case appealed is still pending in the supreme court of the United States, and the time has elapsed in which an order could be made that the appeal should operate as a supersedeas, is without force when we consider the changed condition of affairs, brought about by the defendant railroad company, whose answer admits that the lands in controversy were conveyed to it after the rendition of said decree, of which it was advised when it purchased, and that it commenced to construct the roads, booms, and mills mentioned in the bill, and to remove the timber complained of, some time after it so purchased the land. These facts materially change the situation. Had they existed when the appeal was taken, it would doubtless have been awarded to operate as a supersedeas, and as they now exist for the first time an injunction is asked for. It is not for this court to consider the questions raised by the appeal; that is for the supreme court of the United States.

It is for this court to consider the facts as presented on the hearing of this motion; and, as they have arisen since the appeal was granted, the supreme court, as to them, would not have jurisdiction by virtue of the appeal. This suit is simply to restrain the commission of waste by the defendants pending the appeal, and the preventive writ of injunction is asked for to preserve the property from destruction until a decision of the questions involved is made by the supreme court of the United States. That decision will settle the title to the property in controversy, and determine the rights of all the parties hereto therein. The writ will issue; the injunction will be granted, enjoining and restraining the defendants the "West
v.54F.no.6—64

Virginia and Pittsburgh Railroad Company," Daniel C. Flynn, and Henry M. Dawson, and each of them, their and each of their agents, from cutting and removing timber from the tract of land described in the bill as the "McCleary Land," until the further order of this court; the plaintiffs to give bond with good and approved security, (conditioned as required by law, in a penalty yet to be determined by the court,) before the writ of injunction shall issue.

While the court will thus protect the interest of the plaintiff pending the appeal, it cannot be indifferent to the claims of the defendants to the property in controversy, and it is evident it will work great hardship to the defendants to require them to cease the work now partially completed, and to stop the use of the mills and booms now constructed, and now being utilized in removing the timber. If the court can protect the rights of all the parties to this controversy, and at the same time not take such action as will require the dismissal from employment of the large number of men now working for defendants on the land in dispute, and the nonuse and injury to the valuable and expensive machinery connected with the improvements, it should do so. In my opinion, this can be done, and I may add that I think it is peculiarly a case where it should be done. The injunction against the defendants, when awarded, will remain in force and effect, unless they, or either of them, or some one for them, shall execute a bond with good and approved security, conditioned as required by law and the rules of this court, in a penalty yet to be determined by the court. When such bond shall have been executed, approved by the court, and filed with the clerk, the operation and effect of the injunction will be suspended, and the defendants be authorized and permitted to cut and remove the timber from the land in controversy, but they will be required to report at stated times to the court the quantity and character of the timber so cut and removed, in order that an accurate account of the same may be kept, and the interests of all parties to the pending controversy protected, so that such decree as may be proper can be entered after the appeal now pending shall have been determined.

THE AMERICAN EAGLE.

JONES v. THE AMERICAN EAGLE.

(District Court, N. D. Ohio, E. D. March 17, 1893.)

No. 1,998.

1. TOWAGE—LIABILITY OF TUG.

Where a voluntary association of tug owners, organized merely for the purpose of preventing ruinous competition, is accustomed to receive orders for tugs, and a tug is sent in obedience to such an order, the contract of towage is with the tug, and not with the association.

2. SAME—NEGLIGENCE—OWNER'S RISK.

The fact that, by the contract, certain towage is to be at the risk of the tow owner, does not excuse the tug from liability for negligence. *The Syracuse*, 12 Wall. 171, followed.

3. SAME—BURDEN OF PROOF.

The burden of proving that a contract of towage was at the owner's risk is on the tug.

4. SAME—AGENCY.

A purchaser of cedar ties sent two scows to be loaded with them at the seller's dock, who was to notify a voluntary association of tug owners that towage was wanted. A tug was accordingly sent by the association, but found the scow badly loaded, and refused to tow them except at the owner's risk. *Held*, that the seller's dock man had no authority to contract for their towage at the owner's risk, so as to excuse the tug from liability.

5. SAME—ABANDONMENT OF TOW—NEGLIGENCE—EVIDENCE.

The tug proceeded with the scows down the Cuyahoga river to Lake Erie, but, finding a heavy swell on the lake, thought it unsafe to venture out, and thereupon returned up the river, tied the scows up to a dock, and left them without lights or a watchman. *Held*, that the tug was liable for damage resulting from the scows being carried away from their moorings, whether caused by a defective rope, insecure tying, or other causes, unless the owner had notice of and consented to the arrangement.

6. SAME—BURDEN OF PROOF.

The burden of proof was on the tug to show that the owner of the scows had been notified of the disposition made of them, and had consented to it.

7. SAME—LOCAL USAGE.

A local custom of tying tows up to the river bank under such circumstances, and sending notice to the owner, has no foundation in law, and will not excuse the tug from its liability.

In Admiralty. Libel by Wyndham C. Jones against the tug American Eagle on a contract of towage. Decree for libellant.

Lee & Tilden, for libellant.

H. D. Goulder, for respondent.

RICKS, District Judge. This is a libel filed by Wyndham C. Jones to recover for damages to scows, and for the loss of a lot of cedar ties loaded upon two scows, which it is alleged the respondent contracted to tow from the docks of Norris & Co., in the Cuyahoga river, out to the west shore of the lake within the breakwater west of the piers, on or about the 20th of August, 1890. The facts are that the libellant was the owner of the ties referred to, which he desired to have transported for some work being done on the west shore of the lake at the point named. He had purchased these ties from Norris & Co., and had sent there, to be loaded, two scows of his own build and construction. When loaded, Norris & Co. were to notify the Vessel Owners' Tug Line, and they were to send a tug, and have them transported to the point named. The scows were loaded, and on or about the date aforesaid Capt. Collier was notified by Norris & Co. that the scows were ready to be towed out. Thereupon the clerk of said association signaled the American Eagle, and she went to Norris & Co.'s docks, and undertook to tow the scows to their destination. The captain of the tug claims that when he reached Norris & Co.'s dock he saw the scows were overloaded, and that the ties were improperly piled, and that the tow was not in proper shape for safe transportation, and so notified the foreman at that dock.

Thereupon he claims the foreman told him to proceed, take the scows, and do the best he could with them. The captain of the tug refused to take them, except at the owner's risk, and thereupon he says the foreman of the dock told him he might so take them, and under those conditions he assumed to tow the scows out. He fastened them to his tug, and with some difficulty proceeded as far as the mouth of the river, when he found a dead swell on the lake,—too much sea to enable him to safely tow the scows to the point designated,—and thereupon he returned up the river, tied the scows up at a point on the dock near the mouth of the Old river, and, proceeding further up the river, notified the clerk at the Vessel Owners' Tug Association office what he had done, who in turn, it is claimed, notified the consignor. He does not claim that he gave any further notice, or paid any further attention to the scows. He admits he tied them up without lights, and without any one to watch them, but claims he put them at a safe point in the river, where they were not liable to be disturbed by passing vessels, or injured from that or other causes. The defense is—First, that there was no contractual relation between the libelant and the tug, and therefore the tug cannot be held liable under the contract for towage; second, that the towage was undertaken at the owner's risk; third, that, having found that he could not safely tow the scows to their destination, he fastened them securely in the river at the point above stated; that the libelant was notified of the place at which they were tied, and acquiesced in this disposition of the scows by the tug, and agreed that they might remain there at the owner's risk. These are substantially the grounds of defense relied upon.

Let us first consider the first defense relied on. The answer avers that the Vessel Owners' Tug Association is a voluntary organization made up of the owners of the different tugs belonging thereto, and doing service in the Cuyahoga river and in the harbor adjacent, and that the contract in this case, whatever it may have been, was made with the Vessel Owners' Tug Association, and not with the tug American Eagle. In support of this averment in the answer, no written contract of the association or articles of incorporation were offered, and no evidence of the kind to show the exact character of this Vessel Owners' Tug Association was produced. On the contrary, it appears from the evidence of Capt. Dahlke of the tug American Eagle that, while the tugs comprising that association pooled their earnings, each tug was liable for its own negligence, and that he had made independent contracts of towage utterly regardless of the association. It seems from the evidence before me that this is a voluntary association, organized for the purpose of preventing ruinous competition among the different tugs in securing vessels to tow, and to prevent them from that strife and such useless struggles as are frequently indulged in by rival tugs, each seeking to secure all the towing possible. In this view of the testimony I have no hesitation in finding that the contract of towage in this case was between the libelant and the tug, and that, if the loss was the result of the negligence of the tug, she is responsible.

We next proceed to a consideration of the second defense relied

upon, to wit, that this contract of towage was undertaken at the owner's risk. Conceding, for the purposes of the argument, that the foreman of the dock at Norris & Co.'s had authority to make such a contract for the libelant,—a point which cannot be maintained,—it nevertheless is a well-settled principle of law that such a contract does not release the tug from any loss resulting from its own negligence. In the case of *The Syracuse*, 12 Wall. 171, Mr. Justice Davis says:

"It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that by special agreement a canal boat was being towed at her own risk, nevertheless the steamer is liable if, through the negligence of those in charge of her, the canal boat has suffered loss. Although a policy of the law has not imposed on a towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management the exercise of reasonable care, caution, and maritime skill; and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences. It is admitted in argument, and proved by evidence, that the canal boat was not to blame; and the query, therefore, is, was the steamer equally without fault?"

In that case there was a written contract between the canal boat and the steamer, by which the boat was towed "at the risk of her master and owners,"—that is to say, under a contract on the part of the libelant that he would bear the risks of navigation, provided the steamer which furnished the propulsive power was navigated with ordinary care and skill. That case seems to be conclusive.

But, even if there were any doubt as to this principle of law, the facts in the case do not make out a contract such as the respondent relies upon to excuse it from the liability in this case. The foreman of the dock at Norris & Co.'s yard had no authority to bind the libelant in any such contract. The burden of proof on this point would be upon the captain of the tug, and he utterly fails to establish his claim by the preponderance of evidence required, even conceding the authority of the foreman of the dock. The ties were sold to the libelant by Norris & Co. The title to the ties passed when the scows were loaded and delivered to the tug, and the foreman of the dock was in no respect the agent of the libelant. He cannot even be claimed to be the agent of the consignor with power to bind the consignee by any such contract.

The only remaining question, therefore, is whether the tug discharged its duty under the contract of towage, assumed by undertaking to deliver these scows under the facts stated. Conceding that the captain was the better and the proper judge of whether there was such a dead swell on the lake as made it dangerous for him to undertake to tow the scows out to their place of destination, and assuming that his judgment in this respect is conclusive upon the parties, the question yet remains whether he did his duty in tying the scows up on the river bank at the point named, and under the circumstances heretofore stated, after determining that he could not safely tow them for the reasons aforesaid. There can be no question but that the scows were in his charge from the time he took them from the Norris dock. His contract was to de-

liver them safely at their place of destination, or otherwise account for them to the satisfaction of the owner. It has been claimed that, according to the custom of tug men in this harbor under such circumstances as we have now before us, it was proper and usual for the tug to tie them up to the river bank, and send notice to the consignor or owner where they were. If any such custom exists, it has no foundation in law. A tug cannot be discharged of its responsibility in that way. If the libelant had been promptly notified, at the time, that the tug could not safely tow these scows to their destination, and had consented that the tug might tie them up at some dock on the river and leave them there without a watchman or lights, and had assumed all risk of damage from such exposure, the tug would of course have been legally released from all obligation under its contract. But no such proof of notice or waiver of risk on the part of the libelant has been shown. On the contrary, it appears that, while the scows were tied up in what is claimed to have been a safe place along the river bank, they were left without lights and without a watchman. I think the respondent has failed to show by sufficient evidence such notice to the libelant as either enabled him to look out himself for their protection, or to make any arrangements with the tug to protect them.

I think the principles announced by Judge Nixon in the case of *Cokeley v. The Snap*, 24 Fed. Rep. 504, apply to this case. In that case, a steamboat had agreed to transport a canal boat from Hoboken, N. J., to Spuyten Duyvil creek. When the steamer reached the mouth of the creek she found an accumulation of ice on the eastern shore of the river. The western, or New Jersey, shore was comparatively free from ice, and the master of the tug towed the canal boat to the western shore; but, not finding a safe landing place, proceeded onward to Shadyside. The canal boat was deeply loaded, drawing about six and a half feet of water. The tide was half ebb, and there was only a sufficient depth of water to drop the boat at the river end of one of the piers at Shadyside. She was left there against the remonstrance of the captain of the canal boat, as the libelants allege, and with his passive assent, as the respondents insist, but with the promise from the captain of the tug that he would return the next morning and remove her to a more safe landing place. He did not, however, return. The boat was suffered to remain there during all of the next day and night. On the afternoon of the succeeding day the wind changed to the east, driving the floating ice from the eastern to the western shore of the river. She was caught by the ice and caused to sink, thus inflicting the damage to the boat of which the libelants complain. Upon this state of facts, Judge Nixon held:

"The master of the tug undertook a certain service, to wit, to tow the boat to the landing in Spuyten Duyvil creek. He was prevented by the ice from completing the trip, and hence was excusable for its nonperformance. But his duty under the contract did not end there. He was still bound to take reasonable care of the boat and her cargo. He might have returned with her to Hoboken on the same afternoon; but he states he was afraid to undertake the trip, there being a strong head wind, and the boat being heavily laden, old, and weak. Then he could have remained with her dur-

ing the night, ready to proceed the next morning to this destination, and to render any aid which changes in the wind or weather might require. He did neither, but left her at the end of the pier at Shadyside, and towed another boat lying there back to New York. He assumed the consequences of such an abandonment, and the damage was caused by a change of wind on the next day. He undertook such risk, and must be held responsible, as I find no proof which shows that the canal boat in any way contributed to the damages."

Apply the principles here announced to the case before us. When the respondent found she could not safely tow the scows to their destination, it was her duty either to notify the libelant and return the scows to his possession at Norris' dock or elsewhere, or it was her duty to tie them up safely in some secure place, and protect them until she could tow them out to the point called for by the contract. Nothing short of this could release her from the performance of her duty under the towage contract.

The contention that the libelant was notified as to where these scows were tied up, and that he was satisfied therewith, and that thereby the tug was discharged, is not sustained by the proof. The burden on this point is with the tug. It has not been met by the degree of proof required.

With these views of the law, and under the findings of fact as made, it is not necessary to consider the other points insisted upon in the argument. The question of whether the scows were properly loaded; and whether they were carried away from their mooring by defective rope, by not being tied up securely, or from having been loosened by other causes, it is not necessary now to discuss or consider. A decree will therefore be entered for the libelant, finding the respondent guilty of negligence in the respects indicated in this opinion, and a reference to a master to assess the damages.

THE ST. JOHN.

DELAHOUSAYE v. ADVANCE COAL CO.

(Circuit Court of Appeals, Fifth Circuit. February 20, 1893.)

No. 59.

1. COLLISION—BARGE AT LANDING—LIGHTS.

A coal barge, 175 feet long, 26 or 27 feet wide, and 9 feet deep, was made fast about 10 or 15 feet from the bank of the Palo Alto plantation landing on Bayou Laforche, La., where the bayou is about 200 feet wide, with sloping banks, deep water on the side where the barge lay, and shoal water on the other side. *Held*, that the barge was subject to rule 12, Rev. St. § 4233, and bound, by the provisions adopted by the board of supervising inspectors, January 19, 1881, to "carry one bright white light forward, not less than six feet above the rail or deck."

2. SAME—VESSELS IN MOTION AND AT REST.

A steamer going up the bayou was making at most five miles an hour. There were but few meeting or passing vessels, and no anticipated obstacles. The night was hazy, dark, and rainy. The deck of the barge was but two feet above water, and there was no light displayed. The steamer saw the barge at a distance of about 175 feet, and immediately, but in vain, used every effort to avoid a collision. *Held*, that the steamer was not in fault.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

In Admiralty. Libel by the Advance Coal Company against the steamboat St. John, L. P. Delahousaye and others, owners, for damages for a collision. The district court entered a decree for libellant, and the owners of the steamer appealed. Reversed.

Statement by LOCKE, District Judge:

On the 10th of January, 1891, a coal barge known as "Advance Coal Co., No. 68," 175 feet long, 26 or 27 feet wide, and 9 feet deep, laden with some over 9,000 barrels of coal, was made fast along the bank at the landing place at Palo Alto plantation, on Bayou Lafourche, La. At about 1 o'clock the morning of the 11th the steamer St. John, a stern-wheel river boat, about 175 or 180 feet long, and including guards, 58 feet wide, was coming up the bayou, and in passing either struck her or was struck by her, breaking her adrift. The barge floated down the bayou about a mile or a mile and a half, when another steamer, the Lafourche, pushed her ashore, and the men who had been in charge of her, and followed her down the bank, made her fast. Early the next morning she was found sunk where tied, one side of her slightly above the surface of the water, but mostly submerged. Much of the coal was taken out, but with additional labor and expense, which, together with the loss of the boat and a portion of the coal, caused a damage to the owners, for which suit was brought by a libel in admiralty against the steamer St. John. Upon a hearing the steamer was found to be in fault, and judgment for \$1,969.28 given against her, from which an appeal has been taken to this court.

Wm. Wirt Howe and S. S. Prentiss, for appellants.

W. S. Benedict, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, (after stating the facts.) In this, as in most cases of alleged collision, the important questions are those of fact, which can only be satisfactorily determined by a careful examination of a large mass of testimony so conflicting that the best that can be done is to determine by a preponderance of evidence the probability of the truth of one or the other state of facts relied upon by the parties.

The one vessel was stationary, tied to the bank, with no motor power; the other, a steamboat under way; and the presumption of the fault of the moving vessel must be overcome, if at all, by direct and positive proof which changes this presumption. The uncontradicted facts are that the Bayou Lafourche at the place where the coal barge was lying was then about 200 feet in width, with sloping banks; the deeper water being on the northerly side, where the coal barge was lying, with a shelving bank or ridge of shoal water on the other side. The depth of water at Donaldsonville, 2 miles above, was, by gauge, 12½ feet; at Palo Alto a little less, probably about 11.9 or 12 feet. The coal barge had nearly perpendicular sides, with no curvature of bilge, with a depth of about 7 feet below the water line. This would necessarily prevent a very near approach to the bank, and it may be safely considered that the statement of the mate of the tug that towed and made her fast there, that the boat lay some 10 or 15 feet from the

bank, was probably correct. This is the most favorable statement for the libelant that is found in regard to the original location of the barge which can be relied upon. Mr. Darton, civil engineer in charge of the dredging works of the bayou, thinks, in order to get 7 feet, you would have to go out from the bank 25 feet; but, accepting the statement of the party that made the barge fast, it must have been projecting not far from 40 feet into the channel, where the entire width was about 200 feet, with the deepest water on the side where she was lying. This location would unquestionably bring the boat within the provisions of rule 12 of section 4233 of the Revised Statutes, which provides that "coal boats * * * or other water craft navigating any river by hand power, horse power, sail, or the current of the river, or which shall be anchored or moored in or near the channel or fair way of any * * * river, shall carry one or more white lights, which shall be placed in such manner as shall be prescribed by the board of supervising inspectors of steam vessels."

At a meeting of the board of supervising inspectors of steam vessels, January 19, 1881, it was provided that boats or vessels of this class "shall carry one bright white light forward, not less than six feet above the rail or deck;" and this was the law at the time. This boat was unquestionably a coal boat moored in or so near the channel of a river as to come under the requirements of this law. This brings us to the important and difficult question of this case whether or not the boat at the time of the alleged collision was complying with the law and exhibiting any light. There is no evidence that the law was complied with in the location of any light testified to, but six of the negroes in charge of the boat—the coal wheelers who were to discharge the coal, and in whose charge the boat was left after having been tied up by the officers of the tug who brought her there—state in their testimony that there was a clear white light on the top of the check post in the middle of the boat, about two or three feet above the rail; but this is so directly contradicted by a much larger number of apparently credible witnesses that it becomes an important and difficult question to determine.

This testimony, as in all collision cases, has to be considered in view of all the facts and circumstances surrounding the occasion, and the truth or falsity of the statements estimated and measured by all the lights so obtained. Were not the parties testifying to the existence of the light on the boat positively contradicted, the apparent recklessness of their swearing in regard to other matters would awaken a question as to the reliability of their statements. Williams, the foreman who had charge of the gang, would not admit that he left the vicinity of the boat at all; but declared that, from the time of the landing, with the exception of a few moments before dark, when he went to the store to get some provisions, he was walking the bank in the rain and mud, on the lookout, the entire night; that he did not even go into the house for his supper, but had it brought to him. He never went to sleep at all; walked around on the bank all the time. Another witness claimed that

he also was walking on the bank, carrying a lantern continuously. Two more stated that they were on the coal boat, getting coal, at the time the steamer came along; and only two out of the six admitted that they had been in the pump house, where they had a fire, and cooked and had their supper, and were to sleep that night.

When we consider that these were laboring men, who had been hard at work until dark, getting up the runs, in the rain and wet, and the character of the night, and that there was not the slightest necessity for their remaining out on watch if there had been a light on the boat, the improbability of their story is apparent. But this inconsistency sinks into insignificance when the contradictory evidence is examined. It appears from the testimony of one of the witnesses for the claimant that Wash. Johnson, one of the libelant's witnesses, who testifies that he put the light on the post, and testifies also very fully about the facts of the collision, and how rapidly the boat was filling, and what the mate of the Lafourche said about her condition when she was checked and pushed into the bank, was not there at all that night, but had left at about 6 that evening, and was asleep in the house of another witness, some two miles distant. Were this the only point upon which Johnson was contradicted, it might be but one witness contradicting another, and leave a doubt in the mind; but he is so positively contradicted in other matters also that we must believe that he was not there, and knew nothing about it.

James Holmes, another witness, testifies that while at the store where the foreman, Williams, was, between 8 and 9 that evening, he heard some one tell Williams that he had better go down and have a light put out on the boat, and that Williams told one of the men to go, but that he replied that there was but one lamp that had any oil in it. Williams told him to go and put that up, but the man did not go, but staid there. As to the positive testimony regarding the absence of a light, John Jackson, a resident farmer, living within a short distance of the boat, went out about 11 o'clock to see about some carts of his going by, and states positively that he saw the coal boat, and there was no light on her, nor any one on the bank or around there. Adrian Joseph passed along the levee between 11 and 12, and says the same.

Bryant, cabin watchman; Walker, forecastle lookout; Williams, captain of the watch; Max. Blanchard, pilot; Loret, clerk; Gatechair, second mate; P. Blanchard, mate; Arthur Blanchard, engineer; and Mr. Darton, passenger on the St. John,—all state positively that there was no light on the coal boat when they approached her. Several of these were so situated that they must have seen a light if there was one there at first, and all of them were there very soon after the blowing of the whistle and ringing of the backing bell. The witnesses for libelant who testify to a light having been on the boat at first state it was still burning as she floated down the bayou, but Barre, pilot on the Lafourche, the steamer that met and pushed the boat into the bank at Williams' request, says there was no light, and that he said to Williams, "Why is it that you had no light on the barge?" and that

Williams made no answer. Bryant, watchman on the St. John, says that after the collision three men came down to the bank, and one said, "You see what it is not to have a light on your barge." Taking the entire testimony regarding the presence of a light, we are satisfied that the preponderance is greatly in favor of there being none on the boat. There are but six witnesses who testify to the presence of a light, and one of them is satisfactorily shown not to have been present, or known anything about it; while there are twelve, nearly all river men, who are accustomed to look out for lights as a part of their business, and who must necessarily have seen one had there been one, who state there was none.

But finding there was no light only finds that the coal boat was at fault, but there still remains the question whether there may not have been fault on the part of the steamer. Is there any presumption of negligence or lack of ordinary care on her part in not seeing the barge before so near an approach that it was impossible to completely check the headway before striking her? The position taken by claimants that the coal boat was lying out into the stream 75 feet, and was not struck by the steamer, but that she swung against the steamer as she approached, and that the injury was done by the Lafourche, we do not think is borne out by the evidence. It will be seen that, according to the testimony of the witnesses on board the St. John who did not come out on deck until after they heard her backing bell, although that was the position of the barge then, swung out nearly to the middle of the stream, yet as soon as the steamer backed the boat straightened herself by the current so that the steamer could get by. If the boat was straightened by the current, and swung in nearer to the bank as soon as the steamer backed away, there must have been some other force than the current to have thrown her so across the bayou before the steamer's approach. The influence of the steamer which preceded her was one of suction, a drawing of the water towards her, down the stream, and not propulsion or pushing it forward, and could not have had the effect of swinging the barge out into the bayou. We are therefore satisfied that the steamer struck the barge, and threw her partially across the stream, where she was seen by Darton, but that she had so reduced her speed by backing before the striking that the blow was so slight as to cause no shock perceptible to those on board, yet sufficiently severe to break the lower line by which she was made fast, crack or split the planks of the end, producing a small leak, and push her out into the stream where she was. The backing of the steamer permitted her to swing back with the current, carrying away the rotten deadman or buried log, and letting her go adrift. The only two points upon which the steamer could be found in fault would be an undue rate of speed, or an insufficient lookout and neglect to see the barge in time to prevent the collision. The barge was, by the neglect of those in charge of her, unquestionably in fault. Was the steamer so also? The rule is imperative that a steamer shall keep out of the way of a vessel at anchor, but it is none the less imperative that the boat at anchor shall display a light. If she fails in this, and a collision occurs, she must bear the loss,

unless it appears that with due care she could have been seen and avoided. In proving fault in the steamer in either of the points stated, in the absence of a light, the burden of proof is upon the libellant. The evidence upon the question of speed is very meagre. The pilot of the St. John says they were going against the current about four or four and a half miles an hour. The mate seems to be utterly and unreasonably ignorant about the speed they were making, but says they were going under a slow bell. The second mate says they were going under a slow bell, but he couldn't tell what speed they were making; sometimes they did not go three miles per hour. Examining the testimony in regard to the length of time they were between landings and the speed testified to, we fail to find any evidence showing that she was making at the most more than four and a half or five miles an hour, which we do not consider, under the circumstances, an unreasonable rate. She was in an open stream, with very few meeting or passing vessels, and no anticipated obstacles. The same rules that would apply to a crowded harbor do not apply here.

Is the fact that the barge was not seen before, notwithstanding the absence of a light, presumptive evidence of negligence on the part of the officers or crew of the steamer? The night was dark, hazy and drizzly. It had been raining. The barge or coal boat was but about 2 feet above the surface of the water, with no masts, spars, sails, or upper work, or anything light in color which would be easily visible in the dark, and we cannot consider that the fact that it was not seen until it was within a distance of 175 or 180 feet would show lack of care or diligence. It is testified to that the lookout and pilot were attending to their duties, and they had the right to assume that any vessel or boat in the stream would make itself known by a light. The Scotia, 14 Wall. 181. They were naturally and properly on the lookout for lights, and not low, black objects on the surface of the water; and it does not appear that they could with due diligence have discovered it before they did.

It appears that every precaution to avert the disaster was taken as soon as the discovery was made. The backing bell was rung, and the wheel reversed, so that the headway was stopped, and the blow very slight; yet it was sufficient to crack or split the planks, being unsupported as they were by any backing of coal or any other material, and part the rope and swing her from her place. Unquestionably the damage and leak was so slight at first that with reasonable pumping she would have been kept afloat. It was not noticed or seen at all when she was put ashore below, either by those in charge or the officers of the Lafourche. We fail to find any fault in the steamer on account of unreasonable speed or lack of lookout, and consider the absence of a light was the entire cause of the disaster.

It is ordered that the cause be remanded to the court below, with instructions to dismiss the libel, with costs.

THE JONTY JENKS.

(District Court, N. D. New York. March 16, 1893.)

1. TOWAGE—LIABILITY OF TUG FOR NEGLIGENCE—CONTRACT EXEMPTION.

A stipulation in a towage contract that the tow shall assume all the responsibility does not relieve the tug from liability for damages caused by want of reasonable care and skill in navigation.

2. SAME—NEGLIGENCE OF TUG—WHAT CONSTITUTES.

A tug, with a canal boat lashed to her port side, while passing out of the Albany canal basin into the Hudson river ran the boat upon a dilapidated pier at the upper side of the opening into the river. At the time there was a freshet, but another boat had been safely towed through by the tug shortly before. There were 40 feet of water between the tug and the lower pier, and passing through the middle of the cut there would have been 20 feet of clear water on either side. *Held*, that the tug was in fault.

3. SAME—ABSENCE OF HELMSMAN.

The canal boat also was in fault in failing to have the helmsman at his post, he having been told how to steer, and instructed that the boat could not be properly handled without him, and it appearing that, if at his post, he might have prevented or lessened the injury.

4. SAME—NEGLIGENCE OF TOW.

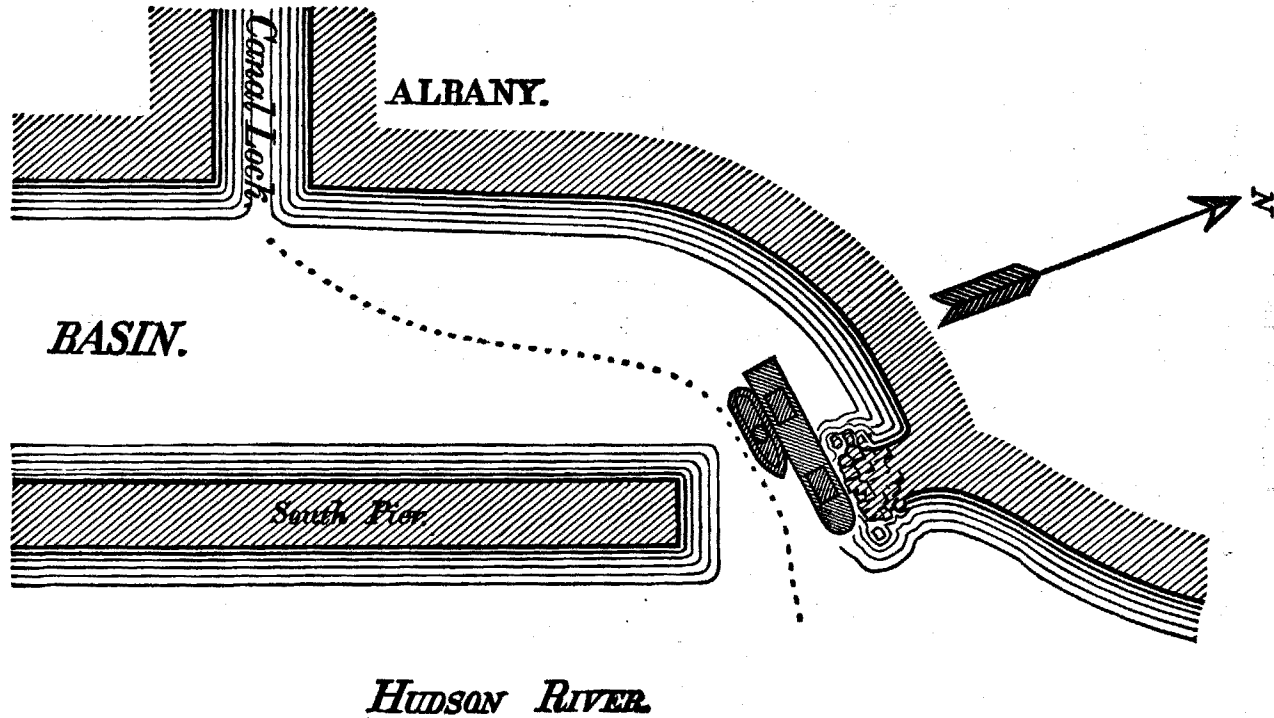
The fact that a canal boat is old, there being no sufficient proof that she is unseaworthy, does not relieve a tug from liability for negligently running her against a pier.

In Admiralty. Libel by the owner of the canal boat J. A. Fassett against the steam tug Jonty Jenks to recover for damages occasioned by careless towing. Decree for half damages and costs to the canal boat.

J. A. Hyland, for libelant.

W. Frothingham, for claimant.

COXE, District Judge. The libelant, as owner of the canal boat J. A. Fassett, brings this action against the steam tug Jonty Jenks to recover for damages to the canal boat occasioned by the careless towing of the tug. On the 4th of November, 1889, the canal boat loaded with lumber was lying at the Albany basin lock. The tug undertook to tow her to a point below the lower railroad bridge at Albany, about a mile below the lock. In order to reach the Hudson river from the Erie canal it is necessary to pass through the upper end of the Albany basin and out between two piers, which are about 70 feet apart. The tug having lashed the canal boat to her port side started on her journey, but in passing through the cut she ran the port bow of the canal boat upon the south end of the northwest pier, causing the injury complained of. The pier or dock at the place of collision has been allowed to go to decay and is in a dilapidated condition. The situation can be fully appreciated by an examination of the following diagram:



It is unnecessary to determine whether or not the towage service was undertaken upon the express agreement that the owner of the canal boat should assume the entire responsibility, for such an agreement if made would not exempt the tug from proper and reasonable skill and care in her navigation. The Princeton, 3 Blatchf. 54; The Syracuse, 6 Blatchf. 2; The Brooklyn, 2 Ben. 547. The task undertaken by the Jenks was not a difficult one. Notwithstanding the fact that there was a freshet at the time the exercise of ordinary care would have enabled her to accomplish it successfully. Indeed, the companion boat of the Fassett had been safely towed out by the Jenks only a short time before. The space between the piers was over twice the combined width of the tug and canal boat and the court is of the opinion that it was unskillful seamanship to run the canal boat upon the stones of the upper pier when there was 40 feet of water between the tug and the lower pier. If the tug had kept the middle of the cut there would have been 20 feet of clear water on either side. Failure to do this was negligence. The Lady Pike, 21 Wall. 1.

The canal boat is charged with negligence—First, because she was improperly loaded; second, because she was old; and, third, because the helmsman was not at his post.

It is thought that there is a failure to prove that the improper loading, assuming the fact to exist, contributed to the accident.

Regarding the unseaworthiness of the boat, the testimony of the man who repaired her is to the effect that her timbers were sound. She had come from Buffalo with entire safety and there is insufficient evidence to charge her with being unseaworthy. Tugs are not privileged to run canal boats onto rocks because they are old.

As to the other point—the negligence of the helmsman—the testimony, though not entirely clear, is much more satisfactory. The weight of evidence establishes the proposition that he was absent from his post at the time when he might have prevented the accident, or, at least, lessened the force of the blow. He was given to understand that the boat could not be successfully maneuvered without his co-operation, and explicit instructions as to how he should handle his helm were given him. The master of the tug testified as follows:

“Question. Did you see the boat roll? Answer. The boat rolled and came over to me. Q. About how long before this happened was it that you gave the order to put the helm astarboard? A. I could not say; it was only a short time. Q. Immediately afterwards did you see this man who had been at the stick? A. Yes, sir; I saw him right abreast of my pilot house, opposite the pilot house windows, very near the middle of the boat. Q. So that the helm was unattended? A. Yes, sir. Q. Could you at that time steer your boat and tow without the aid of the helmsman? A. No, sir.”

Another witness whose duty it was to convey the orders of the master of the tug to the helmsman of the canal boat testified as follows:

“Question. What were the instructions you had received from the captain? Answer. To tell the man at the helm to shift his stick, so when I attempted to give him the signal there was no one there. Q. No one at the helm at all?

A. No, sir. Q. Where were you? A. I was standing about amidships of the canal boat. Q. Where was the helmsman when you turned to give the signal? A. He was standing about three feet away from me. Q. What was the signal? A. It was to shift the helm to port so as to go to starboard."

It is true that this testimony is somewhat indefinite as to time, but it is impossible to interpret it any other way than that the helmsman was absent when he should have been at the post of duty. This fault must be imputed to the canal boat.

It follows that the canal boat is entitled to a decree for half damages and costs and a reference to compute the amount due.

END OF VOLUME 54